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Proving gender and race discrimination in employment

A LOOK AT THE LEGAL TESTS FOR DISCRIMINATION AND THE "CAUSAL CONNECTION" REQUIREMENT

To prove discrimination, plaintiffs must provide evidence that they: (a) are a member of a protected class, (b) are qualified for the position at issue, (c) suffered an adverse employment action, and (d) the employer treated similarly situated employees outside of the protected class more favorably (or some other circumstance that suggests a discriminatory motive). (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.)

A plaintiff must also provide proof of a "causal connection" between the employee's protected status and the employer's action. (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306.) *Mixon* explains:

> While a complainant *need not prove that racial animus was the sole motivation behind the challenged action*, he must prove by a preponderance of the evidence that there was a *'causal connection'* between the employee's protected status and the adverse employment decision.

(*Id.*, at p. 1319, emphasis added. *Accord, Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 665; *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1290.)

Proof of gender discrimination

Protected class

Both gender and race are protected classes. (Gov. Code, § 12940(a)).

Qualifications

This element serves as both a minimum requirement and a basis for comparison between the plaintiff and the selected candidate. Qualifications come in many forms of education, skill set and past experience. To the extent that the plaintiff's qualifications exceed those of the selected candidate, it provides objective evidence that the plaintiff is more qualified.

In terms of education, plaintiffs must establish that they meet the minimum stated requirements. Assuming this, it is helpful to point out specialized education, training or unique experiences that demonstrate that the plaintiff is objectively more qualified than any other candidate(s) who were actually selected.

Performance of job duties over an appreciable period provides some indication of being qualified. For example, in a failure-to-promote case, past favorable performance evaluations provide helpful documentation, both to demonstrate qualifications, and as a basis for comparison between the plaintiff and the candidate(s) selected for promotion.

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"Employee [performance] evaluations serve the important purpose of documenting an employer's hiring, promotion, discipline, and firing practices." (*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 964.) Favorable performance evaluations, awards and accolades are examples of documentation that demonstrate qualifications.

While evidence of satisfactory performance is helpful evidence, it is not a necessary element of a plaintiff's prima facie case. (See, *Caldwell v. Paramount Unified School District* (1995) 41 Cal.App.4th, footnote 6.)

Sometimes a selected candidate appears more qualified than the plaintiff due to specialized skills. Often, the candidate has benefitted from performing a special assignment or "acting" duties in the role, before being selected to permanently perform the role. When a candidate is selected after having performed acting duties, or after receiving specialized skills, we refer to that favorable treatment as "grooming" or a "shoulder tap." If the plaintiff proves to be lesser qualified because the selected candidate received favorable advantages, the perceived greater qualifications of the selected candidate can be characterized as evidence of disparate treatment and an indicator of discriminatory motive. Preferential treatment need not just be selection to a position, it can also be providing preferential experiences which make a chosen candidate outside the protected class appear more qualified than a candidate in the protected class.

Adverse action

"The most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge." (EEOC Compliance Manual, *Section 8, Retaliation*.) However, the FEHA protects an employee with respect to not only so-called "ultimate employment actions" such as termination or demotion, but also "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1138.) *Yanowitz* is the leading case discussing adverse employment actions, and states:

- "[A]lthough an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim."
- Not only "so-called 'ultimate employment actions' such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career" are addressed.
- Conduct is examined collectively; may consist of "a series of subtle, yet damaging injuries," rather than "one swift blow."

Other examples of adverse actions can include:

1. Unfair performance reviews
2. Exchange of more important assignments with less important ones
3. Demotion
4. Denying or removing privileges of employment (i.e., overtime)
5. Unfair warnings and discipline
6. Not providing documents and/or information necessary for an employee to competently do his/her job
7. Barring employee from training
8. Excluding employee from meetings, conferences, etc.
9. Labeling employee as "a troublemaker" to managers and supervisors in employee's group
10. Refusing a transfer and bad-mouthing to potential managers about employee's "bad" performance
11. Assigning an employee duties that fall outside of employee's job description
12. Stripping employee of supervisory duties
13. Disproportionate reduction of workload and pay (i.e., no overtime)
14. Embarrassing the employee in front of his subordinates
15. Undermining the employee by removing important contracts or territories
16. Forcing the employee to train the subordinate and then promoting the subordinate and not the employee who did the training
17. Accusing employee of being confrontational
18. Disclosing confidential information about employee to co-workers
19. Telling the employee to forget about a promotion or a raise

Direct and indirect (circumstantial) evidence

Derogatory statements based on gender serve as direct evidence of discriminatory motive. In *Stegal v. Citadel Broadcasting Co.* 350 F.3d 1061 (9th Cir. 2003), the court held that gender bias could be demonstrated by statements made that a female plaintiff was "not a team player" (*Id.*, at 1070), "a spoiled brat" (*Ibid.*), with a "negative attitude" about her job (*Id.*, at 1068). In *Stegal,* a female broadcaster was terminated nine days after she complained of gender discrimination, sexual harassment and a pay differential based on gender. The manager allegedly expressed being "angry at [the plaintiff] for getting what she wanted and had only been able to do so because she was a woman." (*Id.*, 1063).

Mathieu v. Norell (2004) 115 Cal.App.4th 1174, 1187, provides examples of conduct, which taken collectively, are gender-based indicia of motivating factors to discriminate: "[Plaintiff] complained of the following behavior: (1) Fluck glaring at her; (2) Fluck failing to return Mathieu's emails, which were essential to the completion of her job duties; (3) Fluck shouting at her and hindering the performance of her duties when she inquired about work-related matters; (4) Fluck turning his back on her when he saw her; (5) Fluck sneering at her; (6) Fluck bumping his shoulder into her in the halls or whispering into someone's ear when she was near; (7) Fluck shouting at her that he was busy, "get away" and "what the hell do I have to sign that for?" when she approached him; (8) Fluck failing to return paperwork that was essential for Mathieu to complete her

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job duties; (9) Fluck yelling at her "psycho," "bitch" and "get out"; and (10) Fluck shouting "let's walk past the stick," calling her "Ally McBeal" and commenting that he did not understand how he could ever have been attracted to her. To be sure, all but the last one or two items on Mathieu's list of complaints bear a stronger resemblance to junior high school-style expressions of personal animus than to harassment on the basis of sex.

In *Costa v. Desert Palace, Inc.* (9th Cir.2002) 299 F.3d 838, 861-862 (en banc), affd. sub nom. *Desert Palace v. Costa* (2003) 539 U.S. 90, a finding of gender-based discrimination was supported by facts such as these:

> The most prominent example of ... differential treatment was Caesars' decision to terminate Costa for an incident that netted her male co-worker only a five-day suspension. Costa's claim that she was shoved against an elevator wall and sustained bruises from the altercation is not one to be taken lightly. The excuse that the management could not figure out whom to believe – Costa or Gerber – is questionable given the strong corroboration of Costa's story and the inconsistencies in Gerber's account. . . . The jury was entitled . . . to infer that Costa was fired, while Gerber was only suspended, because Costa was a woman. . . . Finally, the jury could easily have believed that Costa's record was itself largely a result of discrimination because of repeated incidents of unfair discipline that accumulated over time. For example, her supervisor's decision to backfill the records with prior alleged misconduct supports such a conclusion.

However, discrimination is a state of mind and, therefore, notoriously hard to prove. Sophisticated employers are well aware that discrimination is illegal. Thus, most cases are established through circumstantial evidence. (*Guz, supra*, 24 Cal.4th 317, 354 ("direct evidence of intentional discrimination is rare, and such claims must usually be proved circumstantially."); *Riordan v. Kempiners* (7th Cir. 1987) 831 F.2d 690, 697-98 ("Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it. ... [A] Plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled ... because of crabbed notions of relevance or excessive mistrust of juries."].)

Circumstantial evidence of pretext generally relates to such factors as plaintiff's job performance, the timing of events and how the plaintiff was treated in comparison to other workers. (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153.)

Proof of race (national origin) discrimination

The same elements of proof necessary for gender discrimination are also necessary for proof of race discrimination. This section provides examples of proof that demonstrate race or national original discrimination.

Racial (and national origin) discrimination occurs in a variety of forms, affecting a variety of different races. For example:

- A single racial slur by a supervisor directed to the plaintiff is enough to withstand summary judgment. (*Dee v. Vintage Petroleum* (2003) 106 Cal.App.4th 30 ["Here [the supervisor's] remark that 'it is your Filipino understanding versus mine' is an ethnic slur, both abusive and hostile."].)
- *Fragante v. City and County of Honolulu* (9th Cir. 1989) 888 F.2d 591; see also 29 cfr 1606.1. [Filipino employee passed over for employment because of her "heavy Filipino accent"].
- See also, *Warren v. City of Carlsbad* (9th Cir. 1995) 58 F.3d 439, 443 [fire chief's derogatory comments about Hispanics create inference of discriminatory motive.]
- *Cordova v. State Farm Ins. Cos.* 124 F.3d 1145, 1150 (9th Cir. 1997) [decision-maker called another Latino employee a "dumb Mexican" and said he was only hired because he was a minority.]

Racial epithets

Harassment and discrimination laws strictly prohibit the use of the word "nigger" at work. (*McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1116 ("It is beyond question that the use of the word 'nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination."); *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 817 (describing "nigger" as "perhaps the most offensive and inflammatory racial slur in English, ... a word expressive of racial hatred and bigotry."); *Daso v. The Grafton School, Inc.* (D. Md. 2002) 181 F.Supp.2d 485, 493 ("The word 'nigger' is more than [a] 'mere offensive utterance' ....No word in the English language is as odious or loaded with as terrible a history."); *Rodgers v. Western Southern Life Ins. Co.* (7th Cir. 1993) 12 F.3d 668, 675 ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.").

Occasionally, an individual will reference discriminatory treatment of one race, as an indication of a discriminatory atmosphere that tolerates discriminatory practices generally, and the race of the complainer specifically. Where racial slurs have been directed at a minority race of which plaintiff is a member, similar slurs directed at other minorities may contribute to the overall hostility of the working environment. (*Cruz v. Coach Stores, Inc.* (2nd Cir. 2000) 202 F3d 560, 570 [A Hispanic employee could complain of hostile environment based on personnel manager's frequent references to "niggers" in her presence and slurs regarding Hispanics behind her back].) "If racial hostility pervades a workplace, a plaintiff may establish a violation of Title VII, even if such hostility was not directly targeted at the plaintiff." (*McGinest v. GTE Service Corp.* (9th Cir.2004) 360 F3d 1103, 1117.)

Consistent with this, the Ninth Circuit allows the introduction of evidence of discrimination against groups other than the plaintiff's own. (See e.g. *Lam v. University of Hawaii*. (9th Cir. 1998) 164 F.3d 1186, 1188 (allowing into evidence a professor' s racist comments against a black person in a discrimination

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case based on race, national origin and gender, even though plaintiff was Vietnamese. Also see, e.g., *Schwapp v. Town of Avon* (2d Cir. 1997) 118 F.3d 106, 112 (holding that it was error to exclude two incidents of discrimination which "reflect[ed] bigotry . . . toward other minority groups" in hostile work environment case); *Abramson v. American Univ.* (D.D.C. 1988) 1988 U.S. Dist. LEXIS 15818 *4, 54 Fair Empl. Prac. Cas. (BNA) 740 (holding that "evidence that [defendant] discriminated against other minority groups is surely relevant towards the issue of having discriminatory intent in general.").)

Perceived race

If the plaintiff is perceived as a specific race and faces discrimination based upon that perception, the Ninth Circuit has held that a false perception is sufficient to proceed with a discrimination claim. In *Estate of Amos v. City of Page, Arizona*, 257 F.3d 1086, 1094 (9th Cir. 2001), a plaintiff alleged discriminatory conduct based upon the perception that the victim was Native American, even though the victim was white. The Ninth Circuit held, "The City's alleged discrimination is no less malevolent because it was based upon an erroneous assumption."

The U.S. Supreme Court has recognized that national origin is not limited to the person' s country of birth; it is a term that refers as well to "the country from which his or her ancestors came." (*Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88 & n.2 (1973).) In addition, the EEOC has a broad view of what gives an individual the characteristic of being of a particular "national origin." It defines national origin as a characteristic of an individual's, or his or her ancestor's, place of origin or the individual's demonstration of the physical, cultural, or linguistic characteristics of a national origin group. (29 C.F.R. § 1606.1.)

In *EEOC v. WC&M Enterprises, Inc.*, 496 F.3d 393 (5th Cir. 2007), the Fifth Circuit reversed a district court's grant of summary judgment to the employer, rejecting an argument that the plaintiff could not state a claim for national origin discrimination because he could not link the discrimination to a particular country of origin. The Fifth Circuit noted that nothing in the EEOC guidelines requires that the discrimination be based on the victim's actual national origin:

> In order to have a claim of national origin discrimination under Title VII, it is not necessary to show that the alleged discriminator knew the particular national origin group to which the complainant belonged .... [I]t is enough to show that the complainant was treated differently because of his or her foreign accent, appearance, or physical characteristics.

(*Id.* at 401-02 (citing Guidelines on Discrimination Because of National Origin, 45 Fed.Reg. 85,632, 85,633 (Dec. 29, 1980).)

Differential treatment of similarly situated employees, or other circumstances that suggest discriminatory motive

It is well-established that one way to prove pretext and discriminatory animus is to show that others, similarly situated to the plaintiff, were not similarly disciplined or were terminated for similar misconduct or performance issues. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804 ("Especially relevant to [a showing of pretext] would be evidence that white employees involved in acts against [the employer] of comparable seriousness ... were nevertheless retained or rehired."); *Costa v. Desert Palace, Inc.* (9th Cir. 2002) 299 F.3d 838, 854 (en banc) [evidence that female employee was disciplined far more harshly than male coworkers for the same infractions, was denied overtime and medical leave granted to male coworkers, and was supervised more closely than they were, created an inference that sex was a "motivating factor" in her termination supporting a jury verdict in her favor]; *Damon v. Fleming Supermarkets of Florida, Inc.* (11th Cir. 1999) 196 F.3d 1354, 1363 [plaintiff can prove pretext by showing either that she did not violate the cited work rule or that other employees outside the protected class who engaged in similar acts were not similarly treated]; *Spulak v. K Mart Corp.* (10th Cir. 1990) 894 F.2d 1150, 1156 ("As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent."); see also, *Kientzy v. McDonnell Douglas Corp.* (8th Cir. 1993) 990 F.2d 1051, 1060 [affirming jury verdict for female plaintiff who was fired for going home to lunch based, in part, on evidence that similarly situated male employees were merely reprimanded or suspended]; *McAlester v. United Air Lines, Inc.* (10th Cir. 1988) 851 F.2d 1249, 1269 [directed verdict in favor of employer, reversed based on evidence that minority employee was terminated for offense that non-minorities were only suspended].)

Evidence of employer's discriminatory treatment of other employees in the same protected class may create an inference of discriminatory intent towards the plaintiff as a member of the class.

(*Becker v. ARCO Chem. Co.* (3d Cir. 2000) 207 F.3d 176, 194 n.8.)

Discrimination is based on individual treatment

Employers sometimes attempt to introduce evidence about the favorable treatment of *other* individuals in the same class. However, the FEHA protects the right of *every individual* to be judged on his or her own merits, not as a member of a group.

For example, in *Connecticut v. Teal* (1982) 457 U.S. 440, the high court rejected an employer's defense that it could not be liable for acts of racial discrimination in promotions if the "bottom-line" result of the promotional process was an appropriate racial balance. Rejecting this argument, the Supreme Court stated:

> It is clear that Congress never intended to give an employer license to discrimination against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.

(*Id.*, at p. 455. See also, *Furnco Construction Corp. v. Waters* (1978) 438 U.S.567, 579 ["a racially balanced work force cannot immunize an employer from liability for specific acts of discrimination"]; *Los Angles Dept. of*

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Water & Power v. Manhart (1978) 435 U.S. 702 [fairness to a class of women employees as a whole could not justify discrimination in pension rates to individual female employees because the "statute's focus on the individual is unambiguous."].)

Aggregation of claims

Sometimes, the facts of a case give rise to multiple forms of discrimination. Discriminatory practices often overlap so that the motive for the discriminatory conduct cannot be clearly identified as solely race or gender-based. The law recognizes that race and sex cannot be artificially severed in a sexual-harassment claim. [Civil Rights Act of 1964 §§ 701, 703(a)(1), as amended 42 U.S.C.A. §§ 2000(e), 2000(e)-(2)(a)(1); *Stingley v. Arizona*, 796 F.Supp. 424 (U.S.D.C. Az 1992); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987)].

In *Hicks v. Gates Rubber Co.*, the court permitted a black woman to "aggregate evidence of racial hostility with evidence of sexual hostility," after her racial harassment claim had been dismissed, in order to bolster her hostile environment sexual harassment claim. (Id. at 1416; See also, *Nichols v. Frank* 42 F.3d 503, 511 (9th Cir, 1994).)

Further, courts recognize causes of action for discrimination based on combinations of protected characteristics. "[W]here two bases for discrimination exist, they cannot be neatly reduced to distinct components . . . . [W]hen a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors . . . ." (*Lam v. University of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) (emphasis in original); see also, *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1032-33 (5th Cir. 1980) ("[D]iscrimination against black females can exist even in the absence of discrimination against black men or white women.").

Legitimate, non-discriminatory reasons

Employers will often attempt to demonstrate that any adverse action(s) taken were based on a legitimate, non-discriminatory reason. For example:

No requisite knowledge of pregnancy condition; failure to meet performance standards. *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133 [summary judgment granted based on plaintiff's inability to establish employer's prior knowledge of pregnancy at the time of termination, and unsatisfactory performance.] In *Trop*, the court found that the following was *not* direct evidence of pregnancy discrimination: (1) After Trop was fired, Thomas said, "I need somebody here who wants to be here and doesn't have a life"; (2) When Trop told Thomas she was pregnant after being fired, Thomas said: "What were you thinking? How could you possibly be my assistant and be pregnant? How did you think that ever was going to work?" "Do you want to be pregnant? I had thought maybe [Trop] hadn't considered all her options, that she had made a mistake somehow.... You know, there are things you can do. You could.... How was she going to take care of him?" "I couldn't understand how she was going to live her life"; (3) When Trop told Thomas, "Women get pregnant every day," Thomas allegedly replied, "Well, that was never going to happen here. It would never happen here"; and (4) At the December 2002 Christmas party Trop said, "It looks like I get to have one of my own," to which Thomas replied, "Not while you are working for me." (*Id.*, 1146-1147.)

Employee's inadequate technical computer skills. *Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 794 [job restricting required plaintiff to acquire computer skills].

Comparator's superior education, training and experience. *Schuler v. Chronicle Broad, Co.*, 793 F.2d 1010 (9th Cir. 1986) [summary judgment granted against black female employed by television station as a part-time temporary technician for three months, who sued her employer for racial discrimination in giving a permanent job to a white male]; *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983).

Loss of confidence in the employee. *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327 [an armored transportation employee first reported experiencing pain and numbness in his arms, fingers, shoulders, and feet (for a year or two), while under internal investigation into missing cash, and under threat of termination pending the investigation outcome].)

Downsizing due to financial difficulty. *Martin v. Lockheed Missiles & Space Co.*, (1994) 29 Cal.App.4th 1718; *Cochrane v. Norton*, No. C-01-2208 SC 2003 WL 21768006 (N.D. Cal. July 28, 2003); *DeMinico v. Monarch Wine Co., Inc.*, Civ A. No. CV850238PAR, 1986 WL 27578 (C.D. Cal. Mar. 12, 1986)

When developing the narrative that will be used to prepare the complaint, opposing a motion for summary judgment, or presenting evidence at trial, it is important to (a) be mindful of how you will prove the employer's motivation, and (b) anticipate the employer's potential defenses.

Conclusion

Discrimination claims are often difficult to prove, particularly where evidence of discrimination is subtle. Seldom do we have the benefit of direct evidence (e.g., racial epithets, written statements or records). Seldom are there willing eyewitnesses to confirm the discriminatory statement that was said, or the actions taken. By default, proof of disparity in treatment is the predominant method of proving that discrimination has occurred. Hopefully, this paper has provided several helpful examples and authorities for proving discrimination based on gender and race.

Bernard Alexander prosecutes civil rights claims focusing on plaintiff employment discrimination and practices as a civil litigator in both State and Federal Court, where he has tried over 40 cases to verdict. He is the past Chair of the California Employment Lawyers Association (CELA). He created and has managed the CELA Annual Trial College since 2014. He has received recognition as: Joe Posner Award Recipient (CELA) 2016, Top 75 California Labor and Employment Lawyers, by Los Angeles and San Francisco

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