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June 4, 2008

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Can Another Company Really Sue You for Race Discrimination?

By Warren E. Buliox, Esq.

We all know that individuals have standing (the legal ability) to bring claims of race-based discrimination against companies. But can a corporate entity maintain such a suit?

Increasingly, federal jurisdictions throughout the country are recognizing that corporate entities, like individuals, may have standing to sue for race-based discrimination. When a corporation "either suffers discrimination harm cognizable under [42 U.S.C.] § 1981, or has acquired an imputed racial identity, it is sufficiently within the statutory zone of interest to have prudential standing to bring an action under § 1981." Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc., 368 F.3d 1053 (9th Cir. 2004).

In Thinket, a minority owned business brought suit against a major networking company alleging that the company deliberately refused to contract with it based on Thinket's status as an African-American owned business. Thinket's claim was based on a federal law (§ 1981) which prohibits discrimination on the basis of race in the making of contracts.

The threshold question before the Ninth Circuit Court of

Appeals was whether Thinket, as a corporate entity, had standing to sue for race discrimination under § 1981. *Id.* To ascertain whether a party has standing, the court noted that federal courts must adhere to Constitutional requirements of standing as well as to what the court refers to as the "prudential principles" of standing. *Id.* The Constitutional requirements of standing require a plaintiff to suffer harm traceable to the Defendant. *Id.* The court held that Thinket possessed the requisite harm to satisfy the standing requirements of the Constitution because it was directly affected by the Defendant's failure or refusal to contract with it.

Unlike the issue of Constitutional standing, the issue of whether Thinket satisfied the "prudential principles" of standing proved somewhat problematic for the court. Among the applicable "prudential requirements is the requirement that 'a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.'" *Id.* at 1058; quoting *Bennet v. Spear*, 520 U.S. 154, 162 (1997). The issue before the court then became whether Thinket's claim was within the zone of interests of § 1981. *Id.* In order words, the analysis turned on whether Thinket, as a corporation, could establish a racial identity and thus be the direct target of racial discrimination, thereby bringing it within the zone of interests of § 1981.

In attempting to tackle this issue, the Ninth Circuit acknowledged that the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, (1977), indicated that a corporation "...has no racial identity and cannot be the direct target of the petitioner's alleged discrimination." *Id.* Admittedly, the court noted that this statement casts doubt into whether a corporation can assert race discrimination claims under § 1981. *Id.* But, the Supreme Court's statement, according to the Ninth Circuit, was not to be taken as binding precedent. Instead, said the court, the statement was nothing more than an incidental remark or observation not germane to the principle issue, which, after being given its due deference, had been used in conjunction with the rest of the *Arlington Heights* decision by other federal courts to determine that "under some circumstances corporations have satisfied the prudential standing requirements to assert § 1981." *Id.*

The Ninth Circuit noted that the *Arlington Heights* decision held open "the possibility that particular circumstances 'would justify a departure from [the] prudential limitation'" that a corporation has no racial identity. *Id.* at 1058. This was evidenced by Justice Powell's statement in *Arlington Heights*

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that:

We need not decide whether the circumstances of this case would justify departure from the prudential limitation and permit [the corporation] to assert the constitutional rights of its minority tenants.... For we have at least one individual plaintiff who has demonstrated standing to assert these rights on his own.

Arlington Heights, 429 U.S. at 263.

According to the Ninth Circuit, "when a corporation has acquired a racial identity either as a matter of law or by imputation, then it can be the direct target of discrimination and has standing to pursue a claim under § 1981." Thinket, 368 F.3d at 1059. Of particular interest to the Thinket court was the fact that Thinket was classified by the United States Small Business Administration as a minority operation owned and operated by socially and economically disadvantaged individuals. Accordingly, the court held that it had an imputed racial identity and standing to sue. Id.

The Ninth Circuit is not alone in holding that businesses may have standing to bring race discrimination suits -- several other federal jurisdictions, including the First and Second Circuits, have held similarly. Several more jurisdictions, including but not limited to the Seventh and Tenth Circuits, have hinted at the notion.

In summary, corporate entities that have a racial identity may have the ability to maintain a race-based discrimination suit. Companies should be cognizant of this fact and should take steps to ensure that other companies, like individuals, are treated in a manner consistent with anti-discrimination laws. So, for example:

- Don't exclude minority-owned businesses from business opportunities without some clear, legitimate and neutral basis;
- Have legitimate and neutral grounds for terminating a business relationship with minority-owned businesses; and
- While supplier diversity programs are generally a good idea, beware of going too far and inviting potential reverse discrimination claims.