

**COLOR DISCRIMINATION:
DIFFERENTIATE AT YOUR PERIL**

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ABSTRACT

Color bias is discrimination based on differences in skin pigmentation. Despite the plain language of the Civil Rights Act, this form of discrimination, was, for many years, either not actionable or treated as race discrimination. After the Supreme Court ruled otherwise, claims of color discrimination have been recognized by the lower courts and the number of color-bias cases have increased dramatically. Interestingly, these cases are proving to be mostly an intraracial phenomenon. This article examines the emerging case law surrounding color-discrimination complaints. The significance of the issue has grown with changes in the racial diversity of the American workforce. Our conclusions focus on the managerial implications of the consequences of color discrimination and the cost of failure to recognize and deal with color bias in the workplace.

The Civil Rights Act states that, “it shall be an unlawful employment practice for an employer . . . to discriminate with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, *color*, religion, or national origin” [1]. Despite this prohibition on color discrimination, there is a dearth of legal research concerning the legal principles governing its use. Even employment law texts fail to address the matter or subsume it within the race discrimination rubric [2. 3]. The EEOC does not even list color as a

separate complaint category on its Web site [4]. This is somewhat surprising since color discrimination, particularly discrimination based on intraracial colorism, has been with this country since colonial days [5].

This oversight is probably a result of the comparatively few cases filed based on color since the passage of the Civil Rights Act. Throughout most of the period, only about 500 color-bias cases were filed with the Equal Employment Opportunity Commission (EEOC) every year, and almost all of these were settled out of court. These figures do not approach the 80,000 employment discrimination charges filed in 2003 [4, 6]. However, since 2000, a dramatic shift upward has been seen in the number of cases being filed. The EEOC is currently receiving about 1,400 color-bias complaints a year, which represents a 280% increase over prior periods (about 3% of all discrimination complaints) [6].

This dramatic increase is likely to continue for several reasons. Over 7,000,000 Americans identified themselves in the 2000 census as being of more than one race [7]; more than a third of the country is nonwhite [8]; and interracial marriages are increasing at more than a 500% rate [9]. As diversity flourishes in the workplace and racial stereotypes further dissipate, interracial marriages should become even more commonplace. Such changes increase the likelihood of discrimination cases based on skin pigmentation rather than race.

There are also color differences within various races such as Hispanics, African Americans, and those of Middle Eastern heritage [10]. Given the influx of Hispanics and those of Middle Eastern descent into this country over the last several decades, coupled with the rising number of citizens from mixed marriages, discrimination based on color is even more likely to become a significant workplace issue [8].

Therefore, managers should become familiar with the concept of color discrimination and the evolving legal principles. To that end, this article will review the legal history of color discrimination and the types of circumstances administrators are likely to encounter concerning color.

LEGAL BASIS

Despite the plain language of the Civil Rights Act, early case law often did not recognize color as a protected class under the Civil Rights Act [11]. In fact, prior to the Supreme Court's ruling in *Saint Francis Collge v. Al-Khazraji* [10], many courts had interpreted Title VII's ban on color discrimination to mean the same as race discrimination [12, 13]. As late as 1986, a federal district court for Northern Illinois denied a color discrimination charge by a Nigerian who had alleged that his supervisor, who had a lighter skin color, had been pressuring him to give up his teaching position in favor of a lesser-qualified but lighter-skinned African American. Ultimately, he alleged that the darkness of his skin was the reason why his contract had not been renewed and his position had

been given to a Black with a lighter skin color. The court went on to state that “although the court recognizes that discrimination based on skin color may occur to members of the same race . . . this court refuses to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit” [14, at 1546].

On the other hand, some district courts, as early as 1977, were acknowledging that color was actionable under Title VII. In an often-quoted case, *Vigil v. City and County of Denver*, the district court allowed a claim of color discrimination by a Mexican American to go trial noting that, “skin color may vary significantly among those individuals considered Mexican American, skin color may be a basis for discrimination against them . . . at least in this area Mexican Americans are subject to color-based discrimination” [15, at 2].

In 1987, the U.S. Supreme Court clarified matters. In *Saint Francis College v. Al-Khazraji*, the Court concluded that “Congress intended to protect from discrimination, identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics . . . a distinctive physiognomy is not essential to qualify for protection” [10, at 611]. In *St. Francis*, a professor of Arab descent with a darker skin tone applied for tenure and was denied by an all-Caucasian tenure committee. In response to his filing a discrimination charge, the university argued that his claim was not protected by the Civil Rights Act because Arabs are considered part of the Caucasian race. The Court disagreed, saying that there are differences within races upon which discrimination may occur [10]. The implication is that differences based on skin color, as in this case, could be actionable as well.

Three years later (1990), in another often-quoted case, *Tracy Walker v. IRS*, a lighter-skinned Black female charged that her supervisor, a darker-skinned Black woman, had terminated her because of the color of her skin [13]. The plaintiff alleged that her darker-skinned supervisor made statements such as “you need some sun”; “you think you bad, you think you’re somebody, I can do what I want to you”; and “why don’t you go back where you belong?” [13]. However, there were no witnesses to these alleged statements. Had there been witnesses, she would have had a strong case of color discrimination, according to the court [13].

Another administrator did admit to stating that he could not “see” a Black employee discussing a problem about a Black supervisor with a white supervisor. The court found this to be good evidence of color bias, but this person played no role in the plaintiff’s termination. Although there was some evidence that the plaintiff was treated differently from others in the office, the employer was able through performance data to show that the termination was based solely on performance problems. The court also found that the fact the plaintiff was replaced with a darker-skinned Black had no bearing in this litigation. Because

of the absence of direct evidence of color bias, the judgment was in favor of the defendant [13].

In the only appeals court case found, an unpublished opinion of the 7th Circuit, the court affirmed in *Porter v. Illinois Department of Children and Family Services* a lower court's summary judgment despite color-bias comments [16]. In *Porter*, a light-skinned African-American child protection investigator alleged that his termination was due in part to color discrimination by supervisors. There was evidence that his supervisor had told him soon after he took the position that "she did not like light-skinned African-American men and that she was going to get rid of him before his probationary period was over" [16, at 2]. Another supervisor also told him that she had "nothing to do with what was being done to him" [16, at 2].

However, under the mixed-motive burden of proof that was allowed at that time, the defendant was able to prevail because of the plaintiffs poor work record. In a mixed-motive case, a plaintiff must show that despite the presence of illegal discrimination, the employer can still prevail if it can demonstrate that it would have made the same employment decision absent the discriminatory actions [17]. The Civil Rights Act of 1991 removed mixed motive as a burden of proof. In *Porter*, the employer was able to show that the plaintiff had not read assigned case material, that his work was incomplete, that he had failed to meet performance objectives, and that he had threatened a supervisor [18]. The plaintiff, furthermore, was not able to introduce evidence that he had been treated unequally compared to others with similar work records—often critical evidence in proving disparate treatment claims [16].

Most recently, in *Jerry Brack v. Captain D's*, a dark-Black male contested his transfer to a less-desirable store based on the area manager's (an African American) desire for a "lighter-skinned" Black to be in charge of operations at this store. The plaintiff alleged that the area manager had called him "the little Black sheep," that the store needed someone "fair-skinned" to be the manager because the store needed someone closer to the background of the customers" [19, at 941]. The plaintiff had at least one witness to many of these statements. Consequently, the judge refused to dismiss the case despite some evidence showing that the plaintiff was not fully proficient in some of the technical service areas [19].

INTERRACIAL COLOR BIAS

While most color discrimination cases are predominately the result of intraracial color bias, some charges are based on interracial discrimination. For example, in *Zyroon Khan v. Abercrombie & Fitch*, a Black female filed a charge with the EEOC alleging that her low performance ratings and subsequent discharge had resulted from race and color bias [20]. She alleged that she was called a "Black bitch" by a white employee, a supervisor had told her to "go

back to your country” and “we don’t have your kind of people on the cover and inside of the employee handbook,” and that her low performance ratings were slanted because of this alleged race and color bias. However, there were no witnesses to the white employee calling her a “Black bitch,” the supervisor played no role in the company’s determination to terminate her, and the low ratings and termination were found tied to her failure to achieve concrete performance objectives [20]. Moreover, the court did not find that a white employee calling the plaintiff a “Black bitch” would constitute sufficient evidence of color bias [20]. Thus, the case was dismissed.

However, a federal district court refused to dismiss a charge of color discrimination where white nurses of Russian descent were systemically replaced with Black nurses at a hospital serving more than 240 Russian-speaking patients [21]. In addition to replacing whites with Blacks, the hospital also required that the Russian-speaking nurses speak only English, while allowing Black nurses to speak Creole [21]. Based on these facts, the court found that despite clear elements of race and national origin discrimination, these facts could also be construed as color discrimination [21]. The basis of this cause of action was statistical in nature because of the relatively large number of employees for whom reliable statistics were available.

In *Felix v. Marquez*, a Puerto Rican female filed a color discrimination charge because she had been denied a promotion and later discharged. Since much of the workforce was “Black,” she attempted to demonstrate statistically that the lighter-skinned African Americans and whites were being promoted and the darker-skinned employees were not [22]. However, the statistics revealed the opposite to be true. Several employees whose skin color was as dark or darker than the plaintiff’s had been given promotions in grade, while many other employees whose skin was lighter than the plaintiffs had been promoted less often [22].

Moreover, based on personal observation, the court challenged her color descriptions. For example, it found the plaintiff to be a medium shade rather than a darker shade of black. In addition, the employer could prove that a number of performance problems had caused the termination. The court pointed out that if her allegations had been supported by the facts and there were no performance problems, she would have had a valid case [22].

In a 2002 case, *Ava Miller v. Bed, Bath, & Beyond*, an African-American female alleged that whites and lighter-skinned Blacks were promoted to higher level positions for which she was either qualified or more qualified [23]. There were no color-biased comments alleged in this case. The plaintiff was able to establish that all of the store promotions were given to whites or lighter-skinned Blacks. However, the company, while admitting that the plaintiff had the basic qualifications for the better positions, pointed out that she was lacking in important management skills. As a result of these deficiencies, the case against Bed, Bath, & Beyond was dismissed [23].

SETTLEMENTS

Many color discrimination cases are settled well before any court date. Two of the more recent cases available to the public are reviewed here. In August 2003, the EEOC settled a color-bias lawsuit involving Applebee's restaurant in Atlanta for \$40,000 and a change in management practices. In this case a dark-skinned Black waiter alleged that his light-skinned Black supervisor discriminated against him [24], called him a "tar baby," "black monkey," and "jig-a-boo," and directed him to bleach his skin [6, 24].

In a 2002 case, a white supervisor alleged that he was required to discriminate on the basis of color at a Mexican restaurant in San Antonio. He charged that he was ordered by the restaurant's Mexican-American owner not to allow "dark-skinned" Mexicans to work in the dining room. The restaurant subsequently agreed to pay \$100,000 in fines [6].

CONCLUSIONS

Because of changes in the ethnic composition of the American workforce, the number of discrimination cases that turn on variations in skin pigmentation have grown in recent years, and this growth will surely continue [4]. While color discrimination suits must follow the same burdens of proof required under the Civil Rights Act, i.e., disparate treatment and adverse impact [18], several pertinent elements endemic to color-bias claims emerge from the legal record.

First, the legal record reveals that for the most part color bias is an intraracial phenomenon. Possibly, the perpetrators do not understand that color discrimination or harassment based on color toward another person of the same race is protected under the Civil Rights Act [24].

Second, most of the cases involve remarks based on skin color toward one or more persons of the same or different race. However, such comments are not necessary to prevail in color-bias litigation. The plaintiff can win if he or she can demonstrate a statistical pattern of employment discrimination based on shades of skin color and the employer cannot refute the evidence or provide a job-related reason for its actions [18].

Third, a viable color-bias case requires identifiable differences in skin tone associated with an adverse employment action. The plaintiff must then demonstrate that the discriminatory treatment was based on those differences in skin tone, whether by verbal statements supported by witnesses, or through statistical analysis. Proving that the discriminatory act was related to a difference in skin pigmentation is the essential element for prevailing in color cases, particularly when the offender is of the same race, because a charge of race discrimination under those circumstances would be otherwise generally not be actionable.

When presenting a statistical case before the courts, the plaintiff must not only demonstrate accurate differences in skin tone but other data as well. The

plaintiff must also show that those who were rejected for hire or promotion were qualified and the sample size of employees upon which the case is based must also be large enough to have legal weight [25]. A small number, such as two or three rejected applicants for positions or promotions, is insufficient [25].

Managers often fail to realize that discrimination and harassment (even that which is intraracial and perhaps thought to be done as part of good-natured fun) is not only demotivating and demeaning to the victim but sends negative signals to the remainder of the workforce. Clearly, as in the Applebee's case, management training and education is warranted to eradicate this problem [25]. Such training should not be limited to the legal aspects of color discrimination but must also deal with the fundamental problem of poor management skills and sensitivities that are clearly evident in these cases. Only by cultivating good management practices and interpersonal skills that foster treating all employees regardless of race, color, gender, national origin, religion, etc., with the respect and dignity they deserve, will discrimination, in whatever form it raises its pernicious head, be extirpated.

ENDNOTES

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