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Expert Analysis

'Because': The Most Important Word In Discrimination Claims

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Oftentimes, but not always, a complaint of discrimination boils down to: Something bad happened to me at work and I am a member of a protected class, so it must have been discrimination. It is not that simple; what is missing is the "because." It is not unlawful to take action against someone who is a member of a protected class, but it is unlawful to do so *because* of membership in that class. The difference is crucial.

"Plaintiff's membership in a protected class, by itself, is not enough to sustain a [discrimination] claim." *Bennet v. Watson Wyatt & Co.,* 136 F. Supp. 2d 236, 252 (S.D.N.Y. 2001). "A plaintiff must also demonstrate that she was subjected to the hostility because of her membership in a protected class. In other words, an environment which is equally harsh for both men and women or for both young and old does not constitute a hostile working environment under the civil rights statutes." *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 318 (2d Cir. 1999).

That is why one element of a prima facie case of discrimination is causation, i.e., that the conduct occurred "under circumstances giving rise to an inference of discrimination." *Pearson v. Board of Educ.,* 499 F. Supp. 2d 575, 595 (S.D.N.Y. 2007). And, if a plaintiff makes a prima facie showing and the employer in turn presents a legitimate, non-discriminatory reason for the conduct, the plaintiff must then prove the conduct took place *because* of discrimination. Id. at 596.

Plaintiff still bears the burden of showing that the conduct is caused by a discriminatory motive. It is not enough that a plaintiff has an overbearing or obnoxious boss. She must show that she has been treated less well at least in part because of her gender.

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Mihalik v. Credit Agricole Cheuvreux N.A., 715 F.3d 102, 110 (2d Cir. 2013) (citations omitted).

Because Shown

In *Liebowitz v. Cornell Univ.,* 584 F.3d 487, 502 (2d Cir. 2009), the Second Circuit reversed summary

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judgment against plaintiff's gender and age discrimination claims:

> [P]laintiff has presented evidence of the following: (1) during the relevant time period, in addition to plaintiff, defendants laid off five other employees, all of whom were females over the age of fifty; (2) defendants reassigned teaching duties once performed by plaintiff to at least three male instructors; and (3) defendants did not consider plaintiff for vacant positions that arose in 2002, prior to plaintiff's departure, in the Long Island and New York City offices, and attempted to fill one such position in the New York City office with a younger, male employee.
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> * * * Where, as here, the six layoffs, including plaintiff, were women at least 50 years of age, plaintiff's duties were primarily re-assigned to male instructors, and plaintiff was not considered for any vacant positions, plaintiff satisfies the minimal prima facie requirement of demonstrating that the non-renewal occurred under circumstances giving rise to an inference of discrimination.

Id. at 502-03 (citations omitted).

Plaintiff in *Estevez v. S & P Sales and Trucking*, No. 17 Civ. 1733 (PAE), 2017 WL 5635933 (S.D.N.Y. Nov. 22, 2017) was a Hispanic of Dominican origin terminated for theft of company property. He claimed discrimination because a native-born Italian-American who was caught stealing money was not fired. Defendants moved to dismiss, arguing that the different treatment was due to nepotism not race or national origin, i.e., that the Italian-American employee's father was a company supervisor. The court denied the motion, holding: "Defendant's inference is plausible, and in the event that nepotism—as opposed to racial discrimination—is shown to have been the basis … defendants will be entitled to prevail … . But the inference that Estevez pursues is also plausible, and on a motion to dismiss, it is not for this Court to choose among plausible inferences." Id. at *3.

"Because" is an essential element even under the very lenient New York City Human Rights Law.

In *Bivens v. Inst. for Cmty. Living*, No. 14 Civ. 7173 (PAE), 2015 WL 1782290 (S.D.N.Y. April 17, 2015), Judge Engelmayer denied the employer's motion to dismiss where plaintiff alleged, inter alia, that a manager hired a male who was demonstrably less qualified than a female applicant, gave him preferential treatment that he did not give female employees, and "expressed great relief … that, after about nine years in QA/QI, I finally have a guy in QA." Id. at *5.

In *Vogel v. CA*, 662 Fed. Appx. 72 (2d Cir. 2016), the Second Circuit found that plaintiff had made a prima facie showing of retaliation:

> [A] reasonable jury could conclude that after Vogel reported to Human Resources that he suspected he was being discriminated against on the basis of race, Perlman singled him out for hostile treatment … . Perlman yelled at him, called him names, told him that his actual performance was irrelevant, and said he did not want Vogel on his team … .

662 Fed. Appx. at 76.

Because Not Shown

Despite ruling in favor of plaintiff on his retaliation claims, the *Vogel* court affirmed summary judgment against his race and national origin discrimination claims:

> Vogel contends that a comment … that "Indians would rather deal with Indians" suggests discriminatory intent. However, this comment was made shortly before Kozak recruited Vogel … , and was made by Kozak, not by Perlman, who was the individual responsible for the adverse employment actions … . Vogel next relies on a comment allegedly made by Perlman

> that "Vogel did not work well and play well with the guys in India," but this remark also does not support an inference of discrimination, given that it is undisputed that Vogel's working relationship with the members of his team based in India was tense. Finally, Vogel points to the transfer of some of his duties and projects to the India-based team as evidence of discriminatory intent, but he adduced no evidence indicating this shift was motivated by race or national origin—particularly where, as here, there is no evidence that Vogel's white, non-Indian colleagues also had their duties similarly shifted.
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> Id. at 75 (citations omitted).

In *Sharpe v. MCI Communications Servs.*, 684 F. Supp. 2d 394 (S.D.N.Y. 2010), plaintiff alleged race discrimination. He testified, "in November and December of 2005, Fabiitti berated and belittled [him] on a weekly or bi-weekly basis. After December 2005, Fabiitti's critical comments became more frequent." Id. at 398 (citations omitted). Judge Chin granted the employer summary judgment:

> Even assuming he was treated harshly by Fabiitti, the record does not contain sufficient evidence to support a finding that this treatment was racially motivated. Sharpe's subjective belief, unsupported by any concrete facts or particulars, that Fabiitti was "nasty" and "mean" when it came to people of color is insufficient to defeat summary judgment … . Sharpe's argument is undermined by his admission that Fabiitti never made any derogatory racial comments … .
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> Id. at 400-01.
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> The court also noted:
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> Sharpe disputes his managers' characterization of him as overly social during work hours by testifying that … the reason he was perceived as talking more than his coworkers was because he was taller than them and could be seen over the cubicles. To the extent these facts show discrimination at all, they show discrimination based on height, not race.
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> Id. at 402.

In *Pearson*, Judge Chin granted the employer's motion for summary judgment:

> Plaintiffs have not met their burden of proving that the City Defendants' actions were motived at least in part by discriminatory intent, as the only proof of discrimination they have presented is that they are African American and other Social Studies department teachers are not, and one comment that Williams received "preferential treatment." This is weak evidence of discrimination.
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> 499 F. Supp. 2d at 598 (citations omitted).

Plaintiff in *Aiola v. Malverne Union Free School Dist.,* 115 F. Supp. 3d 321 (E.D.N.Y. 2015) alleged:

> On one such occasion, Colaitis stated that the Plaintiff's work "look[s] like [Colaitis's] ass." On several other occasions, Colaitis allegedly called the Plaintiff on a speakerphone and stated that he was "with the boys" … . During one such call, Colaitis stated that the Plaintiff "reminded him of the 'Italian cruise ship Captain,'" who memorably caused the Costa Concordia cruise ship to capsize. The Plaintiff interpreted this remark as a clear indication that Colaitis was harassing him on the basis of his Italian–American national origin.
>
> The Plaintiff also alleges various other indignities that he has suffered at the hands of Colaitis, including: being insulted in front of his co-workers and family members; being made to feel like a worthless employee; being addressed with a demeaning tone as if he were inferior to Colaitis; having Colaitis invade his personal

> space and speak with a physically threatening posture; being publicly mocked or reprimanded and made to feel inferior and an outcast in his place of employment.

Id. at 327 (citations omitted).

Judge Spatt dismissed the complaint:

> Plaintiff has only alleged a single incident of hostility claimed to have been motivated by bias against Italian–Americans. While a single incident may be actionable if it is sufficiently severe, the Court finds that Colaitis's reference to the Captain of the Costa Con[c]ordia is "not of sufficient magnitude to meet the applicable standard for severe intimidation, ridicule and insult" required to plead a legally sufficient hostile work environment claim.

Id. at 336 (citations omitted).

New York City Human Rights Law

"Because" is an essential element even under the very lenient New York City Human Rights Law. "For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees *because of* her gender." *Williams v. N.Y.C. Housing Auth.,* 61 A.D.3d 62, 78 (1st Dept. 2009) (emphasis added).

Plaintiff in *Soloviev v. Goldstein,* 104 F. Supp. 3d 232, 248-50 (E.D.N.Y. 2015):

> [A]llege[d] he was hired as the lowest paid person holding his position, while the more recently hired younger women were paid more … and further that he complained about the lack of dehumidifiers … but the problem was not remedied … he was asked by unidentified staff members when he was going to retire … he received only one promotion while the other Assistants hired after him received multiple, and that unidentified staff … made derogatory comments such as "oh another Russkee[,]" "[y]ou Russians are taking over everything[,]" and "you Russians get everything handed to them[.]"

Id. at 241.

Judge Kuntz dismissed the complaint:

> Mr. Soloviev has shown no connection between his termination and his gender, race, or national origin. Rather, he has "done no more than point to various ways in which [he] feels he was mistreated and argue that it must have been because of" his gender, race, and national origin.
> * * *
> [A] complaint will not always pass muster under NYCHRL's more lenient standard. A complaint must still allege facts on the basis of which a court can find differential treatment—*i.e.* the plaintiff was "treated less well—because of a discriminatory intent. [D]istrict courts must be mindful that the NYCHRL is not a general civility code. The plaintiff still bears the burden of showing that the conduct is caused by a discriminatory motive ... [*i.e.*] *because of* [the protected characteristic]."

Id. at 248-50 (citations omitted).

Conclusion

"[I]t is hornbook law that the mere fact that something bad happens to a member of a particular racial group does not, without more, establish that it happened *because* the person is a member of that racial group." *Williams v. Calderoni*, No. 11 Civ. 3020 (CM), 2012 WL 691832, at *7 (S.D.N.Y. March 1, 2012). Recognizing the difference is key to successfully counseling a client.