

Discrimination: It's the Little Things That Count



By Jeffrey W. Larroca

In a typical discrimination lawsuit, an employee believes he or she has been denied something of consequence (a job, a raise, a promotion) or negatively treated (fired, demoted, reduced in pay). The employee also believes the reason given for the action is not legitimate and that the real reason was their legally protected status. Under federal anti-discrimination law, a legally protected status includes race, color, religion, gender, national origin, age, disability and veteran status. Under state and local law, there can be many more protected statuses, from sexual orientation to genetic predisposition.

The employer rebuts the discrimination claim by showing protected status was not a factor, but rather performance or some other legitimate reason, such as a reduction-in-force, was behind the decision. Thereafter, the employee tries to show that the employer's explanation does not hold water. The employee can do this in a variety of ways, such as showing that the employer's reasons are false or inconsistent or that other factors or behaviors suggest that discrimination played a part in their circumstance. Then, a judge or jury will make the ultimate decision.

A question that frequently goes unanswered is what makes a person believe they've been discriminated against. Sometimes the action is obvious, such as when the manager doing the firing uses an offensive slur, but subtle and/or inadvertent actions can also be the seed for a discrimination suit.

An instructive vignette comes from an episode of *Curb Your Enthusiasm*, the HBO comedy featuring *Seinfeld* creator Larry David, which used discrimination as a comedic vehicle. In one scene, "Mr. David" and a "Friend" meet "Dr. Gramb," who is African-American:

FRIEND: Dr. Gramb, this is my friend Larry David.

Mr. DAVID: Hi, how you doing?

FRIEND: He's my dermatologist.

Mr. DAVID: Hi. Really?

Dr. GRAMB: Oh, yeah, what, for 15 years already?

Mr. DAVID: Even with the whole affirmative action thing?

(awkward silence)

FRIEND: What do you mean the whole affirmative action thing? I don't...

Mr. DAVID: Oh, it was a joke.

FRIEND: Oh, now he's...

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Mr. DAVID: So I wasn't...

Dr. GRAMB: So if I wasn't black, would you have said the same thing or not?

Mr. DAVID: No, don't take it...

Dr. GRAMB: You know, Richie, I've worked too hard and too long at this. I can't do this.

Mr. DAVID: I--no, look, I--I've...

Dr. GRAMB: No, no, no, I can't do it.

Dr. GRAMB: I don't know what his trip is, but I can't do it.

Mr. DAVID: It was a joke.

FRIEND (to Larry David): I know it's a joke.

Mr. DAVID: I tend to say stupid things to black people sometimes.

This scene is humorous because Larry

David is a selfish curmudgeon, a character that is easy to root against. Unfortunately, the subtle or thoughtless acts played for laughs in a sitcom take on real significance when one's job is on the line. People who fail to get a position, or a raise, or a coveted promotion, or who are fired or demoted, rarely believe they were deserving of such an action.

Imagine, for example, a female junior executive who is entering a meeting with her male CEO and three other male junior executives. The discussion of the day is Tiger Woods' extramarital affairs, and as she walks into the meeting room, she hears the CEO engaged in locker room-style banter about Tiger's wife

while the group looks at the image of a blonde in a bikini on his computer screen. When her presence is noted, the discussion abruptly ends, the screen is minimized and there is the common clearing of throats followed by a nervous pause.

Awkward? Yes. But what sort of effect did this situation have on the female junior executive beyond momentary embarrassment? She would certainly conclude that the "boys" were sharing a crude sexual exchange and that she is excluded from such exchanges. And soon, if her male comparators move up and past her, she may conclude that their "frat" mentality - and the access that comes with it - is at the root of her inability to succeed. ●

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