Elimination of Bias: An Interactive Discussion of Bias and Discrimination

Presented by:

Joe Craciun, Money Mailer, LLC
Diana Chen, Alston & Bird LLP
Richard Giller, Alston & Bird LLP
Elimination of Bias

Why are we here and what is it?

(besides that it’s a required 1 hour credit that’s really hard to obtain)
Why we are here...

The State Bar of California requires that you have at least one hour of MCLE dealing with the elimination of bias in the legal profession by reason of but not limited to sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation.
In a nutshell...

These categories of bias (or “protected classes”) are protected by law in California:

- Race/Color
- National Origin/Ancestry
- Gender
- Religion
- Age (for persons 40 and older)
- Mental or Physical Disability
- Veteran Status
- Medical Condition (including genetic characteristics)
- Marital Status
- Sexual Orientation
- Pregnancy
Unlawful discrimination can occur in two ways:

- Unequal (disparate) treatment; and
- Unequal (disparate) impact.

“Elimination of Bias” is intended to be a broader category of education on the topic of bias, which includes understanding unlawful discrimination.
Any questions on the categories?

- Race/Color
- National Origin/Ancestry
- Gender
- Religion
- Age (for persons 40 and older)
- Mental or Physical Disability
- Veteran Status
- Medical Condition (including genetic characteristics)
- Marital Status
- Sexual Orientation
- Pregnancy
Learning by Example

We’ve prepared five vignettes based on real cases for your viewing pleasure.

See if you can decide which of the following vignettes resulted in illegal discrimination.

Mark your answers on the sheet below we’ve provided you and after we’ve performed all of the vignettes, we’ll review the correct responses together.
A. Gupta v. Walt Disney World Co.
B. General Dynamics v. Cline
C. Richardson v. CenterCare, Inc.
D. EEOC v. Mothers Work
E. Washington v. Ill. Dep’t of Revenue
<table>
<thead>
<tr>
<th></th>
<th>CASE NAME</th>
<th>CITATION</th>
<th>TYPES OF BIAS</th>
<th>ILLEGAL?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Gupta v. Walt Disney World Co.</td>
<td>256 Fed. Appx. 279 (11th Cir. Fla. 2007)</td>
<td>Race, national origin, ancestry.</td>
<td>X</td>
</tr>
<tr>
<td>D</td>
<td>EEOC v. Mothers Work</td>
<td>Complaint and Consent Decree, Florida 2007</td>
<td>Gender, pregnancy.</td>
<td>X</td>
</tr>
<tr>
<td>E</td>
<td>Washington v. Ill. Dep’t of Revenue</td>
<td>420 F.3d 658 (7th Cir. Ill. 2005)</td>
<td>Race, national origin, ancestry, sexual orientation, marital status, medical condition.</td>
<td>X</td>
</tr>
</tbody>
</table>
The Take-Home Message

Remember that understanding what constitutes unlawful discrimination is only part of the “elimination of bias”.

Our vignettes were designed to make you think about bias in multi-faceted ways.

What biases were formulated in your mind while the vignettes were being acted out?
<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>CITATION</th>
<th>TYPES OF BIAS</th>
<th>ILLEGAL?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.  Gupta v. Walt Disney World Co.</td>
<td>256 Fed. Appx. 279 (11th Cir. Fla. 2007)</td>
<td></td>
<td>YES</td>
</tr>
<tr>
<td>C.  Richardson v. CenterCare, Inc.</td>
<td>2004 U.S. Dist. LEXIS 19606 (S.D.N.Y. Sept. 30, 2004)</td>
<td></td>
<td>NO</td>
</tr>
<tr>
<td>D.  EEOC v. Mothers Work</td>
<td>Complaint and Consent Decree, Case 3:05-cv-00990-TJC-TEM, Florida 2007</td>
<td></td>
<td>NO</td>
</tr>
<tr>
<td>E.  Washington v. Ill. Dep’t of Revenue</td>
<td>420 F.3d 658 (7th Cir. Ill. 2005)</td>
<td></td>
<td>NO</td>
</tr>
</tbody>
</table>
I. ELIMINATION OF BIAS

A. What is it and why are we here (besides a required 1 hour credit that’s really hard to obtain)?

1. Why are we here?

The State Bar of California requires that you have at least one hour of MCLE dealing with the elimination of bias in the legal profession by reason of but not limited to sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation.

2. What is it?

Elimination of Bias in a Nutshell

These categories of bias (or “protected classes”) are protected by law in California:

- Race/Color
- National Origin/Ancestry
- Gender
- Religion
- Age (for persons 40 and older)
- Mental or physical disability
- Veteran status
- Medical condition (including genetic characteristics)
- Marital Status
- Sexual Orientation
- Pregnancy

B. Unlawful Discrimination vs. “Elimination of Bias”

What’s the difference?

Unlawful discrimination can occur in two ways:
- Unequal (disparate) treatment; and
• Unequal (disparate) impact.

“Elimination of Bias” is intended to be a broader category of education on the topic of bias, which includes understanding unlawful discrimination.

Why is it important? It’s illegal to discriminate on the basis of the protected categories.

[SLIDE 6]

C. Any questions on the categories? (Ask the audience if anyone has any questions on what the above categories mean. Use yourself as an example and run down the various categories and how you fit in each.)

[SLIDE 7]

II. LEARNING BY EXAMPLE

Cautionary tales acted out by A&B1 (main presenter), A&B2 (assistant presenter) and ACCA.

(To the audience):

We’ve prepared five vignettes based on real cases for your viewing pleasure.

See if you can decide which of the following vignettes resulted in illegal discrimination.

Mark your answers on the sheet below we’ve provided you and after we’ve performed all of the vignettes, we’ll review the correct responses together.

[SLIDE 8]

A. Gupta v. Walt Disney World

A&B1: The World Showcase at the EPCOT theme park in Walt Disney World (WDW) near Orlando, Florida, provides guests cultural experiences (as well as shopping and eating opportunities) reflecting eleven nations of the world. Many of the positions in the World Showcase are staffed by employees called “Cultural Representatives” who interact with guests. Let’s see if there’s a bias here.

ACCA: Hi, I’m the GC of WDW. WDW requires Cultural Representatives to speak the language of the country they represent as well as enough English to explain their history, customs, traditions, and culture to guests based on their firsthand experiences.

A&B2: I’m Anesh Gupta and I’m Asian. I’ve been working for WDW for two years as a server for the “Princess Storybook Breakfast,” an American-style meal, served at the Akershus restaurant in the Norway section of the World Showcase.
ACCA: Anesh, WDW has decided to stop the “Princess Storybook Breakfast” at the Akershus restaurant in order to provide an all-day Norwegian dining experience. As a result, servers are required to be Cultural Representatives. Unfortunately, Anesh, you are no longer allowed to serve since you do not qualify as “culturally authentic.”

A&B2: I’m suing. (Ask the audience): What should I be suing for? (Ask audience to fill out their worksheet.)

A&B1: Let’s hear the evidence. WDW?

ACCA: “Cultural authenticity” at WDW does not depend on an individual’s national origin, race, or color, but is entirely dependent on the ability of an individual to share authentically a culture. As long as an individual meets these standards, that individual can serve as a Cultural Representative regardless of their national origin, race, or color. We have individuals of Asian descent who are qualified to work as Cultural Representatives in the Norway Pavilion because they are culturally authentic. We also have individuals who are Middle Eastern, Asian, and black who are Cultural Representatives in the Canada Pavilion.

A&B1: Anesh, what is your cultural experience with Norway?

A&B2: I’ve visited Norway once for a few days on a lay-over back from England, my neighbor’s brother-in-law is Norwegien and I’ve taken a cruise on Norwegian Cruise Line to the Bahamas.

A&B1: (To the audience): What do you think? Mark your answer.

[SLIDE 9]

B. General Dynamics v. Cline

A&B1: In 1997, a collective-bargaining agreement between General Dynamics and the United Auto Workers eliminated retiree health benefits for current employees, except for workers who were presently over age 50. What do you think the alleged bias of the class action was based on? Please mark your answer on your worksheet. This one seems easy, but are you sure you understand what constitutes illegal discrimination in this category? Let’s first hear from a representative of the employees. Cline?

A&B2: Hi, I’m Cline, a representative on behalf of the class. The Age Discrimination in Employment Act (ADEA) prohibits discrimination based on “age” for everyone over 40. We’re all over 40, we’re getting less benefits (no retiree health benefits) than other workers (those over 50), and therefore we’re being discriminated against based on our age.

A&B1: So you’re claiming discrimination based on being too young (i.e., under 50), rather than the more typical situation where the discrimination is directed against someone for being too old. Is that correct?
A&B2: Yep. The ADEA only forbids discriminatory preference for the young over the old, but it should not favor the old over the young.

A&B1: Let’s hear from General Dynamics.

ACCA: We acknowledge that the ADEA speaks only of “age” rather than “being older,” but, the natural reading of the whole provision and Congress’s interpretive clues speak almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting treated better. The ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young. It was not meant to cover an employer’s policies even if they provide unfair advantages accruing to older employees at the expense of their juniors.

A&B1: So you’re saying the enemy of 40 is 30, not 50?

ACCA: In a world where younger is better, talk about discrimination because of age is naturally understood to refer to discrimination against the older. The ADEA is a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern.

A&B1: (To the audience) What do you think? Mark your answer.

[SLIDE 10]

C. Richardson v. CenterCare

A&B1: CenterCare is looking to hire a marketing representative with bilingual skills.

A&B2: Hi, I’m Raymond Richardson. My race is African American, I’m aged 54, my color is black, my national origin is American, and I am not bilingual. I’m applying for the position at CenterCare and I am a qualified marketing representative with 20 years of marketing experience.

ACCA: I’m sorry Mr. Richardson, but we are only looking to hire a marketing representative who speaks both English and French.

A&B2: I’m suing. (Ask the audience): What should I be suing for? (Ask audience to fill out their worksheet.)

A&B1: Let’s hear the evidence. CenterCare?

ACCA: Classification on the basis of language does not by itself identify members of a suspect class and would not support an inference of intentional national origin discrimination. For example, we have individuals of Vietnamese decent who speak both English and French and are thus being considered for the position.
A&B2: Every single employee of CenterCare is Vietnamese and the business office is in the Little Saigon area of Southern California. All of the brochures in the office are printed in English and Vietnamese. I think CenterCare doesn’t want to hire someone who is black.

ACCA: We are requiring candidates for the position to be bilingual in English and French because we are specifically marketing to individuals living in Quebec, Canada. Canada’s national language is both English and French, so we are required to be able to offer our services in both languages.

A&B1: (To the audience): What do you think? Mark your answer.

[SLIDE 11]

**D. EEOC v. Mothers Work, Inc.**

A&B1: Mothers Work, Inc. (now called “Destination Maternity”) is the world’s largest designer and retailer of maternity apparel. The company has over 1,600 retail locations, including over 700 stores, predominantly under the tradenames Motherhood Maternity(R), A Pea in the Pod(R), and Destination Maternity(R). In this next vignette, we take a closer look at this company’s ironic hiring policies. Let’s see what you think about them.

A&B2: Hi, I’m the General Manager of “A Pea in the Pod” in Century City Shopping Center.

ACCA: Hi, I’m Lashonda Burns. I’m American and my parent’s are of Cuban decent. I’m a female employee at A Pea in a Pod. I’ve been working at A Pea in a Pod for over 2 years as a sales clerk.

A&B2: Lashonda, you’re an excellent employee. We’d like to hire more people like you. In order to do that, I’m putting you in charge of interviewing new applicants for the sales associate position.

ACCA: Great! You know our regular customer, Amy? Well, she actually just dropped off an application for the sales associate position. What do you think of her?

A&B2: No, Amy is not a good fit for our store.

ACCA: Ok, what about Brad. He’s an out of work actor, looking for part-time work.

A&B2: Brad sounds perfect! We’ll hire him.

ACCA: I recently interview Claire for the sales associate position. I think she’s a great fit. I learned during her interview that Claire is actually just past her first trimester, so she’d be a perfect person to help model our new spring line and advise our customers on the fit and comfort of our clothes. What do you think?

A&B2: No, Claire isn’t going to work out for the position.
ACCA: (To the audience) This has been going on for nine months and it’s ridiculous. I’m filing a complaint with the Equal Employment Opportunity Commission.

A&B2: Hey, Lashonda, I’ve noticed recently that there’s something different about you… Are you wearing this season’s PeaPod jeans? They look great on you; a perfect fit. Hmm… that’s interesting… By the way, I found out that you filed a complaint with EEOC. You’re fired.

ACCA: I’m suing. (To the audience): What should I be suing for?

A&B1: Let’s hear the evidence. A&B2, what’s your position?

A&B2: Someone who will need to leave a new position several months after being hired it not an ideal candidate for us. We would not hire any employee (male, female, pregnant or non-pregnant) who announced in an interview that he or she would require several weeks of leave a few months after being hired, for example, for scheduled surgery.

ACCA: But you hired Brad knowing that he had to leave after 4 months to have a face lift for his new TV role.

A&B2: I know, but he’s a B-list actor now! He attracts business. This is LA, after all.

A&B1: (To the audience): What do you think? Mark your answer.

[SLIDE 12]

E. Washington v. Ill. Dep’t of Revenue

A&B1: Our last vignette has a few different layers to it. Let’s see if you can decide decipher this puzzle.

ACCA: Hi, my name is Chrissie Washington. I’m a lesbian of Arab decent and I’m an executive secretary at the Illinois Department of Revenue. For sixteen years, I’ve been allowed to work a “flextime” schedule, from 7AM to 3PM in order to care for my son who has Down syndrome. Over the years, my duties have been reassigned to other employees. I suspected the reassignments were due to my race, so I filed formal discrimination charges.

A&B2: Hi, I’m the supervisor at the Illinois Department of Revenue. Chrissie, I recently learned of your discrimination charges against the Department. You know, we only reassigned your duties because some of those duties needed to be completed from 3PM to 5PM, the time when you’re not available to work. So that you can now handle those duties, I’m requiring that you now work the normal 9 to 5 schedule like everyone else, and that way, none of your duties will have to be reassigned to others.

ACCA: But, I can’t balance my family and work obligations with the 9 to 5 schedule. I need to work from 7 to 3.
A&B2: Well, you know, as it turns out that the executive you were supporting no longer needs an assistant. We’re assigning you to another executive secretary position. By the way, with your new assignment, you’ll have to apply anew for a flex-time schedule.

A&B1: Sadly, Chrissie’s flex-time request was refused. But Chrissie continued to leave work at 3PM. To excuse her early departure, Chrissie used two hours of vacation or sick leave every afternoon until these resources were exhausted. Then, Chrissie took a leave of absence for six months until she could again return to work a 7-to-3 schedule.

ACCA: I’m suing. What should I be suing for?

A&B1: Let’s hear the arguments. A&B2?

A&B2: Chrissy can’t claim to be a victim of retaliation simply because her schedule was changed. Although her hours were modified to a standard 9-to-5 workday, her duties and salary remained unchanged. Besides, everyone else has to work from 9-to-5. Chrissy needs to show a material change in the conditions of her employment. Life’s little reverses are not the causes of litigation.

ACCA: But I’m not like everyone else. Although being assigned a 9-to-5 schedule would not be a “material change” for most workers, I have vulnerability, namely, my son’s medical condition. Working 9-to-5 was a materially adverse change for me, even though it would not have been for 99% of the staff. Because of the impact on my particular situation, the requirement that I work a standard shift should be illegal retaliation.


[SLIDE 13]

III. REVIEWING THE ANSWER KEY

This should be an open dialogue. Allow the audience to argue up the issues.

<table>
<thead>
<tr>
<th>CASE NAME</th>
<th>ACCUSED BIAS/CAUSES OF ACTION</th>
<th>ILLEGAL BIAS?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Gupta v. Walt Disney World Co.</td>
<td>Employment discrimination based on race, national origin and color.</td>
<td>X</td>
</tr>
<tr>
<td></td>
<td>Case study</td>
<td>Discrimination</td>
</tr>
<tr>
<td>---</td>
<td>------------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>B.</td>
<td>General Dynamics v. Cline</td>
<td>Age Discrimination in Employment Act.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C.</td>
<td>Richardson v. CenterCare, Inc.</td>
<td>Employment discrimination based on race (African American), age (54), color (black), national origin (African American), and because plaintiff was not bilingual.</td>
</tr>
<tr>
<td>D.</td>
<td>EEOC v. Mothers Work</td>
<td>Employment discrimination based on gender (female and pregnancy) and retaliation for filing charges.</td>
</tr>
<tr>
<td>E.</td>
<td>Washington v. Ill. Dep’t of Revenue</td>
<td>Employment discrimination based on race and retaliation for filing discrimination charges.</td>
</tr>
</tbody>
</table>

[SLIDE 14]

VI. THE TAKE HOME MESSAGE

Remember that understanding what constitutes unlawful discrimination is only part of the “elimination of bias”.

Our vignettes were designed to make you think about bias in multi-faceted ways.
SOME EXAMPLE TOPICS FOR FURTHER DISCUSSION: Our vignettes had characters who could fit in several different protected classes. Our actors were different from the character they played. What images did you formulate in your mind when the facts were presented? Were these biases based on any of the protected categories?

V. Q&A

Copies of the cases and the answer key can be delivered via an environmentally friendly email.