

Bias in the Legal Profession



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I. What is bias? We may be born with some biases. Others may seem to come naturally or out of fear. Remember the Dolphin Tale 2 movie where the young dolphin Hope freaks out about Winter's lack of tail. Apparently, as an infant, I screamed when my Dad took off his glasses – I thought he had removed part of his face. I've seen babies start to scream when they see a face of a different color for the first time. So sometimes we fear what we're not used to – it seems wrong to us. Some biases we are taught either by our culture or our surroundings like the song from the musical _____ says.

Definition of Bias – we'll be talking today from the prospective of bias in the legal profession so we're looking at the concept in the setting of a law firm, corporate counsel department, legal education, or governmental legal departments.

Webster's Dictionary defines Bias as:

bi-as

II. Bias as a Legal Claim

As a legal claim bias equals discrimination and constitutes one of four causes of action:

1. Disparate Treatment
2. Disparate Impact
3. Harassment
4. Retaliation

However, please act above the floor the law sets on human behavior. Today, we're working toward a better way of interacting with each other and toward keeping all things fair within the legal profession for the sake of advancement opportunities. These materials are not designed as tools to teach you how to argue around the elements of a legal claim to undermine a legitimate claim of bias in the legal profession.

III. Disparate Treatment

The elements of a disparate treatment claim basically are that:

- 1) The Firm failed to hire, failed to promote, demoted, terminated, or constructively discharged an employee; and
- 2) The employee's or prospective employee's protected status was a motivating factor in the firm's decision.

Protected Status – although we'll look at that list in a minute, I need to make the point here, that even if you identify a bias that not on the list, bias of any form when it unfairly interferes with an individual's ability to advance in their profession is just plain wrong. So, whether the bias is based on the color of a person's hair, their attractiveness, or whether or not

Family and Medical Care Leave (Don't deny it under legally mandated terms)

Disability (mental and physical) including HIV and AIDS

Marital Status (CA)

Medical Condition (cancer and genetic characteristics)

National Origin

Race

Religion

Sex

Sexual Orientation (CA and others)

Gender Expression (CA)

Victims of Stalking, Sexual Assault, and Domestic Violence (CA)

Military and Veteran Status (CA)

You can see that I designated the ones specific to California with a (CA). Please note that neither appearance nor obesity appears on this list, yet. Arguably, those may fall under race for appearance and disability for obesity. So, as stated before, please make sure you're treating everyone fairly regardless of personal characteristics.

V. Disparate Impact

Basically, the elements of a disparate treatment claim are that:

- 1) The Firm failed to hire, failed to promote, demoted, terminated, or constructively discharged an employee; and

applicants based on the scores they achieved on the test: those who scored 89 or above (out of 100) were ranked as "well qualified;" those who scored between 65 and 88 were ranked as "qualified;" and those who ranked below 65 were ranked as "not qualified."

The applicants ranked as "qualified" were notified they had passed the examination but, but that it was likely they would not be selected. On January 26, 1996, the city announced it was adopting this hiring policy. On May 16, 1996, and on October 1, 1996, the city selected candidates first from the "well-qualified" pool and then filled the remaining vacancies with candidates from the "qualified" pool.

The facts showed that African-Americans were underrepresented in the "well-qualified" category. On March 31, 1997, the first of six African-American applicants representing the class who ranked as "qualified" and had not been selected filed a disparate impact, discrimination charge with the EEOC. The case went to trial and all the way to the US Supreme Court on the issue of timing with respect to the filing of the charge. The Supreme Court ruled that the applicants complied with Title VII's filing requirements because the earliest EEOC charge was filed within 300 days of the city's October 1, 1996, "use" of the test scores to select candidates from the eligible list. This case shows that Disparate Impact claims are still alive and well, so Law Firms should review their policies and the impact those policies have on hiring and promotion decisions to make sure that all groups are being treated fairly.

<http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=14790#sthash.EGyu1POL.dpuf>. (Last visited August 2, 2014).

VI. Harassment – There are two types of harassment causes of action:

1. Quid Pro Quo (or Tangible Employment Action)
2. Hostile Envir

Victims of harassment do not need to tell the perpetrators that the behavior they are receiving is unwelcome. Nor does the behavior have to be unwelcome to a "reasonable person." This prong, unlike the first and last, is purely subjective. How did the victim feel about the behavior? That's all that matters for this one element. However, remember that it takes all three elements for a legally actionable quid pro quo claim.

Last, a plaintiff would need to show that his or her submission to the unwelcome, sexual conduct was the basis for an employment decision. Please note that the US Supreme Court has held that mere threats of making an employment decision do not constitute quid pro quo harassment. There has to have actually been a tangible employment action taken in order to meet all the elements of a quid pro quo claim.

VIII. Tangible Employment Actions – So, what are tangible employment actions? The following is an illustrative list:

Hiring/Firing

Promotion/Failure to Promote/Demotion

Undesirable Reassignment

Significant Change in Benefits

Compensation Decisions

Work Assignment Changes

Please note that some of these examples can be very subtle. For example, a legal secretary may be reassigned from a "nice" partner to a type A partner. That can be considered an undesirable reassignment. So, before making any employment decision, think through your reasons for doing so. Do you have a justified business reason for the change or are you just acting on gut which might have some implicit bias attached? Even if you have a legitimate reason for the employment decision, perhaps something occurred in the workplace of which you are unaware which would cause the employee to think you are engaging in quid pro quo harassment. The only real way to defend yourself from such a claim under those circumstances is to make sure that you have a good business justification for the action. Write it down and keep it in a locked, confidential file. You may need to remind yourself later when a complaint is filed.

X. Retaliation

Retaliation cases are the fourth kind of case that often arises out of issues of bias. The US Supreme Court weighed in on

Vignette 3

Two males filed sexual harassment claims with their employer. The employer hired a private investigator who then conducted a criminal background check on the two employees which involved asking disturbing and embarrassing questions of co-workers and family members. When the company realized the mistake, they hired outside counsel to take over the investigation and tailor it to the employee's claims. The employees sued for retaliation. Did they have a case?

overbearing.

Brendan Pierson [ContactAll Articles](#)

New York Law Journal

November 9, 2011

[Firm Denies Discrimination Against Service Dog Owner](#)

The Southern District U.S. Attorney sued an Orange County law firm for allegedly discriminating against the disabled by refusing to allow a client to enter its offices with her service dog.

The suit ([See Complaint](#)) alleges that Larkin, Axelrod, Ingrassia & Tetenbaum and partner John Ingrassia violated Title III of the Americans with Disabilities Act when they refused to let a client, Lauren Klejmont, enter the office with Reicha, her German shepherd.

"The notion that a law firm and a partner in the firm would so flagrantly violate such a clear and well-established law, as was alleged in this case, is disturbing," U.S. Attorney Preet Bharara said in [a statement](#). "Of all people, lawyers should know better. Individuals with disabilities are entitled to the same access to private businesses as everyone else, and it should be understood loud and clear that we will not tolerate discriminatory conduct."

When Ms. Klejmont went to the firm's Newburgh office to meet with her attorneys, the lawyers met her in the waiting room, but refused to let her inside with Reicha and asked her to leave the dog outside, according to the suit.

Ms. Klejmont needed the dog because of her disability, but the lawyers continued to insist that she could not bring the dog inside, saying that Mr. Ingrassia was allergic to dogs. They also rejected her suggestion to hold the meeting in a conference room instead of in Mr. Ingrassia's office, according to the complaint.

One of the attorneys said he would meet with Ms. Klejmont only if she did not bring Reicha, or if they met in the firm's parking lot and Reicha stayed in Ms. Klejmont's car during the meeting, according to the complaint. Article by *Brendan Pierson* who can be contacted at bpierson@alm.com.

XII. Summary

So it appears to that many out there are letting their noun biases turn into verb biases. I call upon you to help stop this practice. Acknowledge if you have a bias and make sure that it hiring decision, assigning work, or working with a client. I believe we all want to do the right thing

For more information on sexual harassment in the workplace or for a how to guide for conducting workplace investigations, please see my books available on Amazon.com or BarnesandNoble.com:

[C"Ocpicgtøu" I wkfg"vq"Rtgxgpkpi"Nkcdknkv{"hqt"Ugzwcen"Jctcuuogpv"kp"vjg"Yqtmrnceg,](#)

Beth K. Whittenbury, 2013

[Investigating the Workplace Harassment Claim,](#)

Beth K. Whittenbury, ABA Publishing, 2012.