

Musings about Truth and Discriminatory Conduct and Why They Are Compatible in Direct Evidence

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Reverend Dr. Martin Luther King wrote, "It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important." Civil rights have come a long way since Dr. King authored that reflection, and it is important that the written law is one deterrent to illegal activity. The good nature of humans and the legal consequences for not following the law in combination are effective in supporting human rights and civil rights, but let us not forget to amplify the anti-discrimination protections afforded by enforcement of the law. Enforcement, along with education and outreach available to help residents, businesses, and property owners become knowledgeable about the law, reduces the gaps between our natural understanding, our instincts, and our intention to follow the actual law. When a Nebraska business or property owner does not follow the state's mission to not discriminate, the Nebraska Equal Opportunity Commission will investigate an alleged violation once a charge is filed.

One who works for the NEOC often pontificates, that a person has complained of unfair treatment based on the protected class membership and through investigation it is discovered that (1) the treatment may have not been unfair, or (2) been unfair but it has not been illegal discrimination, or (3) the treatment is unfair and is illegal discrimination. The last of these most directly has an actionable outcome: remedy for the harm. The perception is that in each of the outcomes (1 and 2) where no discrimination is found (the fate of some charges filed), there seems to be some perception of a negative correlation to discovery of discrimination when efforts are made to obtain the "facts" rather than the "truth". In other words, and most often, a party to a complaint may want to know why certain information is obtained and other information is not considered relevant.

Facts may be sectioned out by the provider, whether the provider is the charging party or the business/property owner filed against, and the perception is that the truth of what happened escapes this collection of factual evidence. A diligent fact-finder may abruptly pause and shout "Eureka!" realizing full comprehension of the evidence gathered at some point, and decide upon an investigatory path to proceed if additional evidence is required or decide to end an investigation. Most often though, the evidence-gathering has less drama, and instead of the shout of "Eureka!", the fact-finder is applying theory and assumptions, legal elements, and addressing investigatory challenges, and there is no smoking gun.

This is where we introduce the sometimes miraculous but simple investigatory discovery of direct evidence. It is rare to find direct evidence but in some investigations it has been found. Here is one example: a decision-maker makes an overt derogatory or bias statement referencing the protected class. This is the nexus that establishes that the bias and the decision are most likely tangled in the prohibited conduct. It does not take skill to show the connectivity, but it takes great skill to defend. In almost every instance, it cannot be successfully defended.

Thomas Hobbs, a philosopher who deliberated about the state of us, said, "The natural state of man's life is solitary, poor, nasty, brutish and short." Hopefully, for many of us, the thinking that characterized the misery of humankind has changed much since the 1600s, including the adoption of a universally acceptable notion that one may not treat a person unjustly because of their protected class membership in employment, housing, or public accommodations. Where it appears that all humans have not evolved to a point of eliminating some misery in the world by accepting and following a doctrine of anti-discrimination, and harbor illegal discriminatory animus towards others and express their prejudices in overt forms, the law and the enforcement of the law exists to give us a better life and to preserve, protect, and ultimately, to unite us.