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PERSPECTIVE

Tesla verdict provides a simple lesson the hard way

By Leonid Zilberman

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Owen Diaz, right, with his son, Demetric, at their home in Vallejo, Sept. 10, 2018.

The words "justice" and "equity" have been on the front burner for several years, and no matter color, race or creed, Americans have always strived to interpret them in ways that support a universal idea of fairness. Lawyers often use the concepts of justice and equity when making closing arguments to juries to appeal to a sense of rightness or appropriate conduct..

The recent $137 million jury verdict against Tesla in a racial discrimination case brought by Owen Diaz, a former African-American subcontractor of Tesla, is a perfect example of how Americans still harken back to ideals and principals enshrined in our Constitution and the words engraved into stone atop the U.S. Supreme Court building: "Equal Justice Under Law."

After a one-week trial, it took six jurors, only one of whom was Black, just four hours to unanimously conclude that Tesla was a joint employer and had failed to take reasonable steps to protect Diaz.

Over the last several decades, I've had sage mentors with a mantra to always "keep it simple." That's what Diaz's lawyers did. They stuck to the tried-and-true theme that racism and harassment are "not OK" in 2021 and were not OK in 2016 when Diaz worked at Tesla's manufacturing facility in Fremont. The same holds true whether Diaz was employed directly by Tesla or indirectly through an employment agency.

The jury verdict form contained just six questions. Without doubt, everyone knew the answer to the first question: "Was Mr. Diaz subjected to a racially hostile work environment?" The only other question that mattered was: "Did Tesla fail to take all reasonable steps necessary to prevent Owen Diaz from being subject to racial harassment?" Those simple words have been the law, as part of California's Fair Employment and Housing Act, for over 50 years.

Perhaps the biggest blind spot for Tesla was not realizing that it doesn't actually matter whether Tesla "had a written policy against racial harassment," but rather what Tesla did (or didn't do) to enforce its antiharassment policy. In this case, based on testimony from at least three witnesses, the "N" word was used profusely and without any consequences in the factory. In fact, another contract employee who admitted to its use and also to drawing a racist cartoon was not fired by Tesla — rather, he was hired and promoted.

So how does a jury get so moved that they award $137 million in punitive damages? Tesla made a profound error by presenting evidence that tried to minimize the effect of the racial slur. They argued: (1) Diaz never worked for Tesla; he was a contract employee (as if that made a difference); (2) Diaz worked as an elevator operator at the Fremont factory for only nine months (as if racial harassment needed more time to be actionable); and (3), while three witnesses testified that they regularly heard racial slurs on the factory floor, they thought the language was sometimes used in a "friendly" manner — as if there was a difference in how the slur was interpreted based on how it was said. These same witnesses also told the jury about racist graffiti they

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saw in the bathrooms, which was removed by Tesla's janitorial staff.

There is no "friendly" use of racial slurs. It was a mistake for Tesla to suggest that just because other African-Americans were also using the slur, or even that Diaz told his family members to apply to work at Tesla, that that undermined how he claimed he felt or that he experienced racial harassment. There is no "pass" for using prejudiced terms, no matter how others use them.

No matter whether a worker is paid directly by the employer or through a third party, the employer has an obligation to investigate and eliminate all forms of harassment and discrimination in the workplace. There are no exceptions. The fact that this case proceeded to trial, as opposed to being dismissed on Tesla's motion for summary judgment, should have sent a loud and clear signal that legal technicalities were not going to be the focus of the jury.

Even though the punitive damages award will likely get cut significantly because, as a general rule, punitive damages must be no more than a single-digit multiplier of compensatory damages to satisfy due process, as outlined by the *U.S. Supreme Court in BMW v. Gore* (1996), the verdict is nonetheless important. It sends a strong message that employers have a responsibility to protect all who work for them — directly or indirectly through an agency. That obligation is not to simply have a policy and a complaint procedure against harassment, but to actually ensure that concrete steps are taken to enforce the policy, once complaints are made — no matter where they come from.

How could have this case outcome been different? What if Tesla was able to present evidence that it investigated Diaz's complaints and, assuming it found wrongful action, took steps to prevent further harassment by immediately terminating the offending employee? The sixth and final question on the jury verdict form asked: "Did Tesla's negligent supervision or continued employment of Ramon Martinez cause harm to Owen Diaz?" If Tesla was able to show that it terminated Mr. Martinez (the alleged harasser), thus taking all reasonable steps to prevent harassment, and the jury answered that sixth question with a "No," then there would be no $137 million verdict.

It all goes back to "justice" and "equity." Diaz's counsel told the jury, "Tesla doesn't have a zero-tolerance policy regarding harassment, they have a zero-responsibility policy." That is a powerful image. The concept of justice and equity didn't begin in America over 200 years ago, but rather all the way back in 970 BCE, with King Solomon, who exhorted his son that justice was about rightness. To do justly was to act in conformity with a sense of moral righteousness. In other words: "Do the right thing."

With this in mind, Tesla essentially argued that the Tesla of 2016 (when Diaz worked in the factory) was different than the Tesla of today. Since then, Tesla has vastly improved its human resources operations by adding a team dedicated to investigating employee complaints, no matter where they come from. Like many other large corporations, Tesla argued that it has also added a Diversity, Equity & Inclusion team dedicated to ensuring that employees have the equal opportunity, as well as an easy-to-find online complaint procedure. That's great — but none of this infrastructure was available to Diaz in 2016, and those facts only help to show that Tesla didn't follow the law back then, when the same law applied.

Maybe Tesla was thinking of the recently affirmed trial court decision in *Daniel v. Wayans*, 8 Cal. App. 5th 367 (2017), granting actor Marlon Wayans' anti-SLAPP motion against actor Pierre Daniel. Daniel worked as an extra on the movie "A Haunted House 2," written and produced by Wayans, who also starred in the film. Daniel alleged that he was the victim of racial harassment, including intentional infliction of emotional distress, because Wayans, among other things, subjected Daniel to racial harassment by calling him the "N" word during breaks in the filming of the movie and also made fun of Daniel by comparing him to a Black cartoon character, even posting the cartoon online.

The court held that the alleged derogatory comments made by Wayans during breaks in the filming constituted speech in connection with a matter of public interest and were thus protected activity. The trial court granted Wayans' anti-SLAPP motion to strike the suit, finding that Daniel's claims arose from Wayans' constitutional right of free speech because the core injury-producing conduct related to the creation and promotion of his movie. The court even awarded Wayans attorney fees and costs. The fact that the comments were allegedly made during breaks, while no cameras were rolling, did not compel a different outcome. The court reasoned that Daniel's argument that the movie's creative process occurred only when the cameras were rolling rested on an unreasonably narrow view of the creative process.

In the Tesla case, there was no "constitutional right of free speech" and certainly, no "creative process" inherent in building electric cars. While some people may attempt to change a slur into a term of endearment, it does not change the fact that the term is offensive and unacceptable in any workplace.

Perhaps Tesla should have tried to hue its position more with King Solomon's principles of right and wrong and establish a strong moral base of justice and equity for all its workers, even those it contracted with through third parties. Perhaps the biggest takeaway for companies with workers in California is this: You are responsible for the environment and the culture in your workplace no matter who signs the payroll checks, even if there's a legal construct in place that says you may not be the "primary employer." Tesla just learned that lesson the hard way. ■