



PROGRAM MATERIALS

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Subtle Harassment, Code Words and Implicit Bias: Proving Everyday Discrimination in Court

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Subtle Harassment, Code Words and Implicit Bias: Proving Everyday Discrimination in Court

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How Often Do You Have a True “Smoking Gun?”

- “Smoking gun” evidence is relatively rare in discrimination cases
- Very few dispositive admissions or “Did you order the Code Red?” moments
- Most discrimination claims cannot rely on a single incident or material factual dispute to get to trial, ward off summary judgment
- “Employers are rarely so cooperative as to include a notation in the personnel file that the [adverse employment action] is for a reason expressly forbidden by law.” Santos v. Costco Wholesale, Inc., 271 F. Supp. 2d 565, 571 (S.D.N.Y. 2003).

#PresentationGoals

- I. Discrimination analysis elements, where claims get attacked based on “weak link” evidence.
- II. Types of indirect, circumstantial, and “neutral” evidence.
- III. Case law showing how courts have considered and weighed such evidence on dispositive motions, etc.
- IV. How such indirect or less direct evidence may demonstrate bias, raise material fact issues; fine distinctions between similar comments, incidents.

McDonnell Douglas Prima Facie Case – An “Inference of Discrimination?”

- I. Discrimination/Disparate Treatment Under Federal Laws: Title VII, ADA, ADEA (Race, Gender, Disability, Age, etc.)
- II. Prima facie case elements: Plaintiff (1) belongs to a protected class; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) can show the adverse action occurred under circumstances giving rise to an inference of discrimination.
Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008).
- III. Legitimate, non-discriminatory reason for adverse action
- IV. Pretext (can rely on prima facie case or other evidence)

New York City Human Rights Law

- Not to be forgotten – state and local laws will often have different standards or modes of analysis (for actionable conduct, adverse action), in addition to broader protected categories, damages.
- NYCHRL: The standard for proving discrimination is less burdensome than under federal law. “[T]o prevail on liability, the plaintiff need only show differential treatment—that she is treated less well—because of a discriminatory intent.” Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 110 (2d Cir. 2013). Once that low threshold is met, an employer bears the burden of proving the affirmative defense that “the conduct amounted to no more than a petty slight.” Id. at 111.
- Under the NYCHRL, an employee is not required to “show a materially adverse employment action, [but] only that she was treated less well than other employees because of her membership in a protected class.” Kalp v. Kalmon Dolgin Affiliates of Long Island Inc., No. 11 Civ. 4000(JG), 2013 WL 1232308 (E.D.N.Y. Mar. 27, 2013).
- **NYCHRL threshold lower on hostile environment and adverse action, too:** The threshold for establishing a hostile environment claim under the NYCHRL is much lower than under other statutes. A plaintiff must show only that “she has been treated less well than other employees because of her [protected class].” Zambrano-Lamhaouhi v. N.Y. City Bd. of Educ., No. 08 Civ. 3140 (NGG)(RER), 2011 WL 5856409 at *9 (E.D.N.Y. Nov. 21, 2011).

Disparate Impact

- Different analysis from disparate treatment, McDonnell Douglas
- Plaintiff must base claims on a “**particular employment practice that causes a disparate impact** on the basis of” a protected characteristic (race/ethnicity, color, religion, sex, national origin under Title VII as amended, 42 U.S.C.A. § 2000e-2) (emphasis added).
- Plaintiff must identify a specific mechanism and show its role in bringing about the discriminatory results (e.g., statistics).
- Defendant/Respondent must then “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”
- Plaintiff would then have to show that an alternative employment practice exists that would not result in disparate impact, and that the employer refused/refuses to adopt that alternative practice. See Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).

Indirect and Circumstantial Evidence

- Code Words and Neutral Comments connoting stereotypes, bias
- Disparate Treatment in terms and conditions of employment
- Comparators: Performance, Compensation, Discipline, etc.
- Statistics: Diversity/Representation, Selection/Retention Rates, Adverse Impact (Standard Deviation), etc.
- Non-Explicit Sexual Advances and Retaliation
- Temporal Proximity to revelation of characteristic / protected complaint
- Shifting and Inconsistent, Post-Hoc Reasons for adverse action
- Focus is on the collective weight of evidence, holistic picture

Investigations & Client Interviews

- Employees making reports and prospective clients may have trouble pinpointing specific examples to illustrate the source of a strong, sincere belief that discriminatory animus was present.
- Focus on source of the impression, which concrete interactions, statements, events, stories, patterns, treatment, etc. formed it.
- Even constant harassment, abuse may become a hard-to-distinguish part of the stress and background noise of a person's everyday work environment and experience. Identify discrete incidents that stick out.
- Remind witnesses that even he-said/she-said incidents, reputation of alleged wrongdoers, and secondhand accounts are evidence.
- “[E]vidence of discriminatory comments, which can constitute ‘direct evidence,’ [] are adequate to make out a prima facie case, even where uncorroborated.” Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 124 (2d Cir. 2004).

“Code Words” and Loaded Language

- Veiled language, “code words,” “dog whistles,” or other terms that, in context, reference racial or sexual stereotypes or animus can support discrimination claims.
- Defendants should exercise caution in arguing that certain “neutral” statements are not subject to discriminatory interpretation – focus instead on accused’s history, lack of other evidence, strength of proffered reason.
- Judges consider the “real world” meaning and implication of statements beyond an arguable bland, inoffensive reading of the cold printed record, including the tone, manner, setting and delivery described by witnesses.

Words with Prejudicial Historical Context

- An egregious example, the term “boy,” when used towards Black employees, has been recognized as suggesting racial contempt and subservience, given its history and usage belittling and infantilizing African-American men.
- Ash v. Tyson Foods, 546 U.S. 454, 456 (2006): U.S. Supreme Court found Eleventh Circuit erred in holding that the term “boy” could only be evidence of discriminatory animus if it was modified by a racial classification such as “Black” or “white.”
- Rejection of false standard that effectively requires direct evidence of discrimination where more oblique comments effectively may be equally probative (arguments on such modifiers can arise in ESI protocol negotiations as well).

Analysis of Comments by the Courts

- The Ash v. Tyson Foods Court noted that whether the term “boy” evidences racial animus (or, presumably, other such terms) “may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.”
- Insufficient simply to present what was allegedly said – must elicit and present the full context and delivery – everything.
- Humphries v. City Univ. of New York, No. 13 Civ. 2641 PAE, 2013 WL 6196561 (S.D.N.Y. Nov. 26, 2013): “Whether remarks by defendants or defendants' employees support an inference of discrimination depends, however, on the context in which they were made and whether, fairly considered, they themselves reveal discrimination or “tend[] to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class.”

Facially Neutral Comments

- Arguably “neutral” language may be less freighted with historical significance or usage, require more context, such as other allegedly discriminatory comments or examples of unequal treatment.
- Thelwell v. City of New York, No. 13 CV. 1260 JGK, 2015 WL 4545881, at *11 (S.D.N.Y. July 28, 2015), aff’d, No. 17-1767, 2018 WL 2123242 (2d Cir. May 9, 2018): The “use of the words ‘angry’ and ‘abrasive’ [did] not rise to the level of racial code words such as ‘boy’ or ‘thug.’”
- Winston v. Verizon Servs. Corp., 633 F. Supp. 2d 42, 53–54 (S.D.N.Y. 2009): Court discussed the phrase “you people,” which the court wrote “is ambiguous and not necessarily evidence of discrimination.” The court went on, however, to state that “questions of state of mind are best left to a jury...” and the court denied the motion for summary judgment in race discrimination case.

Neutral Comments, Cont.

- Courts that have granted summary judgment on hostile work environment claims because discriminatory bias could not be imputed to certain facially neutral words have indicated that other indirect evidence could show discriminatory intent.
- Mondesir v. N. Shore LIJ Health Sys., No. 14-CV-6496 (JGK), 2016 WL 6952254, at *3 (S.D.N.Y. Nov. 28, 2016): Plaintiff's argument that use of the term "girl" was discriminatory because the plaintiff did not hear the alleged wrongdoer use "girl" with white employees was undercut by the fact that plaintiff's co-workers around her workspace were also Black (Note: workplace context should be closely examined in such a case). Court also noted that while plaintiff objected to being called "girl," plaintiff's deposition "testimony suggests that she did not subjectively interpret the term to be racially derogatory at the time."

Neutral Comments: A recent case

- **What's the difference between these two statements, appearing in the same gender discrimination case?**
- “Who knows if Shelly comes back from her maternity leave?”
- “When if Steve going to get his act together so you don't have to work?”
- Which statement did the court find probative of gender-related animus and sex discrimination in denying summary judgment?
- Answer: The second statement

A “Neutral” Comment That Is Not Neutral

- **Use of “a monkey could do it” or other “monkey” comments – defendants must proceed with caution:**
- Coleman v. Lakeland Area Mass Transit Dist., No. 12 Civ. 71-T-24 (AEP), 2013 WL 2154817, at *2 (M.D. Fla. May 17, 2013) (denying summary judgment where the plaintiff’s manager said “It’s so easy, a bunch of monkeys can do it,” only when speaking to the plaintiff and another black coworker).
- Philip v. Gtech Corp., No. 14 Civ. 9261 (PAE), 2016 WL 3959729, at *14 (S.D.N.Y. July 20, 2016): “[Defendant argues] that his references to “monkeys” were race-neutral. . . Perhaps a reasonable jury might so find. But a reasonable jury could easily find otherwise. And on summary judgment, it is not for the Court—which can make neither credibility determinations nor nuanced assessments of tone and implication—to reach such conclusions itself. The Court instead must construe the evidence in the light most favorable to non-movant.”
- Marrero v. R-Way Moving & Storage, Ltd., No. 10 Civ. 5838, 2012 WL 3544752 (E.D.N.Y. Aug. 16, 2012) (charitably describing the argument that monkey is a race-neutral term as an “astonishing proposition,” holding that a jury obviously could find that the use of the term “‘monkey’ was a derogatory reference to his race”).
- Awolesi v. Shinseki, No. 10 Civ. 6125, 2013 WL 489646, at *9 (W.D.N.Y. Feb. 7, 2013) (finding that a supervisor placing a doll of a monkey in his office, even after the plaintiff complained that it was offensive, the “general discord” between the plaintiff and the supervisor, and that the plaintiff’s “complaints about [alleged wrongdoer] were not well received by other members of the administration could lead a reasonable jury to conclude that Plaintiff was subjected to a hostile work environment”).

Stereotypes as Evidence

- Courts have acknowledged that stereotypes may also be expressed in subtle, indirect and non-obvious ways.
- Humphries v. City Univ. of New York, No. 13 Civ. 2641 PAE, 2013 WL 6196561 (S.D.N.Y. Nov. 26, 2013): Court acknowledged that the plaintiff “allege[d] that [the plaintiff’s] supervisors and co-workers referred to her using pejorative words likened to the **Angry Black Women Syndrome**: aggressive, agitated, angry, belligerent, disruptive, hands on hip, hostile, threatening, and vituperative, among others.” (emphasis added) Court also stated that such adjectives “could, in combination with other concrete factual allegations, support a claim of racial and/or gender discrimination... .”

Stereotypes as Evidence

- Lloyd v. Holder, No. 11 Civ. 3154 (AT), 2013 WL 6667531, at *9 (S.D.N.Y. Dec. 17, 2013): Courts have “recognize[d] that certain facially non-discriminatory terms can invoke racist concepts that are already planted in the public consciousness—words like ‘welfare queen,’ ‘terrorist,’ ‘thug,’ ‘illegal alien.’ Indeed, Title VII can hear racism sung in the whistle register.” (collecting cases)
- In Lloyd, the supervisor called the plaintiff, an African-American woman, “lazy, incompetent, entitled, never at [her] desk, slacking off, and dumb,” and “implied that [the plaintiff] felt the job was an entitlement, [and that she] was ignorant and inarticulate,” but dismissed the race and gender discrimination claims for lack of other evidence to overcome the proffered legitimate, nondiscriminatory reason for the failure to promote. Id. at *8, 10.

Disparate Treatment – A Wide Array

- Unequal compensation of similarly situated employees based upon protected characteristics
- Differences in assignments (clients and prospects, unpleasant tasks), steering to positions
- Quality and manner of managers' interactions with employees, perks, social opportunities (particularly when sustained and consistent over time, affecting career opportunities)
- **Employer failure to investigate, follow policies can be evidence of animus:**
- Bader v. Special Metals Corp., 985 F. Supp. 2d 291, 317 (N.D.N.Y. 2013) (defendants' failure to respond to complaints of discrimination evidence of discriminatory animus); Thomas v. iStar Fin., Inc., 438 F. Supp. 2d 348, 355 (S.D.N.Y. 2006), aff'd, 629 F.3d 276 (2d Cir. 2010) (false accusations and repeated unfair criticism sufficient for plaintiff to meet "minimal standard" for prima facie case).
- **Difference in enforcement or application can show pretext:**
- Edrisse v. Marriott Int'l, Inc., 757 F. Supp. 2d 381, 390 (S.D.N.Y. 2010) (evidence that other employees engaged in same conduct as plaintiff without consequence supports finding of pretext).

Statistics – How Much Do They Help?

- “Inexorable zero” (especially when paired with an “inevitable 100”)
- Adverse impact analyses – Results diverge from expected random statistical results?
- Representation / diversity statistics (especially in C-suite, upper vs. lower ranks)
- Termination of only member of protected category? Not enough on its own
- Statistical evidence of exclusion, disparate treatment, sustained poor outcomes for employees in the protected group at issue can bolster the weight given to coded language, dog whistles and other indirect evidence of bias and animus.
- **Statistics can be used to supplement the record as circumstantial evidence:**
- “[D]isparate treatment plaintiff[] may introduce statistics as circumstantial evidence of discrimination.” Hollander v. Am. Cyanamid Co., 172 F.3d 192, 202 (2d Cir. 1999).
- Germain v. Cnty. of Suffolk, 07 Civ. 2523 (ADS)(ARL), 2009 WL 1514513, at *6-7 (E.D.N.Y. May 29, 2009) (relying on lack of gender diversity).
- Ottaviani v. State of New York at New Paltz, 875 F. 2d 365, 370-371 (2d Cir. 1989) (“plaintiffs in a disparate treatment case frequently rely on statistical evidence”).
- The Second Circuit has consistently held that results of 2.0 standard errors or more generally give rise to an inference of discrimination. See, e.g., Ottaviani, 875 F. 2d at 372-73 (in the disparate treatment context, “a finding of two to three standard deviations can be highly probative of discrimination”); Chin v. Port Auth. of New York & New Jersey, 685 F.3d 135, 153 (2d Cir. 2012) (adverse impact with 13% probability evidence of discrimination where zero members of protected group were promoted, and usual 5% threshold unattainable).

Comparators: Performance, Discipline, More

- **Comparators should be similarly situated, comparable to plaintiff. Comparison of compensation (salary, raises, bonuses), performance ratings, perks, promotions (with comparison of attendant ratings, results), and even mistreatment (can blunt an “equal opportunity offender” argument) or regarding the adverse action at issue (e.g., were comparators fired, demoted for similar conduct?):**
- Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000) (inference of discrimination exists if the defendant “treated [the employee] less favorably than a similarly situated employee outside his protected group”).
- See Durkin v. Verizon New York, Inc., 678 F. Supp. 2d 124, 133 (S.D.N.Y. 2009) (denying summary judgment where “a jury could find that men as a group were treated differently than women as a group.”).
- See Leibowitz v. Cornell Univ., 584 F.3d 487, 502 (2d Cir. 2009) (“well-established that an inference of discriminatory intent may be derived from a variety of circumstances, including, but not limited to . . . the more favorable treatment of employees not in the protected group.”).
- Will generally need to be accompanied by other evidence of discriminatory animus.

Comparators

- **Arguments over appropriate comparators can highlight factual issues:**
- Akinyemi v. Chertoff, No. 07 Civ. 4048 (AJP), 2008 WL 1849002, at *6 (S.D.N.Y. Apr. 25, 2008)(finding where plaintiff and comparators reported to same second level supervisor, issue of whether they were similarly situated is reserved for jury); Mandell v. Cnty. of Suffolk, 316 F.3d 368, 379 (2d Cir. 2003) (finding that plaintiff's allegations that five employees outside of protected class were treated more favorably than he was sufficient to reverse district court's grant of summary judgment).
- Germain v. Cnty. of Suffolk, 07 Civ. 2523(ADS)(ARL), 2009 WL 1514513, at *7 (E.D.N.Y. May 29, 2009) (motion denied where "[t]here is some objective evidence . . . that would suggest she was a stronger candidate for promotion than [the promoted individual].").
- Downes v. JP Morgan, 03 Civ. 8991(GEL)(MHD), 2006 WL 785278, at *24 (S.D.N.Y. Mar. 21, 2006) (denying motion where defendant asserted that plaintiff's proposed comparators worked on more sophisticated work because plaintiff testified that she performed comparable work).

Non-Explicit Sexual Advances

- Not all sexual harassment will be expressly “quid pro quo” or a involve an overtly sexually charged proposition or comment.
- Suri v. Grey Glob. Grp., No. 100846/11, 2018 WL 3650197 (N.Y. App. Div. Aug. 2, 2018): First Dep’t Appellate Division recognized that even subtle, indirect and unwelcome sexual advances can support claims under the New York City Human Rights Law (NYCHRL).
- Plaintiff alleged that her supervisor, during her first week under his management, told her that she had “beautiful hair” and, separately, that she was wearing “really nice boots.” Intention, context, tone and additional conduct supported the implication alleged by the plaintiff.

Non-Explicit Sexual Advances

- Suri v. Grey Glob. Grp. (cont'd)
- About a week after those initial comments, the supervisor allegedly “put his hand on her thigh, close to her knee, and squeezed lightly for a few seconds” during a meeting.
- Plaintiff “immediately moved away” in response, and then was subjected to harsh, negative treatment by the supervisor, including in her job assignments, over the next 18 months.
- All claims were dismissed by the lower court, including those related to the alleged sexual harassment and subsequent retaliatory treatment.
- The Appellate Division partially reversed the dismissal, and revived the employee’s harassment-related claims because she had “offer[ed] evidence that [her supervisor] used his position to implicitly demand sexual favors, and, when she rebuffed him, to explicitly make her life miserable for the next 18 months.” Id. at *2.

Non-Explicit Sexual Advances

- Suri v. Grey Glob. Grp. (cont'd)
- The court specifically noted that “sexual advances are not always made explicitly,” and “the absence of evidence of a supervisor’s direct pressure for sexual favors as a condition of employment does not negate indirect pressure or doom the claim.” Id. at *4-5.
- It was therefore an issue for a jury, and not summary dismissal, to decide whether harassment had occurred (analyzing the comments and subsequent harsh treatment holistically and in full context) and plaintiff had suffered unlawful discrimination based upon her gender.

Non-Explicit Sexual Advances

- Claims under the NYCHRL are subject to a lower standard for discrimination and harassment than the similar New York State Human Rights Law (NYSHRL) and Title VII (main federal law prohibiting race and gender discrimination in employment).
- NYCHRL's low standard for claims prohibits employment-related conduct that is discriminatory if it amounts to more than "petty slights or trivial inconveniences."
- NYCHRL is well-suited to addressing subtle, implicit discrimination and harassment.
- **Subtle sexual harassment can support hostile environment claims:**
E.E.O.C. v. Suffolk Laundry, 48 F. Supp. 3d 497, 518-19 (E.D.N.Y. 2014)
(denying summary judgment where supervisor's direct conduct with the plaintiff included a few flirtatious comments and one occasion where the supervisor touched the plaintiff between the chest and shoulders).

How to Show Pretext: Temporal Proximity, Shifting and Inconsistent Reasons, Etc.

- Plaintiffs can, where appropriate, use prima facie evidence to show pretext as well
- Falsity or dispute of reason not required, but obviously helps to show proffered legitimate reason is at least not the only reason or motivation for termination; Inconsistent application of Company policy, practices
- Temporal proximity connection may be extended by showing that retaliation started to build at a point closer to the complaint, eventually culminated in a firing, demotion, etc. Also can show that a firing or demotion, though some months or a year down the line, was the first real opportunity to take retaliatory action. Proximity can be refreshed by new complaints/protected activity.
- Shifting, inconsistent or post hoc reasons presented for adverse action (including legitimate, nondiscriminatory reasons proffered to the EEOC, court in litigation)
- Dupree v. UHAB-Sterling, No. 10 Civ. 1894 (JG)(JO), 2012 WL 3288234 at *8 (E.D.N.Y. Aug. 10, 2012) (“jury could reasonably conclude that it was only when the Defendants set out to justify their decision to terminate [the plaintiff] that they began to document problems with his performance”); Khabo v. Linnon, 89 Civ. 275 (KC), 1991 WL 95419 at *8 (S.D.N.Y. May 28, 1991) (employer “was creating a ‘false paper trail’ to make its decision to terminate [the plaintiff] seem legitimate”).
- Byrnie v. Town of Cromwell, 243 F.3d 93, 106 (2d Cir. 2001) (denying summary judgment where a juror could believe that a second explanation for the challenged decision “was the result of an attempt to salvage an earlier explanation that was collapsing during civil discovery”); Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 847 (2d Cir. 2013)(reversing summary judgment where termination reasons proffered during litigation not included in prior written explanations).

The Struggle Over Summary Judgment

- FRCP 56: “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
- Summary judgment should be denied where there is a material issue of fact that could permit a reasonable jury to issue a verdict on the claim in favor of the non-movant (usually the plaintiff)
- Disputes regarding the record (supported by the evidence) must be resolved in favor of the non-movant – including differing interpretations of documents and otherwise undisputed statements or incidents.
- Holistic, cumulative analysis of evidence is appropriate:
Courts or defendants may subject allegations and evidence to isolated analysis and disregard (each comment or act on its own is petty or “stray,” is not enough to show animus or create a hostile environment, etc.) – urge that all evidence be considered as part of a bigger picture.

Litigation Takeaways:

Do Not Judge Claims Hastily

- Potential claims should not be disregarded by employees, employers or their attorneys merely because of the absence of openly discriminatory comments. All facts should be assessed based upon full context, real-world implications of conduct and comments.
- Witnesses and potential clients generally do not know what is relevant, or even that their memory of he said/she said incidents or secondhand accounts are “evidence.”
- Hard-nosed, good faith critical analysis and excavation of an employee’s treatment and relevant communications/incidents is necessary to determine whether even seemingly neutral comments, actions or decisions could, in fact, be part of a larger picture suggesting animus/bias.

Investigation Takeaways: Go Beyond Perceived Standards of “Unlawful” Conduct

- Supposed “equal opportunity offenders” may treat certain employees more harshly, or the conduct may impact employees unevenly. The intensity, frequency or significance of harsh treatment or language used may differ based upon race, gender or other characteristics (including employees taking leave or receiving accommodations, etc.). The same conduct also may have very different meanings when directed at various groups of employees.
- Do not assume that, because harassment does not seem to be “severe or pervasive,” or a complaining employee has not been fired or demoted, no meaningful cause of action exists. Different laws and jurisdictions, such as the NYCHRL, have standards that may allow claims based upon facts that would not satisfy federal law.

Workplace Takeaways: Best Practices, Deep Investigations

- Monitor trends and look for patterns—statistical and in behavior or outcomes.
- Address problem supervisors and managers promptly with training, discipline.
- Over time, have employees in certain groups tended to be terminated or leave at higher rates or after shorter stints?
- Do performance evaluations, disciplinary actions, promotions, assignments and compensation trends reveal favorable or negative trends among employees by race, gender, or other characteristics?

What Questions Do You Have?

- Practical discussion?
- Hard-to-research issues?
- Additional citations?
- War stories?

Thanks for attending!

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