

Leveling the Playing Field

Elimination of Bias in the Legal Profession

Wendy L. Patrick, JD, PhD

Elimination of Bias in the Legal Profession

- Opposing Counsel
- Judge
- Colleagues
- Clients
- Witnesses
- Public Opinion



24th - 25th May 2021

11 am WAT

1pm EAT

6am EST (NY)



ENGINEER ABDULLAHI A. SULE

Executive Governor of Nasarawa State,
Nigeria



ABDULKARIM ABUBAKAR KANA

Attorney General and Commissioner for
Justice, Ministry of Justice, Nasarawa State



MARKUS GREEN ESQ

AGA-Africa Board Member



HON JUSTICE KASHIM ZANNAH

Chief Judge, Borno State High Court
Nigeria



YAHAYA YAKUBU SHAFA

Judge Nasarawa State Revenue Court &
Secretary of Justice Sector Reform Team



MELBA PEARSON

Civil Rights and Criminal Law Attorney,
Center for the Administration of Justice,
Florida International University (FIU).



WENDY L. PATRICK

Deputy District
Attorney, San Diego



BARR. ISHAKA MUDI DIKKO SAN

Senior Advocate Of Nigeria (SAN)



Detecting Bias and Prejudice



Definition of Bias (Merriam-Webster)

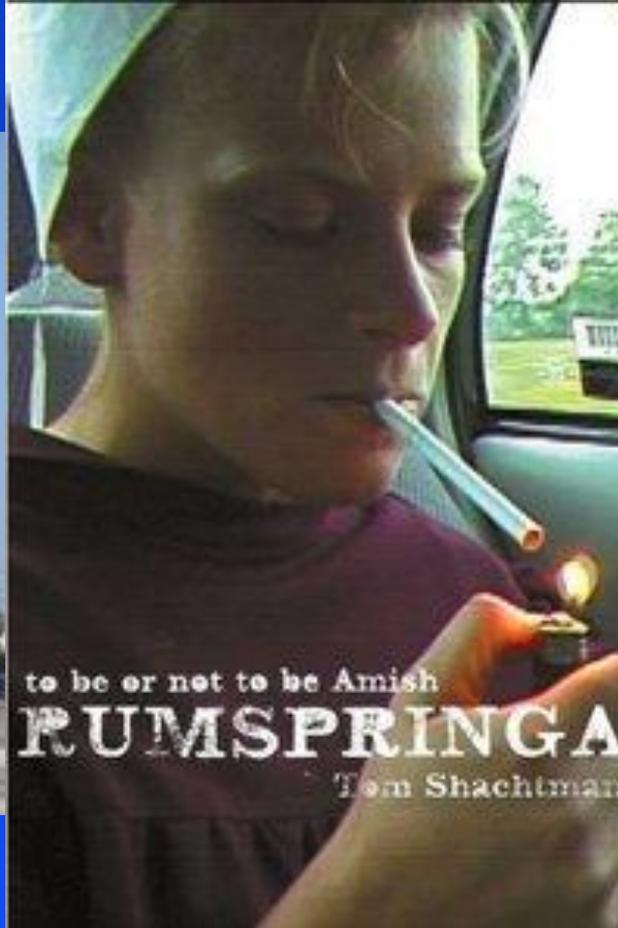
- Bent, tendency, an inclination of temperament or outlook; especially: a personal and sometimes unreasoned judgment: prejudice: an instance of such prejudice

Pay Attention or Pay the Consequences

Knew or should
have known



Stereotypes



Implicit Bias: The Allure of Affinity



Social Climate Change



2020: Hairstyle Discrimination



- CA is the first state to outlaw discrimination against natural hair in workplaces and schools.

Self-Identification

- 2021: AB 979
Publicly Held
Corporations
- Underrepresented
community: someone
who “self-identifies as”



LAWS

- **Title VII of the Civil Rights Act of 1964: race, color, religion, national origin, sex.**
- **Reverse Discrimination.**

SCOTUS Ruling June 2020

- The Court said the language of the Civil Rights Act of 1964, which prohibits sex discrimination, applies to discrimination based on sexual orientation and gender identity.

CA Rule 8.4.1(a) Prohibited Discrimination Harassment and Retaliation

- In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:
 - (1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or
 - (2) unlawfully retaliate against persons.*

CA Rule 8.4.1(b)

- (b) In relation to a law firm's operations, a lawyer shall not: (1) on the basis of any protected characteristic,
 - (i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

CA Rule 8.4.1(b)

- (iii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or
- (2) unlawfully retaliate against persons.*

CA Rule 8.4.1(c)

- For purposes of this rule: (1) “protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

CA Rule 8.4.1(c)

- (2) “knowingly permit” means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

CA Rule 8.4.1 Comment [5]

- What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice.

CA Rule 8.4.1(c)

- (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

CA Rule 8.4.1(c)

- (4) “retaliate” means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this rule.

CA Rule 8.4.1 Comment [1]

- This rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel.

CA Rule 8.4.1 Comment [1]

- Law firm* management and supervisory lawyers retain their separate responsibility under rules 5.1 and 5.3. Neither this rule nor rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this rule any responsibility to advocate corrective action.

CA Rule 8.4.1 Comment [2]

- The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Cal. Code Jud. Ethics, canon 3B(6) -

CA Rule 8.4.1 Comment [2]

- . . . [“A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.”].)

Ca Rule 8.4.1 Comment [4]

- This rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

CA Rule 8.4.1 Comment [8]

- This rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

Ca Rule 8.4.1 Comment [9]

- A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

What California did Not Adopt

Revised ABA 8.4(g)

- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status

Revised ABA 8.4(g)

- . . . in conduct related to the practice of law.
This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.
This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Revised ABA 8.4 Comment

- [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

Revised ABA 8.4 Comment

- . . . Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Home Court Disadvantage: Lost in Translation



Don't Believe Everything You Hear



Gender Discrimination



Title VII permits a gender based assignment if gender is a “bona fide occupational qualification” reasonably necessary to the normal operation of the particular business or enterprise.



Gender-Related Body Language in Court



What is a BFOQ?



Lawyer Selection

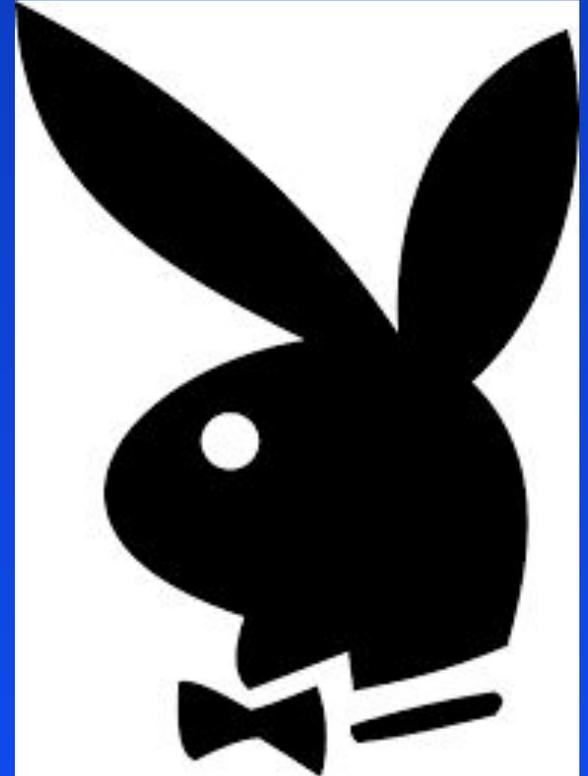


Bohemian Club v. FEHC



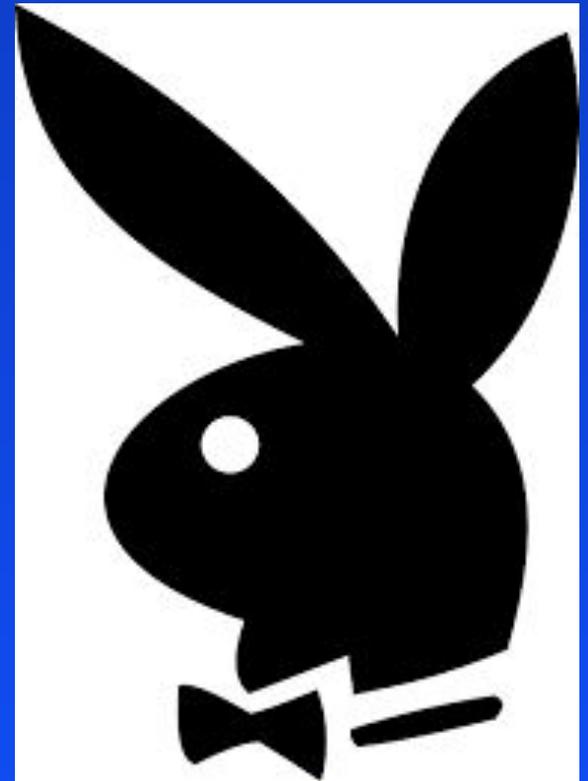
What is Not a BFOQ?

- Customer preference for employees of one sex.
- Necessity for providing separate facilities for one sex



What is Not a BFOQ?

- Fact that members of one sex have traditionally been hired to perform the particular type of job.
- *Bohemian Club*



Recognized BFOQ

Personal privacy considerations which may justify a BFOQ:

- Job req EE to observe individuals in a state of nudity or to conduct body searches
- Would be offensive to prevailing social standards to have person of opp sex present

Recognized BFOQ

- Detrimental to mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.
- *Bohemian Club v. FECH.*

Sexual Favoritism



Sex Crime v. Sexual Harassment



Disclosure



Ignorance of the Law is No Excuse



Cal. Gov. Code Section 12926(r)(2)

- "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

Cal. Gov. Code Section 12926(s)

- (s) "Sexual orientation" means heterosexuality, homosexuality, and bisexuality.

CA Dept of Fair Employment & Housing

- In employment, the FEHA prohibits discrimination and harassment on the basis of age (40 and over), ancestry, color, religious creed (including religious dress and grooming practices), denial of family and medical leave,

CA Dept of Fair Employment & Housing

- disability (mental and physical) including HIV and AIDS, gender, gender expression, gender identity, genetic information, marital status, medical condition (cancer and genetic characteristics),

CA Dept of Fair Employment & Housing

- national origin, race, sex (including pregnancy, childbirth, breastfeeding, and medical conditions related to pregnancy, childbirth or breastfeeding) and sexual orientation.

ADA Amendments Act (2008)

Expands “major life activities” to encompass “major bodily functions.”

Major life activities include things like breathing, reading, concentrating, and walking,

ADA Amendments Act (2008)

Major bodily functions include things like functions of the brain, respiratory system, circulatory system, and reproductive system.

Philadelphia

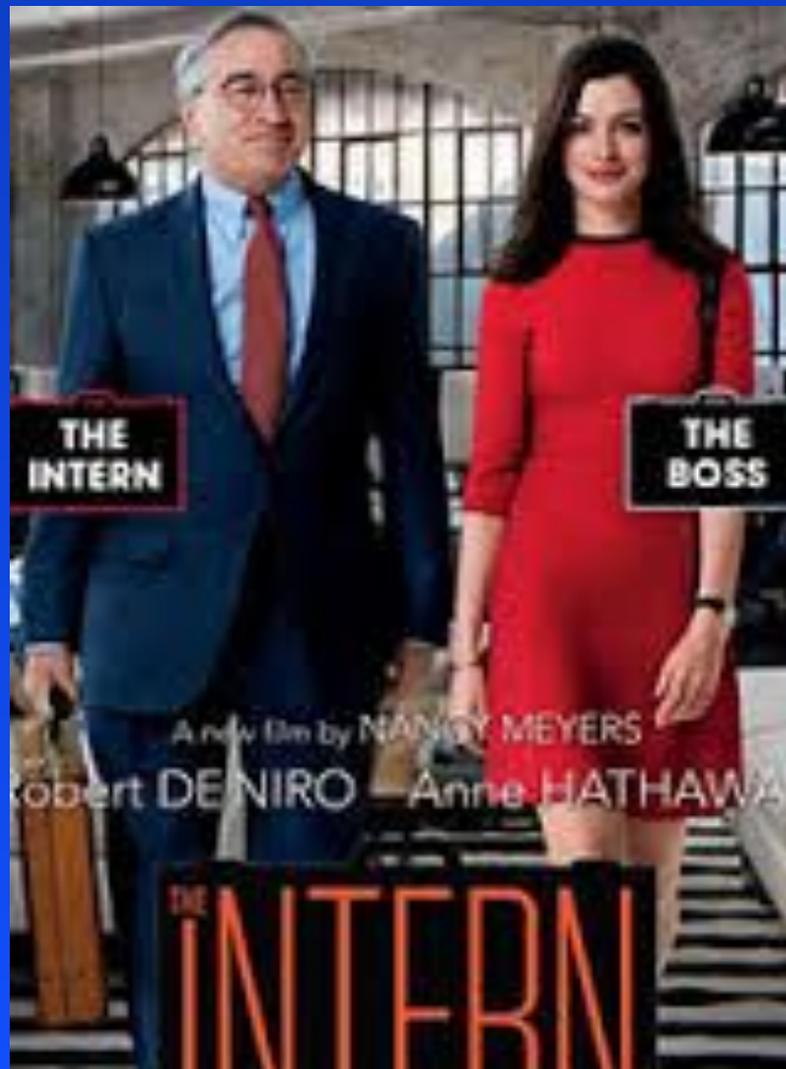


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Age-Related Protective Bias



Reverse Mentoring



Religion



- *Friedman (CA)*: a religious belief must constitute something other than “a philosophy or a way of life,” but “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection”

Political or Social Beliefs



World Church of the Creator

Teachings occupy “a place in his life parallel to that held by a belief in God for believers in more mainstream theistic religions.”



Practicing Religion in the Workplace



What is Not Protected



Turbans in the Courtroom

- *Jensen v. Superior Court of San Diego* (1984): Test is whether it “interferes with courtroom decorum by disrupting justice, i.e., whether it tends to cause disorder or interfere with or impede the functioning of the court.”

Courtroom Exhibitionism



The Fashion Felony: No Socks No Service



Who is Not Protected?

- **Regional/ State Flair**
- **Victims**
- **Hairstyle/ Facial hair**
- **Cultural preferences**
- **Recovering Substance Abusers**





Protective Bias



Strategies for Playing it Safe



The Lawyer's Higher Calling



Leveling the Playing Field

Eliminating Bias And Enhancing Sensitivity

Wendy L. Patrick, JD, PhD