Corporate Counsel Business Journal
January • February 2020
CCBJournal.com

CCBJ

SOCIAL MEDIA FIRESTORMS CAN CONSUME REPUTATIONS

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▶When a patron storms out of a store over perceived mistreatment, do not confuse the lack of legal grounds for a discrimination claim with a free pass on the far greater reputational risks that outweigh the cost of any litigation.

In April 2018, at a Philadelphia Starbucks, police arrested two men of color waiting for a third participant before beginning a business meeting. A Starbucks employee contacted police after concluding that the men had not purchased anything. Another patron captured the arrest on video and posted it on Twitter where it soon received more than 200,000 likes. Although it is unknown whether the men initiated any subsequent court action, they eventually settled with Starbucks (for an undetermined amount) and the city of Philadelphia (for $1 each and the promise of a $200,000 investment in a program for entrepreneurs).

To placate protesters and tamp down the backlash, Starbucks closed more than 8,000 locations one May afternoon for diversity training. Currently, the company is facing a race discrimination lawsuit filed by a Caucasian regional manager who claims she was terminated after refusing to discipline another Caucasian employee accused of discrimination in the aftermath of the event.

Several months later, in December, at a Portland, Oregon, Doubletree Hotel, a hotel guest named Mr. Massey was in the lobby talking with his mother on a cell phone. A security guard interrupted Mr. Massey's call and demanded his room number and to see a room key. While the guest continued his phone call, the security guard contacted the manager, who contacted the police. When the police arrived, the manager asked that they escort the patron out of the hotel. Mr. Massey, who recorded part of the interaction on his phone, is suing three companies who allegedly own, operate, and/or franchise the hotel, the manager, and the security guard for $10 million dollars under Oregon non-discrimination laws.

These are just two of many examples of incidents entangling businesses in negative press in recent years. Social media hashtags such as boycottstarbucks, #couponcarl, #[insertordinarydailytask]hileblack, and #hallwayhillary serve as lasting reminders to patrons of color that they may need to be careful patronizing certain businesses.

This kind of negative exposure that arises from the capture and posting of these incidents on social media does far more damage to the reputations of these companies than any claim could cause. Forbes reported that the estimated loss for the one-day training across all Starbucks locations implemented as a result of the April 2018 incident cost the company $16.7 million in sales. In the same article, a marketing company estimated that Starbucks received more than $16 million in negative publicity as a result of the incident. This is especially relevant now that customers have even more online options and person-to-person service platforms to choose from, making it easier to avoid the companies that they have heard permit demeaning behavior.

Complicating these developments is the reality that societal norms and the expectations of consumers that give rise to mass outrage do not necessarily

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Race-based mistreatment of customers may not give rise to actionable claims. It can, however, inflict catastrophic reputational harm.

correlate with current legal standards related to customer discrimination. Thus, the ability to avoid or overcome customer discrimination lawsuits is not necessarily an accurate indication that a company is adequately prepared to avoid the damage to reputation associated with such an incident. In fact, cases that might give rise to a perfect storm of social media outrage often do not present a viable theory of recourse for a customer under federal and state laws.

Litigation under the Civil Rights Act of 1866, specifically section 1981 of Title 42 of the United States Code, offers a prime example of this incongruency. In §1981, the federal government ensures non-white citizens have the ability to "make and enforce contracts" in the same manner and to the same extent as white citizens. In reviewing claims under §1981, courts utilize a three-part test for commercial establishment discrimination: 1) whether the plaintiff is a member of a protected class; 2) whether the defendant acted with discriminatory intent; 3) whether defendant interfered with a protected activity. (See *Green v. Dillard's, Inc.*, 483 F.3d 533, 538, 8th Cir. 2007). The third of these prongs is often the issue for customers. Today, courts continue to affirm the requirement that a customer allege that the customer was subject to "actionable interference" with contract.

In *Lopez v. Target Corp.*, 676 F.3d 1230 (11th Cir. 2012), a cashier refused to check out a Latino customer not once, but twice. The customer eventually found a cashier who would accept payment for his purchases. After completing the transaction, the customer reported the incident to a supervisor, later filing a lawsuit. The District Court dismissed the customer's §1981 claim because the customer could not allege that he was "actually prevented, and not merely deterred from making a purchase." 676 F.3d at 1234 (internal citations omitted). The District Court also dismissed the customer's claim of intentional infliction of emotional distress because the allegations pertained solely to verbal abuse, which were insufficient under Florida law. *Id.* at 1236.

Likewise, in *Withers v. Dick's Sporting Goods, Inc.*, 636 F.3d 958 (8th Cir. 2010), the customer alleged an apparently disturbing pattern of treatment. The customer and her daughter returned several items for store credit after calling the store in advance to confirm that a receipt was not necessary. The customer and her daughter proceeded to shop with their store credit, only to be followed by an employee in every department. They purchased a few items and ended their trip early but returned to the store the next day. On their return trip, they were again watched in every department in which they shopped, and at one point noticed an employee peeking at them through a rack of clothing. When the customers finished shopping, a manager accused the mother of switching the tag on an item, though an associate determined that all like-items had been mislabeled by the store. Not wanting to continue shopping, the customers left the store again with a balance of store credit. The Circuit Court of Appeals for the Eighth Circuit determined that the conduct did not "block or thwart [the customers'] tangible attempt to contract." 636 F.3d at 966. Notably, the customers argued that the Eighth Circuit's determination forced them to "put up with Dick's racist behavior in order to obtain satisfaction of the debt owed them." *Id.* at 965.

Before *Withers*, there was *Gregory v, Dillard's, Inc.*, 365 F.3d 464 (8th Cir. 2009), in which the Eighth Circuit also denied the claims of 13 African-Americans who claimed "discriminatory surveillance and

watchfulness" at Dillard's. Because all of the plaintiffs either decided not to make a purchase after they perceived discriminatory treatment or purchased items anyway, the court dismissed their claims.

The *Gregory* court further distinguished the 13 plaintiffs from the two plaintiffs in *Green v. Dillard's, Inc.*, 483 F.3d 533 (8th Cir 2009). In *Green*, one employee refused to assist the couple when they asked to see a watch behind a locked glass display and also prevented another employee from assisting the couple. The Green court found that there was sufficient evidence that the couple would have purchased the watch but for the "actionable interference" of the employee. *Id.* at 539.

Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001), offers one of the few examples of a specific factual scenario in which a customer was able to sustain a claim to trial under §1981. In Christian, two friends, one black and one white, were shopping together at Wal-Mart for Christmas toys. A sales associate asked the black customer six times if she needed assistance, but never monitored the white customer. The sales associate later claimed she saw the black customer unzip her purse and place a toy in it. The customer claimed she reached in her purse for one of her belongings. The associate informed a manager that she believed there was a theft, and the police were contacted. The sales associate later claimed she realized nothing had been stolen and attempted to stop the police from coming. When the police arrived, however, the manager requested that the police escort the customers out the store. Unlike the aforementioned cases, the *Christian* court concluded that, because the customers had items in a cart which they intended to purchase and had the means to purchase them when they were asked to leave the store, the customers showed that they had been prevented from entering a contract with the business. The Court of Appeals for the Sixth Circuit overturned a motion for directed verdict in favor of the business.

What all of these cases show is that perceived mistreatment of customers on a racially discriminatory basis often does not amount to an actionable claim. Where a customer is likely disgusted with the treatment he or she receives and walks out, no claim arises under the Civil Rights Act of 1866. Just because a business is avoiding these claims, however, does not mean there are not significant risks in failing to implement training and policies to prevent perceived discrimination. The negative public relations costs can outweigh the costs of any litigation. ■