Employment Discrimination in the Ethnically Diverse Workplace

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Racial integration has long been the touchstone of racial progress in the workplace. But integration is only the beginning of the struggle to end racial discrimination. As workplaces become more diverse, they do not necessarily become less racially discriminatory. Diverse workplaces may be characterized by antagonism between people of different races. Interethnic discrimination may exist along side the discrimination that has traditionally occurred between blacks and whites, i.e., non-white racial and ethnic groups may engage in disparate-treatment employment discrimination actionable under Title VII of the 1964 Civil Rights Act. Examples of interethnic discrimination occur among members of different ethnic subgroups, as when Puerto Ricans allegedly discriminate against Mexican-Americans or Dominicans, or white Latinos allegedly discriminate against Afro-Latinos. In reality, then, there are many ways that non-white ethnic groups and subgroups can be complicit in race-based decision making in the workplace.

In the emerging interethnic discrimination cases, workplace diversity has been viewed as something of a safe harbor from charges of discrimination. This view exists despite established Supreme Court precedent to the contrary. Early in the history of Title VII, the Supreme Court rejected the premise that no question of bias could be present if a workplace has many members from a plaintiff's protected group. Yet, when the context is contemporary interethnic discrimination, the emerging cases suggest that some courts are so viscerally impressed by the vision of a presumably diverse workplace that they miss the applicability of this precedent and instead construct what I term a makeshift “diversity defense” to discrimination.

The diversity defense describes the way in which legal actors automatically view racially “diverse” workplaces as the equivalent of racially harmonious ones. This equivalence effectively treats all people of color as the same and overlooks the histories of racial animus within and across different ethnic groups. The judicial fashioning of a diversity defense to employment discrimination appears to reflect wishful thinking that diversity is a panacea for racial conflict. Unfortunately, diversity alone cannot eradicate racial discrimination.

The majority of interethnic employment discrimination claims that are starting to appear are those in which Latinos are involved as victims or as agents of individual disparate treatment discrimination in the workplace. Accordingly, it is important to note that racism, and in particular anti-black racism, is a pervasive and historically entrenched fact of life in Latin America and the Caribbean. Over 90 percent of the approximately 10 million enslaved Africans brought to the Americas were taken to Latin America and the Caribbean, whereas only 4.6 percent were brought to the United States. In Latin America and the Caribbean, as in the United States, lighter skin and European features can increase one's chances for socioeconomic advancement, while darker skin and African or indigenous features may limit opportunities for social mobility. Attitudes of bias are also well established within the Latino community. Sociological studies of Latino racial attitudes often reflect a preference on the part of Latinos for maintaining social distance from African Americans. And while the social distance level is largest for recent Latin-American immigrants, more established communities of Latinos in the United States are also character-

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Consider a paradigmatic case that demonstrates the analytical problems surfacing in the emerging interethnic discrimination cases. A self-identified Afro-Panamanian tutor of Spanish sued his university employer for failure to renew his appointment as an adjunct instructor, claiming a violation of Title VII’s prohibition against race and national origin discrimination. The plaintiff alleged that the Latinos who directed the department where he worked discriminated against “Black Hispanics,” and that there was a disturbing culture of favoritism in promoting white Cubans, Spaniards, and white Hispanics from South America. The court, not understanding that a color hierarchy informs the ways in which many Latinos experience the racism and national origin bias of other Latinos, dismissed his racial discrimination claim on summary judgment. The national origin claim was also dismissed on summary judgment, because five of the eight adjunct instructors that were reappointed instead of the plaintiff were natives of other South or Central American countries such as Argentina, Peru, Mexico, and the Dominican Republic. The surviving discrimination claim that went before the jury, which was based on color, was weakened when the judge explicitly stated in the opinion that “Diversity in an employer’s staff underscores an inference of discriminatory intent.”

This decision embodies a number of serious legal and factual errors. To begin with, the notion that diversity in the workplace disproves bias runs entirely counter to a significant line of Supreme Court decisions explaining the proper use, and nonuse, of statistical information about diversity. The rules of statistical inference and its evidentiary use were incorporated into the jurisprudence of employment discrimination under Castaneda v. Partida. In its decision there, the Supreme Court explained that statistically significant measures showing a lack of workplace diversity may constitute evidence of discrimination. But that doesn’t work in reverse: the presence of statistical diversity in the workplace (more precisely, the absence of statistical evidence of a lack of diversity) cannot be equated with the absence of discrimination itself. This is so because, as the Supreme Court noted in Teamsters v. United States, population statistics have been traditionally considered relevant to Title VII cases only in the context of statistically significant, gross underrepresentations of racial minorities, since our racial history has shown that, in the absence of any other explanation, it is more likely than not that racial discrimination accounts for the underrepresentation.

Indeed, workforce statistics were first approved for use in individual disparate treatment cases only insofar as they “may be helpful to a determination of whether petitioner’s refusal to hire respondent conformed to a general pattern of discrimination.” There was no suggestion that workforce statistics could have an exculpatory use. Moreover, in Phillips v. Martin Marietta Corp., the Court rejected the notion that diversity (a proportionate representation of the plaintiff’s protected class in the workplace) was absolute proof that no discrimination was present.

The finding that there was no discrimination on the basis of national origin in our case is perhaps even more erroneous because it overlooks a firmly established fact of Latino life. Its treatment of Latino ethnic subgroups as interchangeable and homogeneous is the equivalent of treating immigrants from Nigeria, Egypt, and South Africa as racially homogeneous. As in Africa, the continent of Latin America contains vast differences in racial composition and bias. Those countries perceived or touted as European are viewed as more advanced than those more significantly populated with people of indigenous or African descent. Thus, in the list of countries the judge mentioned in finding an absence of national origin bias, Latin American racial constructs would rank Argentina as a highly valued white country, followed by Peru, then Mexico with its indigenous population. Least respected would be the Dominican Republic and the plaintiff’s own country of origin, Panama, because of their dominance by African-descended peoples.

For Latinos influenced by Latin American racial paradigms where each country has a racial identification, a diverse workforce of Latinos is not the immediate equivalent of a bias-free context. Nor is a color preference divorced from a racialized ideology within the Latino context. Diversity means something more nuanced to people of color, who tend not to view each ethnic group as the same as another simply because it is non-white. Yet the public discourse about diversity as a panacea for racial discrimination overlooks the complexity of actual diversity. In a diverse workplace there is the possibility for racial harmony, but there is also the possibility for a racial dystopia. What the emerging cases suggest is that, unlike with traditional black-white employment discrimination cases, interethnic discrimination cases require a broader inquiry, one that will reveal how bias is manifested in multiethnic contexts.

Demographers project that one in four job seekers will be the child of a Latino immigrant by the year 2020 and that Latino workers will vastly increase their representation in the workforce. The nature of the racial ideology that pervades Latino communities is thus relevant to the emerging interethnic discrimination cases.

A Proposal for a “Multiracial Racism” Approach

The growing number of Latino workers, and the biases that they often bring to
the workplace, presents major challenges to the employment discrimination regime under Title VII. One of these challenges lies in the collection and presentation of information about the existence of bias within Latino subgroups.

A fuller record of interethnic racial animus is needed to add nuance to the jurisprudence of antidiscrimination so that the multiethnic workplace becomes less opaque to fact-finders and legal actors can identify the new markers of racial discrimination. The Multiracial Racism Litigation Approach (MRLA) proposed here is one mechanism for doing so. Given the traditional presumption that racial discrimination only exists when a white-Anglo person is present as an instigator or victim, this proposed approach would require plaintiffs to provide more detailed pleadings in the vein of a "Brandeis brief," i.e., one in which economic and social surveys and studies are included along with explanations of the law. Expert witnesses on the subject of interethnic bias will need to be brought in and depositions will need to be more expansive in approach. By more fully developing the record, fact-finders will be better able to see beyond the veil of a diverse workplace as a presumed racial utopia. This approach will, thus, reinforce for courts how established employment discrimination doctrines may be applicable to the context of interethnic discrimination.

One court has already anticipated the need for a fuller record with social science data and expert witnesses in interethnic discrimination cases. In Ali v. National Bank of Pakistan, a self-described light-skinned Pakistani citizen from the province of Punjab employed at the National Bank of Pakistan’s New York branch alleged that the bank discriminated against him in favor of darker-skinned Pakistani citizens from the province of Sind. In dismissing the plaintiff’s claim, the court noted that, while a number of light-skinned employees predominated in the less highly paid job positions, it was problematic that no “evidence by way of expert testimony or treatise was presented with respect to color differences among the various provinces of Pakistan, or discrimination based on color.” The court was disturbed by the lack of a fuller record because it was unclear whether a light-skinned Pakistani who “is darker in complexion than those commonly termed white in the United States” warrants “protected class status” under the McDonnell Douglas prima facie evidentiary standards. The court explicitly stated:

 Suffice it to note that the presumption of a protected class status on the basis of color is bound up with an entire national racial history. It may well be that there are indigenous discriminatory practices around the world having nothing to do with the American experience. However, there is no basis on this record for the recognition of skin color as a presumptive discriminatory criterion (rooted one would suppose, in the intermingling of distinctive national or racial groups) in employment in Pakistan, or among Pakistanis in New York, under McDonnell Douglas guidelines.

In short, the judge is asserting that when Title VII cases implicate racial meanings beyond what is commonly expected in the U.S. setting, a fuller record about those meanings must be established in order for the existing legal doctrine to be applied effectively. And that is exactly why the MRLA proposed herein should be more systematically applied.

The goal of the MRLA is to contextualize allegations of interethnic discrimination by (1) establishing the premise that interethnic hierarchy and bias may exist, (2) focusing the inquiry on whether there were racially advantaged and disadvantaged employees among the diverse non-white workers, (3) providing the social science data about the relevant racial attitudes, and (4) demonstrating the applicability of established employment discrimination doctrine to diverse workplaces.

Judges customarily admit empirical information through the use of expert witnesses, pursuant to Federal Rule of Evidence 702. Judges have accepted the presentation of expert testimony on the deployment of racial stereotypes in the workplace in order to disabuse fact-finders of what they believe is “common sense.” In Walker v. State, a law professor provided expert testimony on behalf of an African-American state trooper alleging discriminatory discharge. The testimony, based on research in the literature of racial stereotyping, explained how the content of the performance evaluations was rooted in racial stereotyping. Expert testimony in interethnic discrimination cases would be especially useful in delineating how various populations of color racialize themselves by subgroup and other groups as well.

In cases where litigants do not proffer the empirical evidence themselves, a growing number of courts have held that the use of social frameworks to correct beliefs that are erroneous does indeed assist the trier of fact and can accordingly be admitted under Federal Rule of Evidence 201’s judicial notice provision. While this is a form of judicial notice that involves neither legislative facts nor adjudicative facts as contemplated in Federal Rule of Evidence 201, the Federal Rules do not
bar this third use of social science in law, thereby allowing a court to admit empirical information "to keep it responsive to its changing environment."18

Fortunately, the admission of empirical evidence to create a social framework is not contravened by the trial court gatekeeper role envisioned in Daubert v. Merrell Dow Pharmaceuticals19 and its subsequent cases. This is because the proffered empirical evidence is scientifically valid, as indicated by (1) its publication in peer-reviewed journals, (2) its general acceptance within the scholarly disciplines of sociology and political science, and (3) its relevance to employment discrimination case issues of cultural stereotyping. Furthermore, the MRLA requires no modification of existing legal standards for proving individual disparate treatment discrimination. This is because apparent workplace diversity does not alter any of the preexisting legal standards for proving discrimination as articulated in McDonnell v. Douglas and its progeny.20 As the Supreme Court has stated, "a racially balanced work force cannot immunize an employer from liability for specific acts of discrimination."21 The MRLA would simply provide needed context for the standard Title VII proof in diverse workplaces. Plaintiffs must still show how the alleged facts amount to discrimination but will do so by focusing on cultural and historical context.22 Defendants will still have the same opportunity for rebuttal by proffering a nondiscriminatory reason for the challenged employment decision, in addition to providing expert witnesses of their own regarding the relevant cultural and historical context presented by the plaintiff.

Returning then to the paradigmatic Latino interethnic discrimination case, the plaintiff needed to explicitly present the documentation of how racial privilege and bias generally exist in non-white contexts. With that background empirical information, the plaintiff would then have been more likely to persuade the court to consider the empirical data about Latino racial attitudes and their manifestation. The plaintiff's submission of expert testimony regarding the long legacy of anti-black bias against Afro-Latinos within Latin America would have dispelled the inclination to view Latinos as homogeneous and interchangeable. In turn, the disruption of the presumption of Latino homogeneity would have eliminated the rationalization that "diversity in an employer's staff undercuts an inference of discriminatory intent." And established employment discrimination doctrine would not have been overlooked.

In conclusion, because of the long legacy of black-white racism in the United States, discussion of race has rightfully been considered a color discrimination case and allowed the color claim to survive the summary judgment motion. Yet this is an unsatisfactory assessment of Latino interethnic discrimination claims because not all Latino plaintiffs have dark skin or prominent African features as markers of their social treatment. For those Latino plaintiffs whose African ancestry is not readily discernible, it is important to examine a workplace environment for the deployment of racial stereotypes tied to national origin status that is part and parcel of Latino racial discourse. Indeed, a review of Latino color discrimination claims demonstrates that such claims are more typically viewed as viable by judges primarily when a Latino plaintiff alleges color discrimination at the hands of a white Anglo employer or supervisor. See Tanya Kateri Hernández, Latinos at Work: When Color Discrimination Involves More Than Color, in Shades of Difference: Why Skin Color Matters 236 (Evelyn Nakano Glenn ed., 2009) (noting that in the absence of a stark White-Anglo versus Latino narrative of color discrimination judges are less able to detect the existence of color discrimination). Unfortunately for the plaintiff, the jury trial on the color discrimination issue returned a verdict in favor of the defendant. Such a result was inevitable once the judge handicapped the jury's assessment of the issues by entering summary judgment on the racial and national origin discrimination claims.

By supplying judges with empirical information showing racial bias in multiracial workplace settings, we can work to enforce civil rights laws within diverse workplaces.

Endnotes
6. Ironically, the judge sua sponte converted the case into a color discrimination case and allowed the color claim to survive the summary judgment motion. Yet this is an unsatisfactory assessment of Latino interethnic discrimination claims because not all Latino plaintiffs have dark skin or prominent African features as markers of their social treatment; for those Latino plaintiffs whose African ancestry is not readily discernible, it is important to examine a workplace environment for the deployment of racial stereotypes tied to national origin status that is part and parcel of Latino racial discourse. Indeed, a review of Latino color discrimination claims demonstrates that such claims are more typically viewed as viable by judges primarily when a Latino plaintiff alleges color discrimination at the hands of a white Anglo employer or supervisor. See Tanya Kateri Hernández, Latinos at Work: When Color Discrimination Involves More Than Color, in Shades of Difference: Why Skin Color Matters 236 (Evelyn Nakano Glenn ed., 2009) (noting that in the absence of a stark White-Anglo versus Latino narrative of color discrimination judges are less able to detect the existence of color discrimination).
problem with Latino interethnic discrimination, and blackness. Latino divisions seem "always to entail" the explicit recognition of historical disadvantage that the prima facie presumption of a protected group (race, sex, etc.) and was rejected after applying for a job or promotion for which he or she was qualified, and that after rejecting the plaintiff the employer continued to seek applications from persons of plaintiff's qualifications. The employer can rebut the prima facie showing of discrimination by proffering a nondiscriminatory reason for the employment decision. Thereafter the burden shifts back to the plaintiff to present either further evidence of discriminatory intent or evidence that the defendant's proffered nondiscriminatory justification was actually a pretext for discrimination. The elements of the prima facie case may be modified to suit varying factual patterns beyond the hiring and promotion context. But it is not sufficient for a plaintiff merely to show that the employer's proffer of a nondiscriminatory reason was "unbelievable." See Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000); see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

22. While the MRLA recommends that litigators provide a more extensive narrative in their pleadings to include data about interethnic racial animus in order to counteract the diversity defense, the MRLA does not abrogate Federal Rule of Civil Procedure 8(a)(2). Because the MRLA is a suggested framework for litigation, it does not interfere with that rule's simple mandate for a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Indeed, the Supreme Court has explicitly rejected a heightened pleading requirement for employment discrimination cases because it would conflict with this rule. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).