



# Customer Complaints: How To Avoid Discrimination Claims From Your Clientele

Insights

12.31.18

The story of two African-American men arrested for trespassing at a Starbucks while waiting for a friend made national headlines this summer. But the incident did not surprise many African Americans. “Shopping while black” is a phrase coined to describe the mistreatment African Americans routinely encounter in retail establishments, including being followed by store security while shopping, being questioned about their ability to pay, being forced to wait longer than white customers, and generally being treated disrespectfully when seeking customer service. In fact, in a 2016 Gallup poll, 25 percent of African Americans reported being treated unfairly in a retail setting in the previous 30 days.

No retailer wants the reputation of treating customers differently on account of race or other protected categories such as gender or religion. The in-store customer experience is critical to maintaining traditional shoppers, especially given the fierce competition of online sales. In a country with an increasingly diverse population of consumers, becoming known as a store that treats minority customers poorly is a surefire way to lose business.

The stakes of these incidents of mistreatment are also rising; attorneys appear to have begun to focus on discriminatory treatment of customers as a source of claims. This past year, one lawyer in Portland, Oregon alone filed suits against five separate area retailers alleging discriminatory treatment of customers. Headlines have also included lawsuits by a middle-aged African-American couple in Maryland accused of stealing a refrigerator, an African-American woman aggrieved by a store’s practice of keeping African-American beauty products in locked cases, an African-American man accused of stealing a coat he wore into a store, and a prominent African-American rapper accused of stealing a pair of sneakers. As publicity about these types of events increases, you can bet the number of lawsuits will also increase. Retailers need to understand the basis of how these claims can come about so that they can focus on preventing the underlying issues.

## The Relevant Laws

Discrimination in public accommodation lawsuits generally arise under one of three sources. The first is Title II of the Civil Rights Act, the lesser-known cousin of Title VII. But Title II is exceedingly more limited in scope than Title VII in the protected classifications, the establishments covered, and the relief available. First, Title II proscribes discrimination only on account of race, color, national origin, and religion; it does not prohibit discrimination on account of sex. Second, not every establishment open to the public is considered a place of public accommodation; the statute

establishment open to the public is considered a place of public accommodation, the statute specifically includes entertainment venues, restaurants, hotels, and other like facilities. Retailers are specifically excluded from being included as a place of public accommodation, unless you have an in-store restaurant or other covered location in your establishment. Finally, actions under Title II provide only injunctive, not monetary relief, and therefore are less desirable claims to plaintiffs' attorneys.

The second source for claims is the civil-rights-era nondiscrimination law, 42 U.S.C. §1981, which guarantees to people of color the same rights to make and enforce contracts as enjoyed by white individuals. Retail transactions are considered a contract, and therefore refusing to sell an item to an individual on account of race violates the law. Section 1981 provides for a variety of monetary damages to the aggrieved individual in addition to attorneys' fees.

The third source of public accommodation discrimination lawsuits is state law. Only five states in the country do not have any statewide laws regulating discrimination in public accommodations other than for disability. Every other state's law prohibits discrimination on the basis of race, religion, national origin, and gender. Some also extend the prohibition to categories such as age, sexual orientation, familial status, and gender identity.

State laws vary not only in their scope, but also in their interpretation. An example of this is how some state courts have concluded that "ladies' nights"—where only female patrons receive a discount on drinks—violate the prohibition on gender discrimination. Other states have rejected this contention noting it is too *de minimis* of an issue to rise to the level of a statutory violation in spite of the obvious gender basis for the differing treatment.

Given the variety of laws and differing scopes, retailers with multistate operations are likely best off simply assuming all discriminatory treatment on the basis of various protected characteristics is prohibited and adopt policies accordingly. Moreover, the Americans with Disabilities Act (ADA) and associated state laws both also prohibit discrimination on account of disabilities, but those laws' unique features put them beyond the scope of this article.

### **Activities Giving Rise To Claims**

At the core of every discrimination claim is a belief by the customer that they have been mistreated. But managing the day-to-day interactions between employees and customers to avoid this is far from easy in the absence of any discriminatory intent. Even the best employees have bad days and will lose composure on occasion. More often, however, it is misconduct by customers that sets the stage for a conflict.

Foregoing for the moment outright theft, scams designed to fleece retailers abound. These range from old-fashioned bill switching trying to confuse cashiers into giving too much change to attempts to return merchandise after it has been well used or broken. Some people are simply ill-mannered and ill-tempered. Others misread sales promotions and want to argue about discounts employees have no ability to give. Store-level employees observe this misconduct regularly and develop perceptions that can result in poor treatment of customers with honest problems.

perceptions that can result in poor treatment of customers with honest problems.

What generally takes these negative interactions and raises them to a lawsuit are two situations: an allegation of theft, or when a store employee visibly treats individuals in different protected categories in dissimilar manners. A good example of a story from the first category is the situation where a famous rapper was accused of stealing tennis shoes. In reality, he had not even entered the store at the mall from where the shoes were stolen, which obviously led to trouble for the retailer.

But discrimination lawsuits against retailers are brought even when a company had solid evidence of theft. In one lawsuit, the plaintiff (who was Korean-American) was observed taking bottles of perfume out of their boxes and swapping them with less-expensive perfumes. Following her purchase, the customer's attempted deceit was revealed and she was charged with shoplifting. The loss prevention manager was not notified of the trial date, and so the charges against the customer were dismissed when he did not appear. The customer sued claiming she had been mistreated because of her national origin. The employer prevailed, but only after expensive proceedings.

Treating customers in different ways appears even more upsetting to other customers and the general public in spite of the potential for innocent reasons, such as an employee providing more prompt attention to a well-known regular customer than someone shopping in the store for the first time. But treating people of differing protected categories in dissimilar ways creates the classic framework for a discrimination claim. A recent case involving two African-American women visiting a small restaurant exhibits this.

The women testified they were the only African-American customers in the restaurant on a busy morning. Their request to be seated at a booth instead of the counter was ignored. They waited significantly longer for service than other customers, and white customers who entered the restaurant after them were leaving after having eaten before the African-American customers received their food. The food they did receive was burned, and the waitress was rude and disrespectful to them. In contrast, that same waitress displayed a cheery disposition toward white customers. They heard another waitress say, "I'm not waiting on them." A federal judge concluded this evidence was sufficient to require a trial on the issue of whether they had been discriminated against on account of their race.

### **What You Should Do**

In response to the high-profile situation where its customers were arrested, Starbucks closed its stores for part of a day to train all employees on issues of discrimination. Given the publicity of the situation, some saw this effort as lacking—despite the fact that the actual event was caused by only one or two employees at one of Starbucks 8,000 company-owned locations in the country. However, it aptly demonstrates that effective training is the first piece of the puzzle.

Training on discrimination is already part of every major retailer's orientation process. But in light of the heightened focus on the issue, retailers should ask themselves two things. First, is the training integrated with training on the events that result in these claims (i.e., shrink and customer service)? Second, is the training effective for our workforce?

One of the flaws in modern nondiscrimination training is the presentation of it as a stand-alone activity unconnected to the situations in which claims arise. Discrimination training needs to be integrated in training on security and theft issues, as well as customer service issues. Employees need to be able to understand how to avoid activities that may be perceived as discriminatory while effectively carrying out their security duties. They also need to be trained on methods for handling difficult customer interactions while treating the customer with respect.

Measuring effectiveness may be more difficult. Testing after training does not assess an individual's ability to use their training. To this end, companies should consider whether they can incorporate situational observation by mystery shoppers or supervisors to assess performance.

Just as important as training employees is having a thorough process for responding to complaints. When a customer makes a discrimination complaint, three critical events need to occur: understanding, investigation, and follow through. Closing the loop with the customer and advising them that their complaint was investigated and that some action has been taken to address their concern goes a long way toward calming them and preventing lawsuits.

*For more information, contact the author at [EHarold@fisherphillips.com](mailto:EHarold@fisherphillips.com) or 504.522.3303.*

## ***Related People***



**Edward F. Harold**  
Regional Managing Partner  
504.592.3801  
[Email](#)

## ***Industry Focus***

Retail