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Understanding unlawful discrimination in the workplace

By Brian J. MacDonough

There have been several news stories in recent months about the legal implications of inappropriate and/or offensive language in our society, generating discussion about whether such language is, or should be, unlawful in certain circumstances.

The Legislature last fall held a committee hearing on a widely publicized bill that sought to penalize the use of "bitch," by imposing a fine of up to $200 for any person who "uses the word 'bitch' directed at another person to accost, annoy, degrade or demean" that person.

While the proposed legislation, fraught with constitutional issues involving the exercise of free speech, was largely decried and gained no traction, it does highlight an important question: In what circumstances may offensive and demeaning comments constitute unlawful discrimination?

In fact, in January, Supreme Court Chief Justice John G. Roberts Jr., during oral arguments in *Babbe v. Wilkie*, asked the hypothetical question whether the phrase "OK, Boomer" would qualify as age discrimination.

The answer to Chief Justice Roberts' question is not a bright-line "yes" or "no." Context matters. For example, in connection with a hostile work environment claim, one of the central legal issues is whether the conduct in question was severe or pervasive.

As a general rule, a single, isolated comment will not be actionable as creating a hostile work environment, but in some instances it may. See *Augis Corp. v. Massachusetts Comm'n Against Discrimination*, 75 Mass. App. Ct. 398, 408-409 (2009) (noting that a supervisor who calls a black subordinate a f***ing n***** "has engaged in conduct so powerfully offensive that the MCAD can properly base liability on a single instance").

Courts do not impose a numerosity test. Rather, the legal analysis is focused on whether the discriminatory comments "intimidated, humiliated, and stigmatized" the employee in such a way as to pose a "formidable barrier to the full participation of an individual in the workplace." See *Thomas O'Connor Constructors, Inc. v. Massachusetts Comm'n Against Discrimination*, 72 Mass. App. Ct. 549, 560-61(2008); *Chery v. Sears, Roebuck & Co.*, 98 F. Supp. 3d 179, 193 (D. Mass. 2015) (noting that, in the context of a hostile work environment based upon race, "[i]t is beyond question that the use of the ['N' word] is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination").

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Similarly, in the context of a disparate treatment claim (e.g., allegations that an employee was terminated based on unlawful age bias), evidence that the decision-maker referred to the employee as a "Boomer" should not be evaluated in a legal vacuum. Rather, this evidence may be presented to the jury as just one piece of a "convincing mosaic of circumstantial evidence" from which a fact-finder could properly determine that the termination decision was driven by discriminatory animus based on age. See *Burns v. Johnson*, 829 F.3d 1, 16 (1st Cir. 2016).

So, while sticks and stones may break bones, words also do harm and, depending on the circumstances, may result in legal claims and liability.

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