Employer Catering to Discriminatory Harassment and Preferences by Influential Outsiders

Author : Michael Z. Green

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Dallan F. Flake, Employer Liability for Non-Employee Discrimination, 58 **B.C. L. Rev.** 1169 (2017).

In a recent *Boston College Law Review* article, Employer Liability for Non-Employee Discrimination, Professor Dallan Flake (Ohio Northern) addresses a subject that has generally perplexed me as well as many employees and employers—how courts can develop a cohesive framework under Title VII to address employer liability for employment discrimination actions due to the behavior of company outsiders. In particular, I have always wondered about the usual trope that customer preference cannot be a defense in discrimination claims while recognizing that there is nothing more important to employers than the preferences of their customers. This article catalogues a host of very interesting cases describing the acts of customers and other non-employee harassers or their biased preferences that raised liability concerns for employers in discrimination claims brought by their employees. Flake's thought-provoking discussion of these cases offers a noteworthy guide for employers developing policies with respect to discriminatory influences from outsiders.

The article argues that increasing employer involvement in the service industry has led to a number of integrated business models, including outsourcing, that pose new legal challenges when considering non-employee actions. To a large extent, the article illustrates initially how the workplace has evolved from a binary employer-employee relationship by triangulating into an employer-employee-customer relationship. As a result, employees are more likely to interact with non-employee customers or clients, vendors, suppliers, temporary employees, and independent contractors all potentially located at the same worksite. Although the analysis discussed could apply to any of these influential non-employee relationships arising within many of the newer business structures, most of the article emphasizes the challenging dynamics posed by discriminatory actions of customers.

Under Flake's thesis, the law should not use the same standard for discrimination by non-employees as it does for discrimination by fellow employees because an employer can more easily control its own employees' harassing behavior. Flake offers a unitary standard of reasonableness for all employment discrimination claims involving acts by non-employees that would establish employer liability under a two-pronged approach: "(1) whether [the employer] knew or should have reasonably known about the non-employee discrimination and (2) whether it acted reasonably in response to the discrimination." (P. 1173.)

In an intriguing classification of the ways in which non-employee discrimination against employees occurs, the article divides these claims into four categories:

(1) "conscious and direct (such as when a customer sexually harassed a waitress)";
(2) also conscious but "indirect (such as when airlines hired only female flight attendants based on customer preference)";
(3) "unconscious… directly, such as when restaurant diners unintentionally tip black servers less than white servers"; and
(4) also unconscious but "indirectly, such as when customers give implicitly biased feedback to employers that is then used to make employment decisions." (P. 1174.)

The article also highlights how different analytical constructs may apply to these categories of claims. For harassment, an employer can be liable if it has actual or constructive knowledge of the non-employee's behavior unless the

employer shows that it promptly and reasonably acted to end the harassment. For an employer to prevail when subjected to a claim of customer-based preference as indirect discrimination, it must show that its actions were justified by a bona fide occupational qualification (BFOQ) necessary to the essence of the business. For unconscious discrimination, either directly from customers' unintended actions or indirectly based upon customers' hidden biases as submitted or inferred, an employer would need to establish that its actions were job-related and consistent with business necessity. Flake believes that these different approaches to dealing with non-employee discrimination have created confusion and fragmentation warranting a unitary standard requiring knowledge and reasonableness in responding as components related to establishing employer liability.

The article does not devote much detail to the inability of employers to control outsiders as compared to its own employees. In continuing explorations of these topics, it might be helpful to examine in more depth whether current employment discrimination analysis operates more as a shield for employer liability without the need for more flexible employer defenses. For example, one might question whether employees have the resources to bring claims challenging an employer's systemic discriminatory decisions as being based upon customer preference or resulting in a disparate impact. Most discrimination claims tend to be focused on the treatment of individuals by their employers with employees facing difficult burdens of persuasion. Nevertheless, this article makes an important contribution by identifying how customers' discriminatory preferences based upon unconscious bias might, at a minimum, require a more nuanced analysis regarding employer liability.

Furthermore, Flake asserts that any distinctions or difficulties in an employer's ability to control the different actors may be covered within the reasonableness standard he suggests. That standard applies equally in cases involving both employee and non-employee harassment. The actual analytical changes imposed by the suggested unitary standard and its knowledge requirement would arise in intentional discrimination cases involving customer preferences and BFOQ claims that were not blatantly discriminatory when addressing concerns of privacy, safety, or authenticity. More provocatively, this unitary standard would also add an employer knowledge requirement in cases based on a disparate impact claim related to customer evaluations, a result possibly "unpalatable to some" as Flake has conceded. (P. 1215.) Apparently, he will address this issue more specifically in his next article, cited in footnote 88, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?* (forthcoming in the *Minnesota Law Review* in 2018).

Even if you do not agree with Flake's assertion that lesser control over non-employees who discriminate and the challenges of identifying unconscious discrimination warrant a more flexible analysis requiring knowledge before employers become liable for intentional customer-preference discrimination or disparate impact, the article is an engaging read because of the creative way in which it chronicles the riveting theories of non-employee discrimination developed from the cases. Also, the article shines an important light on customer preference cases that may involve unconscious bias. Given the lack of scholarly attention to this subject, the article initiates some crucial steps in understanding the analytical development of employer liability related to the discriminatory behavior and preferences of influential outsiders.

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