



## Microinequities: Should Employers “Sweat the Small Stuff”?

By Andrea D. Cherng and Eric A. Tate

**M**icroinequities are the subtle putdowns, snubs, dismissive gestures, or sarcastic tones that can undercut employee performance and encourage employee turnover.<sup>1</sup> Articles in the *New York Times*, *Wall Street Journal*, and *Time Magazine*, among other publications, evidence the growing concern of corporations across the country about the impact of microinequities on employee morale, productivity, and attrition. Recent court rulings call into question whether employers should fear that the latest HR buzzword<sup>2</sup> – microinequities – will become a source of labor law liability for employers. Put another way: Should employers “sweat the small stuff”?

In June 2006, the U.S. Supreme Court held in the case of *Burlington Northern & Santa Fe Railway Co. v. White* that unlawful retaliation under Title VII may include actions that would not necessarily constitute discrimination.<sup>3</sup> Specifically, the Court ruled that an employee need not prove that he or she was subjected to a reduction in pay, demotion, or other material change in the terms and conditions of employment

to establish a retaliation claim.<sup>4</sup> Rather, a plaintiff can prevail merely by showing that the alleged retaliatory conduct would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.”<sup>5</sup>

Similarly, in 2005, the Ninth Circuit Court of Appeals in *EEOC v. NEA* held that “rude, overbearing, obnoxious, loud, vulgar, and generally unpleasant” conduct “not on its face, sex – or gender-related” could be grounds for an employment discrimination claim under Title VII.<sup>6</sup>

These decisions arguably encourage litigation over workplace incidents that, when viewed alone, should not rise to the level of actionable discrimination or sexual harassment.

Against this backdrop of apparently lowered legal standards for the severity of conduct necessary to establish claims of employment discrimination, there is an increased concern and renewed focus by corporate America on the effects on employee morale, productivity, and attrition of facially non-discriminatory, *e.g.*, not sex- or race-

specific, behaviors among employees, microinequities. In this Commentary, we explore the extent to which microinequities can also serve as the basis for employment discrimination claims.

### MICROINEQUITIES DEFINED

M.I.T. Professor Dr. Mary Rowe coined the term “microinequities” in 1973 to refer to a non-obvious form of discrimination that was not unlawful, but nonetheless created and/or reinforced “glass barriers” excluding persons who were different and perpetuating unequal opportunity.<sup>7</sup> Microinequities are often subtle messages of disapproval or disregard at times unconsciously communicated to others. By way of example, microinequities include:

- Dismissing the idea of one employee only to embrace it when paraphrased by another
- Using a formal handshake with one employee and a playful pretend punch for another employee who will then be perceived (correctly or not) to be in management’s “inner circle”
- Going out to lunch with certain employees more frequently than others
- Not saying “good morning” or otherwise greeting employees
- Checking one’s BlackBerry or otherwise multi-tasking while speaking to an employee

- Addressing some employees by chummy nicknames, and others more formally
- Mispronouncing, despite earlier correction, the name of an employee or confusing the names of two employees
- Crossing one’s arms when listening to a comment from an employee
- Routinely being late for or leaving early from meetings
- Ridiculing accents or peculiar speech patterns of employees
- Continually interrupting employees or completing sentences for people

### MICROINEQUITIES ALONE ARE NOT ACTIONABLE

Fortunately for employers, under the current state of the law, microinequities, in and of themselves, have yet to become actionable. In the same *Burlington Northern* case noted above, the U.S. Supreme Court unambiguously held that petty slights, minor annoyances, or a simple lack of good manners are not unlawful.<sup>8</sup> The Court explained that judicial standards must filter out the significant, objective harm from complaints about the ordinary tribulations of the workplace such as the sporadic use of abusive language or snubbing by supervisors or co-workers. Employers, therefore, can take solace that Title VII does not “set forth a general civility code for the

American workplace.” Similarly, the California Supreme Court has held that a “mere offensive utterance or even a pattern of social slights” such as “ostracism suffered at the hands of co-workers” is not actionable under the state’s anti-discrimination statute.<sup>9</sup> Likewise, other courts have opined that “[w]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate the act or omission to the level of a materially adverse employment action.”<sup>10</sup>

With such pronouncements by the courts, should employers be concerned about microinequities, *i.e.*, “sweating the small stuff”? The answer is yes, and for reasons beyond merely their effects on employee morale, productivity, and attrition.

### MICROINEQUITIES STILL A CAUSE FOR LEGAL CONCERN

*Evidence of discriminatory animus.* To begin with, while not actionable alone, microinequities can be used as “atmospheric evidence” of discriminatory animus to support discrimination claims premised on more severe conduct. For instance, the Second Circuit Court of Appeals in the case of *Demoret v. Zegarelli* recently found that a supervisor’s micromanaging of a female subordinate and criticism of her for being five minutes late to meetings (when male employees could allegedly skip

meetings with impunity) did not rise to the level of a hostile environment.<sup>11</sup> Nonetheless, in denying the employer's summary judgment motion, the court held that these otherwise lawful acts did give rise to an inference of gender discrimination.<sup>12</sup>

*Increasing sensitivity to minor slights should reduce occurrence of all slights.*

Likewise, by educating employees about otherwise semiconscious and perhaps unintentional messages of disrespect, employees are more likely to refrain from conduct that may be more clearly offensive and form the basis for claims of more overt discrimination. Conversely, minor unpleasantries that go unchecked can allow escalation of behavior culminating in significant and actionable transgressions.

*Employer duty to prevent discrimination and harassment from occurring.* Similarly, education and training on microinequities further establishes that an employer is meeting its overall duty to prevent discrimination and harassment in the workplace.<sup>13</sup>

*Glass ceiling effects.* Further, repeated slights and exclusions – microinequities – are often reported as contributing to glass ceiling environments and otherwise helping to preclude the advancement of persons of protected categories within companies.

*Avoid unnecessary litigation costs.* It also is important to note that even if a plaintiff is ultimately unsuccessful, many lawsuits start from employees feeling marginalized, excluded, and trivialized based on race, gender, age, or some other protected category status. As any employer who has successfully defended an employment lawsuit well knows, a defense verdict in such cases is the classic example of a Pyrrhic victory.<sup>14</sup> Therefore, employers will benefit by cultivating a corporate culture where employees are conscious of the effects of and attempt to eliminate microinequities because employers will thereby reduce the likelihood that lawsuits (regardless of merit) will be brought.

*The slippery slope of evolving labor law.* Finally, on the one hand, *Burlington Northern* indicates that there exists a bright line distinguishing microinequities from unlawful employment actions. On the other hand, the deterrence standard for retaliation claims adopted by the U.S. Supreme Court in *Burlington Northern* also suggests a potential blurring of this distinction. The *Burlington Northern* Court underscored the importance of context in examining allegations of workplace wrongdoing – “[c]ontext matters.”<sup>15</sup> In particular, the *Burlington Northern* Court explained that it was important to examine the totality of circumstances, because “[t]he real social impact of workplace behavior

often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”<sup>16</sup> Indeed, there are many slights, rude behaviors, and other conduct far less severe than an actual demotion or termination of employment that might nonetheless cause an employee a level of discomfort that affects the employee's ability to effectively perform his or her job. One could argue that if an employee believed that facing such microinequities would be the consequence, a reasonable worker might be dissuaded from making or supporting a charge of discrimination.

It does not appear that under the current state of the law, an employee facing such microinequities would have an actionable claim. However, the answer arguably is not clear, and if not actionable today, there is no telling whether a claim on such grounds would be actionable in the future. For example, it was not until 1986 that the U.S. Supreme Court in the case of *Meritor Savings Bank v. Vinson* recognized the concept of “hostile environment” sexual harassment as an actionable form of sex discrimination under Title VII.<sup>17</sup> Today, of course, hostile environment is one of the most common forms of discrimination and harassment claims.

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The application of a totality-of-circumstances standard by courts analyzing discrimination claims may be a step on a slippery slope towards recognition of microinequities, alone, as actionable.

## CONCLUSION

In sum, the boundaries delineating employer liability have not expanded to encompass the “small stuff” – the petty slights and minor annoyances that often take place at work and that all employees experience – standing alone. While there may not yet be a cause for employer alarm, there is sufficient grounds for employers to be concerned about the potential for legal exposure based on microinequities. “Sweating the small stuff” – being mindful of and trying to eliminate microinequities in the workplace – not only will promote employee retention and overall corporate performance but also should help reduce employer liability for employment law claims in general. ■

<sup>1</sup> Joann S. Lublin, *Improve Morale by Eliminating Subtle Slights in the Workplace*, Wall Street Journal Online (2004), <http://www.careerjournal.com/columnists/manageyourcareer/20041208-managingyourcareer.html>.

<sup>2</sup> Julie Rawe, *Why the Boss May Treat You Right* (also entitled *Why Your Boss May Start Sweating the Small Stuff*), Time (March 15, 2006), <http://www.time.com/time/magazine/article/0,9171,1172212,00.html>.

<sup>3</sup> See the June 2006 edition of Morrison & Foerster’s Employment Law Commentary for a detailed analysis of *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006).

<sup>4</sup> *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2412-15 (2006).

<sup>5</sup> *Id.* at 2415.

<sup>6</sup> *EEOC v. NEA*, 422 F.3d 840, 844-45 (9th Cir. 2005).

<sup>7</sup> Mary P. Rowe, *Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity*, Employee Responsibilities and Rights Journal, Vol. 3, No. 2, pp. 153-63 (1990).

<sup>8</sup> *Burlington Northern*, 126 S. Ct. at 2415.

<sup>9</sup> *Yanowitz v. L’Oreal USA, Inc.*, 36 Cal. 4th 1028, 1054 (Cal. 2005) (citation omitted).

<sup>10</sup> *McRae v. Dept. of Corrections and Rehabilitation*, 142 Cal. App. 4th 377, 386 (Cal. Ct. App. 2006) (citation omitted).

<sup>11</sup> *Demoret v. Zegarelli*, 451 F.3d 140, 150 (2d Cir. 2006).

<sup>12</sup> *Id.* at 152.

<sup>13</sup> See, e.g., Cal. Gov’t Code § 12940(k) (“It shall be an unlawful employment practice... For an employer ... to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”).

<sup>14</sup> See, e.g., *Owen v. Sunstar Acceptance Corp.*, 1999 U.S. Dist. LEXIS 16932, at \*13-16, (S.D. Ala. 1999) (exclusion from lunch and business meetings did not create hostile work environment).

<sup>15</sup> *Burlington Northern*, 126 S. Ct. at 2415.

<sup>16</sup> *Id.* See also *McRae*, 142 Cal. App. 4th at 387-88 (“in many cases, the employee is affected by a series of employment actions, at least some of which might not, in and of themselves, constitute a material change in the terms or conditions of employment. In such cases, it is appropriate to consider the ... allegations collectively under a totality of circumstances approach.”).

<sup>17</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-69 (1986).

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