Subtle Harassment, Code Words and Implicit Bias: Proving Everyday Discrimination in Court

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SUBTLE HARASSMENT, CODE WORDS AND IMPLICIT BIAS: PROVING EVERYDAY DISCRIMINATION IN COURT

By Lawrence M. Pearson

In response to several high-profile racial bias incidents, companies such as Starbucks and Papa John's, and government entities such as the NYPD and New York City Department of Education have been prompted to conduct training to aid managers and employees in recognizing, addressing and mitigating the effects of implicit or subconscious bias. For employment law practitioners, understanding these subtler forms of bias can be critical to sustaining or defending against a discrimination or harassment claim, as these cases often do not include a "smoking gun" piece of evidence or an allegation that neatly fulfills the various requirements of a cause of action. Moreover, bias on the part of managers or coworkers does not always manifest itself and cause harm in obvious, immediately apparent ways.

Although statistics-based proof and disparate impact theories are common in employment class actions, proving bias in court through subtle, even neutral-seeming conduct in single or multi-plaintiff cases can be challenging, and requires cumulative evidence and context that illustrates how certain loaded words contribute to the disparate treatment of the affected employees. Fortunately, federal and state courts have already pointed out the kind of facially neutral statements that, particularly when combined with other evidence and unequal practices, may prove workplace discrimination.

Code Words and Other Seemingly Neutral Comments

Veiled language—"code words," "dog whistles," or other terms that, in context, reference racial or sexual stereotypes or animus—will not serve as a shield behind which an alleged wrongdoer can hide simply because they did not say something explicitly discriminatory. Courts will consider the meaning of statements beyond their bland, inoffensive reading, including the tone described by an employee. Judges operate in the real world, and there are many cases in which purportedly neutral comments were found to support claims based on their context. One particularly egregious example, the term "boy" being used towards Black employees, has been recognized as suggesting racial contempt and subservience, given its history and usage belittling and infantilizing African-American men. See *Ash v. Tyson Foods*, 546 U.S. 454, 456 (2006) (U.S. Supreme Court found that the U.S. Court of Appeals for the Eleventh Circuit erred when it held that use of the term "boy" could only be evidence of discriminatory animus if it was modified by a racial classification such as "Black" or "white").

Where the supposedly neutral language is even more coded and less freighted with historical meaning, courts may require more context, such as other discriminatory comments or additional concrete examples of unequal treatment, in order to find that such subtle comments or acts may support discrimination claims. See, e.g., *Thelwell v. City of New York*, No. 13 CV. 1260 JGK, 2015 WL 4545881, at *11 (S.D.N.Y. July 28, 2015), aff'd, No. 17-1767, 2018 WL 2123242 (2d Cir. May 9, 2018) ("use of the words 'angry' and 'abrasive' [did] not rise to the level of racial code words such as 'boy' or 'thug.'"). Additional evidence could include patterns of unequal compensation based on race or gender, differences in assignments, marked differences in the quality and manner of managers' interactions with employees, particularly where such things are sustained over time, or other instances of coded language or dog whistles.

Courts have acknowledged that stereotypes may be expressed in subtle and non-obvious ways. For example, in *Humphries v. City Univ. of New York*, No. 13 Civ. 2641 PAE, 2013 WL 6196561 (S.D.N.Y. Nov. 26, 2013), the court wrote that the plaintiff "allege[d] that [the plaintiff's] supervisors and co-workers referred to her using pejorative words likened to the Angry Black Women Syndrome: aggressive, agitated, angry, belligerent, disruptive, hands on hip, hostile, threatening, and vituperative, among others." Id. *9. See also *Lloyd v. Holder*, No. 11 Civ. 3154 (AT), 2013 WL 6667531, at *9 (S.D.N.Y. Dec. 17, 2013) ("The Court recognizes that certain facially non-discriminatory terms can invoke racist concepts that are already planted in the public consciousness—words like 'welfare queen,' 'terrorist,' 'thug,' 'illegal alien.' Indeed, Title VII can hear racism sung in the whistle register."). In *Lloyd*, plaintiff's supervisor called plaintiff, an African-American woman, "lazy, incompetent, entitled, never at [her] desk, slacking off, and dumb" [], and "implied that [the plaintiff] felt the job was an entitlement, [and that she] was ignorant and inarticulate," but dismissed the claims for lack of other evidence to sustain claims that actionable discriminatory treatment in employment had occurred. Id. at *8, 10.

Non-Explicit Sexual Advances

On Aug. 2, 2018, the Appellate Division, First Department, issued an opinion in the case of *Suri v. Grey Glob. Grp.*, No. 100846/11, 2018 WL 3650197 (N.Y. App. Div. Aug. 2, 2018), which recognized that even subtle, indirect and unwelcome sexual advances can support claims under the New York City Human Rights Law (NYCHRL). In that case, the plaintiff alleged that her supervisor, during her first week under his management, told her that she had "beautiful hair" and, separately, that she was wearing "really nice boots." About a week after these comments, the supervisor is alleged to have "put his hand on her thigh, close to her knee, and squeezed lightly for a few seconds" during a meeting. She "immediately moved away" in response, and then was subjected to harsh, negative treatment by the supervisor, including in her job assignments, for the next 18 months. However, all of the employee's claims were dismissed by the lower court, including those related to the alleged sexual harassment and subsequent treatment.

The Appellate Division partially reversed this dismissal, and revived the employee's harassment-related claims because she had "offer[ed] evidence that [her supervisor] used his position to implicitly demand sexual favors, and, when she rebuffed him, to explicitly make her life miserable for the next 18 months." Id. at *2. The court specifically noted that "sexual advances are not always made explicitly," and "the absence of evidence of a supervisor's direct pressure for sexual favors as a condition of employment does not negate indirect pressure or doom the claim." Id. at *4-5. Therefore, it was an issue for a jury,

and not a court's summary dismissal, to decide whether harassment had occurred (analyzing the comments and subsequent harsh treatment holistically) and the plaintiff had suffered unlawful discrimination based upon her gender.

Importantly, the court also made it clear that claims under the NYCHRL, New York City's local anti-discrimination law, are subject to a lower standard to find liability for discrimination and harassment than the similar New York State Human Rights Law (NYSHRL) and Title VII, the main federal anti-discrimination law outlawing race and gender discrimination in employment. Under the NYCHRL, employment-related conduct that is discriminatory may support a claim if it amounts to more than "petty slights or trivial inconveniences." New York City practitioners therefore should always bear in mind that the NYCHRL provides protections that go significantly beyond those of other state and federal laws, and is well-suited to addressing subtle, implicit discrimination and harassment.

Key Takeaways

Employees and their attorneys need not abandon claims in the absence of openly discriminatory comments when they believe adverse treatment was due to discrimination. Conversely, employers and their own attorneys should not allow themselves to be lulled into complacency by the absence of egregious, open demonstrations of animus or bias. A hard-nosed critical analysis of an employee's treatment and relevant communication should be conducted to determine whether even seemingly neutral comments, actions or decisions could, in fact, be part of a larger picture demonstrating implicit bias:

First, examine closely the conduct of any supposed "equal opportunity offender." The intensity or frequency of harsh treatment and differences in language used towards employees may differ on the basis of race, gender or other characteristics (leave-takers or employees receiving accommodations, etc.). The same conduct also may be taken very differently by various classes of employees.

Second, look for patterns—statistical and in behavior or outcomes. Over time, have employees in certain groups tended to be fired or leave at higher rates or after shorter stints? Do performance evaluations, disciplinary actions, promotions, assignments and compensation trends reveal favorable or negative trends among employees by race, gender, or other characteristics?

Third, do not assume that because harassment does not seem to be "severe or pervasive" or an employee has not been fired or demoted that no cause of action exists. Different laws and jurisdictions, such as the NYCHRL, have standards that may allow claims based upon facts that would not satisfy other laws.

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