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When Race-Neutral Nicknames Go Terribly Wrong

By Warren E. Buliox, Esq.

What's really in a name? It carries a bit of family history, serves as a way to distinguish ourselves, and perhaps even can be a reflection of trends in popular culture. But what about legal liability?

Suppose you learn that over the last several months one of your managers, Teddy, has gone around on several occasions referring to Alonzo Ramirez, a sales representative of Hispanic descent, as "Al" to other employees in staff meetings and to potential customers during sales calls. For Teddy, whose full name is Theodore Adams, this is a way to help make Alonzo more personable to staff and customers alike. After all, this is what Teddy did for himself. The ultimate goal, according to Teddy, is to set Alonzo up for success in the future. At first, Alonzo laughs it off and, somewhat reluctantly, goes along with the flow. As time goes on, however, he grows incensed by Teddy's now persistent reference to him as "Al" and begins to insist that Teddy refer to him by his birth name, Alonzo. Teddy, who honestly sees no harm in what he's doing, tailors back a bit, but still continues to call Alonzo "Al" occasionally, particularly during sales calls.

Alonzo is convinced that Teddy's deliberate and routine "Americanizing" of his Hispanic forename over his objections has created a racially harassing and hostile work environment. He contacts you and threatens suit unless something is done quickly. You understand that racial harassment - to be actionable under anti-discrimination laws - must not only be severe and pervasive, it must also be based on one's race or ethnicity. Assuming Teddy's conduct is severe and pervasive, can Teddy's repeated references to Alonzo as "Al," which on its face are racially neutral, serve as the basis of a successful harassment/hostile work environment claim?

The short answer for some courts is yes, even if there is no evidence of discriminatory intent other than the Westernizing or Americanizing of an ethnic name. In El-Hakem v. BJY, Inc., 415 F.3d 1068 (9th Cir. 2005), the Ninth Circuit Court of Appeals (which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) dealt with this very issue. In that case, the plaintiff, whose given name was Mamdouh El-Hakem, brought an action against his former employer and CEO alleging racial discrimination and hostile work environment under 42 U.S.C. §1981 ("Section 1981"). His lawsuit was based on his CEO's insistence on using non-Arabic names when referring to him over the course of almost a year. Specifically, the CEO would often refer to the plaintiff as "Manny." Id. at 1071. When he objected and suggested that he simply be referred to as Hakem, the CEO then Westernized that name too and called him "Hank." Id. at 1073-74. In the CEO's expressed view (as recounted by the Court), a Western name would increase the plaintiff's chances of success and, notably, would be more acceptable to the company's clientele. Id. at 1071.

In its defense against the plaintiff's claims, the defendant in El-Hakem argued that it could not be held liable for race discrimination/harassment because the conduct at issue was based on the plaintiff's name, not his race. Id. at 1072-73. According to the defendant, the alleged race harassment/discrimination must be based on physical or "genetically determined characteristics such as skin color." Id. Further, the defendant argued, even if the plaintiff believed that the non-Arab names his CEO called him had some racial element, there was no evidence that the CEO felt that way. Id. at 1074. As such, there was no evidence of discriminatory intent and the defendant could not be held liable for discrimination/harassment as a matter of law.

In rejecting the defendant's arguments, the court noted that physical and genetic characteristics are not essential to qualify harassment as racial under Section 1981. According to the court, ethnic characteristics protected by the law include more than just a person's skin color and physical traits, because names in and of themselves "are often a proxy for race and ethnicity." Id. As such, the court went on, there was reason to believe the defendant's deliberate refusal to refer to the plaintiff by his given ethnic name was based on his race/ethnicity. Id. at 1073-74. Further, even if there was no direct evidence that the CEO believed his actions had racial implications, the CEO's decision to discriminate against the plaintiff's Arab name in favor of Western names provided sufficient evidence of prohibited discriminatory intent. Id. Since the conduct at issue was frequent and persistent (taking place over the course of a year) as opposed to isolated, it was severe and pervasive enough to support a finding of a racially hostile work environment in violation of Section 1981. Id.

So what does this all mean for you in dealing with Alonzo's problems with Teddy? It means you should take his concerns seriously and investigate his claims thoroughly. You will want to find precisely why Teddy gave Alonzo the nickname. In other words, was he trying to make Alonzo more "personable" because of what he perceived as a negative reaction customers may have to a

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sales representative of Hispanic descent? One of the questions you may want to ask is whether Teddy gave all employees nicknames, and not just Alonzo or other employees of the same national origin as Alonzo.

If the story Alonzo relays to you can be substantiated, it could very well mean that he has in fact been harassed and subjected to a hostile work environment in violation of the law. To avoid potential liability, you should take prompt appropriate remedial action, including, but not limited to, disciplining Teddy. Depending upon the circumstances, it may be sufficient to instruct Teddy not to use the nickname again, document this instruction in Teddy's personnel file, and caution him that doing so could result in more serious discipline, including termination of employment. However, if the harassment had been persistent, especially if Alonzo had already made unsuccessful direct requests to Teddy to not use the nickname, more serious action may be necessary at the outset, such as reassigning Teddy to another location. This holds true even if you conclude after your investigation that Teddy, in his mind, had noble intentions for attempting to Westernize Alonzo's name.

As always, employers should strive to be proactive in eliminating harassment and discrimination in the workplace, including ensuring that employees are trained to recognize, appreciate, and respect ethnic characteristics beyond those associated with one's skin tone or physical attributes. This would not only include, as discussed above, ethnic names but could also conceivably encompass speech patterns unique to a particular ethnic group and customs and traditions of various ethnic groups.

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