Race Discrimination Remains Challenging Issue For Hospitality Industry

By: Kenneth Winkler

There have been several developments in the area of employment law in 2006 that will have a significant impact on the hospitality industry. As result of the U.S. Supreme Court's decision in Burlington Northern & Santa Fe Railway Co v. White, 126 Sct. 2495 (2006), much attention has been focused on the issue of retaliation. In Burlington, the Court clarified the definition of an adverse employment action under Title VII of the Civil Rights Act and arguably made it easier for employees to raise prima facie claims of retaliation. The Department of Homeland Security's issuance of a proposed rule on how to respond to "No-Match" letters is but one of the developments in 2006 that have made immigration reform a topic of national, state and local concern. There have also been substantial verdicts and settlements of claims based on allegations of national origin discrimination (such as 9/11 backlash), sexual harassment and wage and hour violations.

Despite these developments, race discrimination remains a challenging issue for the hospitality industry and was an issue also addressed by the U.S. Supreme Court this past term. In Ash v. Tyson Foods, 1126 S.Ct. 1195 (2006), the Court addressed the issue of whether the term "boy," without any modifiers, could be probative of racial bias. The case was brought by two African-American superintendents who sought promotions to shift manager positions, but lost out to two white employees. The plaintiffs claimed that the selection was racially discriminatory, because the decision maker had previously referred to the plaintiffs as "boy." The Appellate Court had ruled that the use of the word "boy" without any modifiers was not evidence of race discrimination. The Supreme Court disagreed and ruled that requiring modifiers or qualifications in all instances to make the word "boy" evidence of bias was error. According to the Court, the speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Hospitality employers should take notice of the decision, as many lawsuits stem from the use of insensitive language and foolish name-calling.

In March 2006, for example, Cracker Barrel resolved a Title VII lawsuit by agreeing to enter a consent decree with the U.S. Equal Employment Opportunity Commission ("EEOC") and pay $2 million to 51 current or former employees at three of its Illinois restaurants. Among the allegations were claims that the black employees were subjected to racially derogatory language, were required to wait on customers that white employees refused to serve and were required to work in smoking sections. The Consent decree also requires Cracker Barrel to train all employees at those stores regarding harassment, to post a notice regarding the outcome of the lawsuit, and to periodically report any complaints it receives to the EEOC. The decree also prohibits Cracker Barrel from retaliating against employees for complaining about illegal harassment or accepting benefits under the decree. As evidenced by the following summaries, the Cracker Barrel case is just one of many recent cases in which restaurants and hotels have been forced to defend serious allegations of racial discrimination.

- The owner of a Florida hotel agreed to pay $99,000 to settle a race discrimination claim by a fired white female employee who alleged that she was terminated soon after the company learned that she had biracial children.

- The EEOC filed a lawsuit against an up-scale Las Vegas hotel on grounds that employees, mostly blackjack and other pit game dealers, had been forced to listen to racist comments from patrons, pit bosses and other floor staff, and were punished when they complained about it. One African-American dealer was allegedly told he was too sensitive after overhearing racist remarks, and another objected after hearing a casino pit manager say that "all blacks look alike."

- In California, plaintiffs recently filed a lawsuit against a well known restaurant chain alleging that the restaurant has a nationwide corporate policy and practice of favoring white employees over African-American employees for "front-of-the-house" positions. The complaint alleges that the corporate headquarters have instructed managers to "cleanup the restaurant" meaning to hire fewer African-Americans and keep them out of the "front-of-the-house" positions. The plaintiffs claim they are hired disproportionately to the "back-of-the-house" positions, such as bussers, bar backs and less desirable jobs and denied promotional opportunities. The complaint also alleges that African-American applicants are subjected to a formal application process, but white applicants are not.

- In Florida, an African-American cook survived summary judgment on his claims of racial harassment and may now proceed to trial against a family dining franchisee of a national chain. The cook alleges that he was the victim of racial slurs by his managers and racial slurs and other race-based comments by co-workers that management knew of but ignored. In denying summary judgment, the court stressed upper management's failure to formally reprimand the management staff who admittedly referred to the cook by racial epithets.

- A leading food and facilities management company paid $80 million to settle a nationwide class lawsuit alleging racial discrimination. The class of over 3,000 employees and candidates had alleged that the company's promotion policies and practices were discriminatory.

- The EEOC recently filed a Title VII action against a QSR franchisor and franchisee alleging that Black employees were segregated in the workforce, assigned backroom cleaning duties and were terminated because of their race.

Race Discrimination under EEOC Spotlight

In April 2006, the EEOC issued a new Compliance Manual section updating guidance on how Title VII prohibits employment discrimination on the basis of race and color. The manual was issued in recognition of the fact that charges alleging race discrimination in employment accounted for 35.5 percent of the Commission's 2005 charge receipts, which

according to the EEOC constitutes the most-alleged basis of employment discrimination under federal law. The manual is designed to help prevent discrimination and assist in identifying and responding to instances of discrimination. The manual includes numerous examples and guidance that can be helpful to hospitality operators. In one such example, the EEOC references discriminatory acts at a restaurant to explain color discrimination:

> James, a light-complexioned African American, has worked as a waiter at a restaurant for over a year. His manager, a brown-complexioned African American, has frequently made offensive comments and jokes about James's skin color, causing him to lose sleep and dread coming in to work. James's requests that the conduct stop only intensified the abuse. James has been subjected to harassment in the form of a hostile work environment, based on his color.

Although it might seem that this scenario is unlikely, the example reflects a real-life situation in which a national family dining operator settled a lawsuit for $40,000 with the EEOC to resolve claims brought by an African-American former employee who claimed that he was discriminated against based on his dark skin by a light skinned African-American manager. The charging party had also alleged that he was terminated after lodging a complaint to corporate headquarters.

The EEOC's issuance of the new compliance manual section should serve as notice to hospitality employers that the EEOC intends to continue its aggressive prosecution of race-based charges.

Employers Must Be Proactive

Given the litigation landscape, employers must take proactive steps to prevent racial discrimination from occurring in the workplace. While many of the following suggested measures may seem obvious, they are too frequently ignored or given lip service.

- Implement and enforce an Equal Employment Opportunity policy that is adhered to and supported by upper management.

- Implement policies and practices designed to widen and diversify the pool of candidates considered for employment openings and promotions. By employing a diversified management team, employers will have better success in attracting qualified and diverse minorities.

- Ensure that promotion criteria are made known, and that job openings are communicated to all eligible employees.

- Encourage all managers and staff to call other employees by their name. If you have name tags, use them! Insensitivity and name-calling leads to trouble.

- Design, implement and enforce a harassment policy that clearly prohibits all forms of discrimination including, but not limited to, racial discrimination and harassment. Many employers have sexual harassment policies, but either fail to specifically prohibit other forms of discrimination or fail to explain what other acts are prohibited. The policy should contain: (1) an explanation of what conduct is prohibited; (2) a clearly described complaint process that provides multiple, accessible avenues of complaint; (3) assurance that the employer will protect the confidentiality of the complaints to the extent possible; (4) assurance that complaints will be taken seriously and investigated promptly and fairly; (5) aassurance that the employer will take prompt and appropriate corrective action if it determines that a violation of the policy has occurred; and (6) assurance that employees will not be retaliated against for filing a complaint or participating in an investigation.

- The industry has been plagued by high profile lawsuits based on alleged discriminatory service. Implement policies prohibiting discrimination against customers and patrons and stress the importance of consistent quality service. Educating staff about the company's commitment to equality and quality service will go a long way.

- Train, Train and Train! Management and staff should receive periodic training on all forms of discrimination and not just sexual harassment. A policy is worthless if it is neither understood nor followed.

While no measurers are full-proof, hospitality employers can significantly reduce the likelihood of being sued for racial discrimination by implementing sound policies and procedures and investing the time and resources to properly train management and staff about such policies.

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