My Dog Mocha Increased Teletubby™ LaLa’s Value to me as a Prop in Teaching Disparate-Treatment Law by Chewing Off Her Arms.

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October 15, 2004

Until yesterday, I used Teletubbies, LaLa and Po (Figures 1 & 2 respectively), to explain disparate-treatment discrimination1 to employees with whom I consult. Although LaLa sustained a catastrophic injury, I will continue to use her as a prop in my consultations.

Yesterday afternoon, as I was writing a different version of this article, I had to get up from my desk to answer the front door. While I was greeting the visitor, my mixed-breed dog, Mocha, whom my wife and I rescued from the Franklin Township Animal Shelter, knocked LaLa (aka in Europe as “Laa-Laa”) off my desk and chewed off both of her arms and also bit superficial scars into her face, which Dermabrasion might make less noticeable. Owing to the complete dissections of the ulna nerve in the left arm and the median nerve in the right, reattaching LaLa’s amputated arms was contraindicated. Although LaLa qualified as a Teletubby with a Disability under the Americans with Disabilities Act2 (as a private-sector employee she is not covered under the Rehabilitation Act of 1973), I did not at first believe that I had a duty to accommodate her disability by reassigning her to a vacant position in my organization. After further reflection, however, I concluded that even without an accommodation, LaLa could perform the essential functions3 of a Prop, as a consequence of which she met the definition of a Qualified Teletubby with a Disability, to whom I owed a reasonable accommodation.

The Problem: Explaining Disparate Treatment

Many employees with whom I consult about work-related problems have an imprecise understanding of illegal discrimination. Rightly or wrongly, they believe that mostly all of the inconveniences which befall them at work or elsewhere, including instances of inclement weather, were caused because of some form of discrimination. Their misunderstanding of discrimination, I concluded, was mainly linguistic in origin.
“Discrimination” is a nominalization\(^4\) of the verb “discriminate” as harassment is a nominalization of the verb “harass” (properly pronounced like the name “Harris”). By burying the verb within the noun, the writer of “discrimination” hides from the reader the action conveyed by “discriminate.” Hence: “The agency discriminated against me because I am a White Anglo-Saxon Protestant male” better conveys to the reader what the agency did to the writer than “I was a victim of discrimination because I am …”

So the first injunction I make to consultees is that, henceforth, they will never use “discrimination,” but will use “discriminate” instead. But consultees do not usually understand what “discriminate” denotes, because they don’t see the verb “contrast” lurking within “discriminate.” If they did, they would reflexively look to see how the agency is treating them in comparison with how the agency is treating their co-workers. They perceive only that the agency has treated them badly and then scurry off by themselves to an EEO Counselor to initiate an informal complaint. I try to improve their comprehension of discrimination by first exchanging the noun phrase “disparate treatment” for “discrimination” and then converting the nominalization “treatment” to its verb form, infra.

The Solution: Using Teletubbies to demonstrate who is similarly situated and who is not.

Title VII of the Civil Rights of 1964 prohibits two forms of discrimination---disparate treatment and disparate impact. The Supreme Court differentiated between the two as follows:

> Claims of disparate treatment, which involve employer's alleged treatment of some people less favorably than others because of their race, color, religion, sex or national origin, and as to which proof of discriminatory motive is critical, may be distinguished from claims that stress disparate impact, which involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.\(^5\)

To raise a presumption of disparate-treatment discrimination (“prima facie case”), the employee must prove among other things that “similarly-situated employees who were outside of her protected class were treated more favorably.”\(^6\) With this rule in mind, I urge consultees to chant, “I was treated differently than … I was treated differently than …” and then I leave it to them to fill in the ellipsis with the name of the co-worker whom the agency treated more favorably.

What traits must the comparative employee have in common with the complainant before the comparative employee (to whom EEOC refers as “C1,” “C2,” depending on the
number of comparators) will be regarded as being similarly situated to the complainant? The 11th Circuit recently stated:

The plaintiff and the employee she identifies as a comparator must be similarly situated "in all relevant respects." *Id.* The comparator must be nearly identical to the plaintiff to prevent courts from second-guessing a reasonable decision by the employer. See *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir.2001).

Please accept as true that, before Mocha amputated her arms, LaLa, as a tiny plastic figurine, was nearly identical to Po except that she is yellow and he is red. In the disparate treatment dialectic, their difference in color is critical because, as part of proving her prima facie case, LaLa would need to show that "her employer treated similarly situated employees outside her classification more favorably." Color is a protected classification, and LaLa and Po are in different color classes. So before Mocha viciously attacked LaLa—and I am seriously considering turning him into the Somerset Count Prosecutor for committing a possible hate crime---I would hold LaLa up in the left hand and Po in the right and, depending on the sex and density of the melanin content of the skin of the person sitting across to me, I would ask, "This is you and this is …whom?"

Before asking consultees to identify the comparative employee, I would hold up LaLa and Po and ask if they could detect any difference between the two. Temporarily taken aback that I might be trivializing their work-induced existential angst by gesticulating with two cheap toys that no self-respecting kindergartner would have in his/her collection, they would point out the obvious difference in LaLa and Po’s color. I would then add that there were more subtle differences, such as the difference in their headdresses (see Figures 1 & 2, supra), but that these differences did not necessarily make Po dissimilarly situated to LaLa. To make them dissimilarly situated, their differences had to make a comparison of the agency’s treatment of them inapt. To remain similarly situated, LaLa and Po only had to be “nearly identical” only "in all relevant respects." The agency’s treatment of them would determine which differences were relevant and which were not.

“But surely,” you may be asking yourself, “Po and LaLa are no longer similarly situated. Po is red and has arms and LaLa is yellow and has none. There is a non-prohibited factor—the absence/presence of upper extremities—which makes the two significantly different from one another.”

It bears repeating (because this is the lesson of this article) that that difference, however stark physiologically, is relevant only if the agency’s treatment of LaLa and Po depends on that difference. Let’s assume for example that LaLa and Po are employed as letter carriers at the Postal Service’s Time Square Station in NYC. Both have less than
commendable attendance records. A single mother with no access to reliable childcare, LaLa is frequently late to work because her commute is delayed because she has to see her child off to school. (LaLa is suing the Postal Service for failing to have a part-time work program which she claims has a disparate impact on mothers.) The Station Manager has thrice suspended LaLa and has now fired her for unacceptable attendance. LaLa accuses the Station Manager of firing her because of her sex. According to LaLa, Po and another male carrier who works on Tour 2 with her, Tinky Winky (Figure 3), have worse attendance records than she, but only she was fired.

The Postal Service admits that presence of upper extremities on Po and Tinky Winky does not make them incomparable to LaLa, because their arms and LaLa’s lack thereof have nothing to do with the reason they disciplined her. The Postal Service argues, however, that LaLa does not have a leg to stand on (which she would not if I had not snatched her from Mocha’s mouth) because Po and Tinky Winky worked on Tour 2 several years before LaLa did. The Postal Service argues that “the Courts [sic] and the Commission have further specified that in order to be considered similarly situated, the supervisors issuing the discipline should be the same, the employee's jobs should be the same, and the discipline should have been issued during approximately the same period of time. See, e.g., Mazzella v. RCA Global Communications, Inc., 642 F. Supp. 1531 (S.D.N.Y.1986), affd, 814 F.2d 653 (2d Cir. 1987); O'Neal v. United States Postal Service, EEOC Request No. 05910490 (July 23, 1991).”

Let’s assume that Po and Tinky Winky’s unacceptable attendance occurred two or three years before LaLa’s (say in 1996 versus 1999). Does this mean that LaLa should throw up her hands (oops) and give up her case because their unacceptable attendance did not occur “during approximately the same period of time” as hers occurred? It does if LaLa’s lawyer forgets that a court’s statement of a rule of law is not binding on her unless the facts of the case in which the rule was announced is analogous to LaLa’s facts. Because LaLa has hired me and because I have not forgotten the limitations of stare decisis, I am going to demonstrate that the oft-quoted rule that the misconduct must occur at approximately the same time should not be applied in LaLa’s case.

In my deposition of the Station Manager, I asked him if the Postal Service’s attendance rules changed between 1996 and 1999; if the means by which carriers requested leave
had changed; if the carriers’ workload had changed; and if his complement of carriers, including temps and subs, had changed. No, no, no, and no, he replied.

“So then is it fair to say that Po and Tinky Winky’s unauthorized absences in 1996 were every bit as bad for your post office as was LaLa’s in 1999?” I ask the Station Manager.

When he answers “yes,” I have proven that the difference in when their unauthorized absences occurred does not account for the Postal Services’ treating Po and Tinky Winky more leniently than it treated LaLa. The different timeframes turned out to be a distinction without a difference.

That’s the lesson of this article: the complainant and comparators don’t have to be conjoined twins; they only have to be similar enough to satisfy the court or the Commission that the agency’s different treatment of them turned not on a difference in the circumstances between them, but on a difference in their sex, color, religion, race, or national origin.

In the end, I can still use LaLa as a prop because the amputation of her arms only means (sadly) that she can’t hug Po anymore.
Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Act appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations.

He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication’s compact disc MSPB LITIGATION TECHNIQUES

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1 Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. As set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, the basic allocation of burdens and order of presentation of proof in a Title VII case, is as follows. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id., at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. The central focus of the inquiry in Title VII case "is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" FURNCO CONSTRUCTION CORP. v. WATERS, 438 U.S. 567 (1978), citing International Broth. of Teamsters v. U.S. 431 U.S. 324, 335 n. 15 (1977). Because of the difference in their colors, I used LaLa and Po to teach the similarly-situated employee component of a prima facie case of disparate-treatment discrimination.

2 The Americans with Disabilities Act of 1990 (ADA) makes it unlawful to discriminate in employment against a qualified individual with a disability.
If you have a disability, you must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation, in order to be protected from job discrimination by the ADA. This means two things. First, you must satisfy the employer's requirements for the job, such as education, employment experience, skills or licenses. Second, you must be able to perform the essential functions of the job with or without reasonable accommodation. Essential functions are the fundamental job duties that you must be able to perform on your own or with the help of a reasonable accommodation. An employer cannot refuse to hire you because your disability prevents you from performing duties that are not essential to the job.” Pasted from: http://www.eeoc.gov/facts/ada18.html

“A nominalization is a noun phrase that has a systematic correspondence with a clausal predication which includes a head noun morphologically related to a corresponding verb.

Example (English)

The noun phrase ‘refusal to help’ corresponds to ‘he refuses to help.’ The head noun ‘refusal’ is morphologically related to the verb ‘refuse.””


Teamsters, supra.

Kriescher v. Fox Hills Golf Resort and Conference Center 2004 WL 2240588, *3 (7th Cir.(Wis. (C.A.7 (Wis.),2004). In these newsletters, except for seminal precedent, I will cite the most recent case available on Westlaw to demonstrate the currency of the rule of law I am writing about.


See also Kriescher, supra. “Kriescher must first establish a prima facie case of discrimination which includes showing that similarly-situated employees who were outside of her protected class were treated more favorably.” (Internal citations omitted.)

Teamsters, supra.

Wilson supra.


In Learning the Law (9th ed. 1973), Glanville Williams describes the doctrine of stare decisis:

What the doctrine of precedent declares is that cases must be decided the same way when their material facts are the same. Obviously it does not require that all the facts should be the same. We know that in the flux of life all the facts of a case will never recur, but the legally material facts may recur and it is with these that the doctrine is concerned.

The ratio decidendi [reason of deciding] of a case can be defined as the material facts of the case plus the decision thereon. The same learned author who advanced this definition went on to suggest a helpful formula. Suppose that in a certain case facts A, B and C exist, and suppose that the court finds that facts B and C are material and fact A immaterial, and then reaches conclusion X (e.g. judgment for the plaintiff, or judgment for the defendant). Then the doctrine of precedent enables us to say that in any future case in which facts B and C exist, or in which facts A and B and C exist the conclusion must be X. If in a future case A, B, C, and D exist, and the fact D is held to be material, the first case will not be a direct authority, though it may be of value as an analogy.
13 Sweeney v. Principi, EEOC Appeal No. 01A05821 (August 29, 2002). Sweeney, one of my cases naturally, is a must-read for anyone trying a disparate-treatment case before the Commission. To bring the Commission to its senses, I remarked that the complainant and the comparator did not have to be “conjoined twins” to be similarly situated. Despite this brusqueness, I won the appeal anyway. It is mandatory reading because it is one of the few OFO decisions which reversed an AJ’s finding that the complainant and the comparator were not similarly situated.