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EEO Committee Reviews Workplace Diversity Issues

By Justin M. Swartz and Rachel Bien

Few doubt the merits of diversity in the workplace. Indeed, a host of organizational leaders—from chief executive officers to top military brass—have recently touted the importance of a diverse labor force. As a result, an entire industry has emerged, geared toward eradicating workplace inequality.

Many thoughtful ideas have made their way onto "best practices" lists that identify methods to increase the representation of historically underrepresented groups in corporations and firms. (See, e.g., Equal Employment Opportunity Committee Diversity Task Force web page, which links to several lists of "best practices," *www.abanet.org/dch/comadd.cfm?com=LL104000&pg=2.*)

Despite all of this attention, however, the challenge of actually achieving diversity remains. As Alexandra Kalev, Frank Dobbin, and Erin Kelly wrote in a recent article examining the effectiveness of employers' efforts to promote diversity, "We know a lot about the disease of workplace inequality, but not much about the cure." "Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies," 71 *Am. Soc. Rev.* 589, 590 (August 2006).

At the 2007 National Conference on Equal Employment Opportunity Law in Charleston, South Carolina, the Section's Equal Employment Opportunity Committee (EEOC) presented two panels that focused on efforts to increase diversity in private-sector workplaces, including law firms. The consensus that emerged from both panels was clear: truly overcoming inequality in the workplace requires more than changing hearts and minds. It demands a structural, top-down approach with incentives for meeting concrete diversity goals.

Discussing one such approach, panelist Gilbert F. Casellas, an attorney at Mintz Levin Cohn Ferris Glovsky & Popeo, PC, and former EEOC Chair, suggested that companies make diversity measures "part and parcel of [their] strategic business plan." According to Casellas, upper management's compensation should be "linked to achieving and maintaining goals in the area of [minority] recruitment, retention, and employee engagement."

Empirical research confirms that diversity measures that build in accountability achieve greater results than those that do not. Kalev, Dobbin, and Kelly contend that organizational structures demanding accountability, such as affirmative action plans, diversity committees, and diversity staff positions, are the most effective means of increasing diversity in the workplace. Their study found attempts to reduce social isolation through networking and mentoring less effective. Perhaps most striking, considering its popularity, is the study's finding that typical diversity and antiharassment training is the least effective. In fact, training workshops often generate a backlash against minorities—particularly against African Americans.

While lauding the potential for this research to help employers fashion effective diversity policies, panelist Michael Foreman, director of the Employment Discrimination Project at the Lawyers' Committee for Civil Rights Under Law, noted that those opposed to efforts at inclusion will likely mount legal challenges. "Private employers would be naïve to believe that attacks on diversity efforts will be limited to public employers," Foreman wrote in his materials for the panel. The very programs found to be most successful "tend also to be those which may expose . . . employer[s] . . . " to litigation.

The Supreme Court's recent opinions in *Parents Involved in Community Schools v. Seattle School District No. 1;* 127 S. Ct. 2738 (2007), have thrust diversity efforts back into the heart of public discourse. While striking down two programs designed to promote racial diversity in elementary and secondary schools, the Court reaffirmed that diversity can be a compelling governmental interest, a central holding of the Supreme Court's 2003 decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Grutter*, the Court upheld the University of Michigan's use of race as "one factor among many" in making law school admissions decisions—for the sake of achieving a diverse student body. It is not yet clear how these opinions will influence private employers.

Noting the increase in such challenges even in the wake of *Grutter*, Foreman asked the panel whether private employers can do things to increase diversity that public institutions cannot. Current EEOC Chair Naomi Earp surprised many in the audience by answering that allowing companies to take race into account when making *any* decisions can be a "slippery slope," suggesting that even corporate "affinity groups" may be unlawful, and endorsing Justice O'Connor's prediction in *Grutter* that diversity efforts will be unnecessary in 25 years. EEOC Commissioner Leslie Silverman, an audience member, disagreed with some of the chair's points. We will likely find out who is right, as *Parents Involved* will no doubt embolden opponents of workplace diversity.

The debate over the extent to which the Supreme Court's affirmative action cases will bear on private employment raises two principal issues. First, because constitutional principles do not govern private actors, private affirmative action programs are evaluated under Title VII. Although the Supreme Court held in *Johnson v. Transportation Agency*, 480 U.S. 193 (1979), that the standard for evaluating such programs under Title VII is less stringent than constitutional strict scrutiny, the precise parameters remain murky, as Chair Earp noted.

Second, even under this lower standard, some question whether the diversity rationale the University of Michigan advanced in *Grutter* applies to the employment setting. Foreman argued that it does, noting the *Grutter* Court's heavy reliance on briefs filed by large corporations touting the benefits of a diverse workforce.

Citing a brief filed by General Motors, the Court remarked that successfully navigating "today's increasingly global marketplace" requires a workforce "exposed to widely diverse people, cultures, ideas, and viewpoints." This, Foreman argued, is a tacit approval of diversity as a legitimate reason for race-conscious measures in the private employment context.

Foreman acknowledged, however, that notwithstanding the appeal of equating the two contexts, unlike most educational institutions, few private employers have articulated a "clear institutional mission related to diversity." This distinction may disappear as companies continue to make diversity a focal point of their workplace policies.

Most appellate courts have yet to weigh in on these important employment law issues. Until courts give progressive employers the cover they need, they will face the difficult challenge of designing diversity policies that achieve results while steering clear of reverse discrimination claims. The panelists agreed that employers must nonetheless continue to attempt to find the right balance—diversity efforts are necessary to eradicate the effects of past discrimination, to minimize current discrimination, and to enable American companies to hire the best talent and retain their competitive edge. ■

Justin M. Swartz (*jms@outtengolden.com*) is a partner and **Rachel Bien** (*rmb@outtengolden.com*) is an associate at Outten & Golden LLP in New York City.