OPINION

Navigating customer ratings and employment discrimination in restaurants

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Customer service in the restaurant industry is key to generating repeat business, making customer feedback on service vital for restaurateurs. Feedback provides valuable insight into servers' performance and effectively outsources evaluations onto patrons. It is common to receive unsolicited feedback through Yelp, Amazon and Google, and employers in the restaurant industry have factored evaluations by customers into a vast array of business decisions: whom to hire, promote, discipline and fire; pay rates, bonuses, tips and other remuneration; and work schedules, job duties and other assignments.

But restaurants relying on customer feedback to make employment decisions should ensure that doing so does not facilitate discrimination. Consumers may take race, sex and other immutable characteristics into account when reviewing the performance of their servers and other restaurant staff. Potential legal problems then arise if a restaurant makes personnel determinations based on such tainted ratings, even though the bias-motivated consumers are not the restaurant's employees.

Feedback-based discrimination

Customer satisfaction data can certainly enhance a restaurant's performance and provide a legitimate, nondiscriminatory reason to take adverse action against an employee. But, as a number of recent studies have shown, customers' biases can also taint their feedback. For example, a 2011 study conducted at Cornell University's School of Hotel Administration concluded that customers rated the performance of same-race servers more positively than different-race severs, despite similar quality of service. Other studies have likewise concluded that traits such as race and sex often motivate customers when evaluating servers. Studies of restaurant tipping also show that bias tends to affect how generously patrons tip their servers. The problem for an employer relying on such ratings when making a personnel decision is whether the customer's discrimination may be imputed to it, exposing it to lawsuits based on Title VII of the Civil Rights Act of 1964 (and similar state and local laws), under either a disparate-treatment or disparate-impact theory of liability.

Disparate treatment liability

Disparate-treatment cases occur when an employer has treated an employee or applicant less favorably than others because of a protected trait. A disparate-treatment plaintiff must prove that the defendant had a discriminatory intent or motive for taking a job-related action. If the plaintiff cannot prove such intent, the disparate-treatment claim fails as a matter of law.
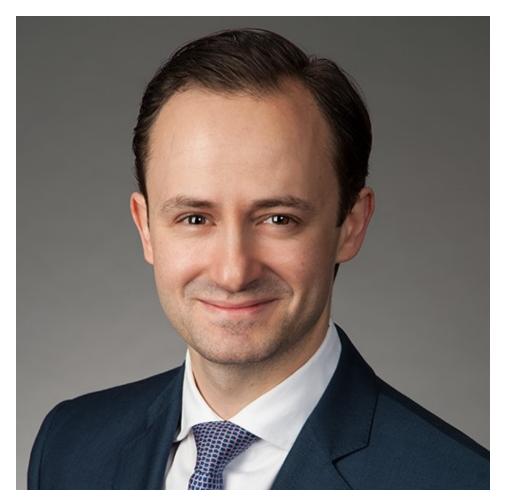
At first glance, it may appear that an employer basing personnel decisions on customer feedback reviews should avoid liability for a disparate-treatment claim by arguing that even if some reviews were motivated by bias, the employer had no such motivation. Because the employer is merely making data-driven employment

decisions based on customer reviews, which it does across the board for all of its employees, plaintiffs cannot establish intentional discrimination.

But a different scenario arises if the employer knows the feedback is tainted but nonetheless decides to rely on it. Courts have long held that employers cannot discriminate against employees based on customers' known discriminatory preferences. In some such cases, employers have been found liable for acquiescing to their customers' explicit discriminatory demands. In other cases, the employer assumes a discriminatory preference based on customer data, behavioral patterns or anecdotal evidence.

An employer expressly relying on tainted feedback runs counter to Title VII's goal of eradicating discrimination from the workplace. As one court put it, "[a]n employer may not immunize its actions by ducking beyond the preferences of a client," because of the "broader employment law principle that the employer has the ultimate responsibility for providing a non-discriminatory working environment — even when third parties are creating discriminatory conditions."

(Credit: Kyle Winnick)

Disparate impact

Employers must also ensure that they are not subject to a disparate-impact claim for using discriminatory ratings when taking job-related actions. In contrast to a disparate-treatment claim, which requires intentional discrimination, disparate-impact claims recognize that some employment practices, adopted without a deliberately discriminatory motive, may still violate Title VII because in operation they have significant adverse effects on protected groups. The evidence in these cases usually focuses on statistical disparities and on competing explanations for those disparities. Disparate-impact litigation proceeds in three steps:

1. A plaintiff must establish a *prima facie* case by establishing that application of a neutral employment policy has caused a significantly discriminatory pattern. This requires the plaintiff to prove a significant statistical disparity caused by the employment practice.

2. The employer may defend against a *prima facie* showing by demonstrating that the challenged practice is "job related for the position in question and consistent with business necessity." The employer must prove and assert actual reasons why the challenged employment practice is important to the position.

3. A plaintiff can overcome an employer's business-necessity defense by showing that alternative practices would have less discriminatory effects while ensuring that business needs are met.

The Supreme Court has held that a plaintiff can establish a *prima facie* case of disparate impact even if the challenged employment practice is subjective. "If an employer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to "adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin."

Assuming that such plaintiffs could establish a *prima facie* case of disparate impact, the fight would center on business necessity and less discriminatory alternatives. As the Supreme Court stated in the seminal disparate-impact case, "[t]he touchstone is business necessity. If an employer practice … cannot be shown to be related to job performance, the practice is prohibited."

Best practices

Restaurants relying on customer feedback to make personnel decisions should take steps to ensure that such decisions are not tainted by discrimination. Restaurants should disregard feedback that appears to be motivated by pernicious stereotypes and put greater emphasis on performance. An employer could ask customers to justify their ratings. Some commentators have suggested allowing customers to see favorable reviews of a worker, arguing that this will place the focus on performance.

By making a good-faith effort to eliminate bias in their rating systems, employers would not only create a more accurate rating system but also severely undercut any potential Title VII action. A plaintiff bringing a disparate-treatment claim would be hard-pressed to explain how a restaurant acquiesced to a customer's discriminatory preferences in the face of proof that the restaurant took affirmative steps to purge its ratings system of bias. Similarly, a plaintiff bringing a disparate-impact claim would face increased difficulty in establishing a less discriminatory alternative, as the employer's efforts to reduce bias in the rating system should have already sanitized the system of bias.