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Makela Hayford

LESSONS FROM BROOKLINE:

Lawsuits Won't Save Us From Racist Workplace Practices

By Makela Hayford

> *"For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."*[1]
>
> —Audre Lorde

In 2010, Paul Pender instigated an 11-year litigation nightmare resulting in an $11 million settlement when he left a voicemail for Gerald Alston that concluded with the words "f...g n...r." Both men served as firefighters for the Town of Brookline and at the time. Pender, who is white, supervised Alston, who is Black.

When Alston took offense to the voicemail, Pender explained that the slur was not intended for Alston. Instead, Pender intended it for "a young black gangbanger" who had cut off Pender in traffic. This explanation worsened the impact of the slur, yet many individuals charged with responding to Alston's complaint believed that Pender's story sufficiently explained away Alston's claim of a personal attack.

If the Town officials believed that someone indeed cut Pender off in traffic, Pender's use of a historic slur in such a commonplace occurrence remains unjustified, revealing his casual use of a racial slur. Further, Pender's categorization of a stranger in traffic as a "gangbanger" reveals unabashed stereotyping and the use of another derogatory term directed at a Black person. Alston was implicated in these stereotypes and their harmful effects.

In actuality, the explanation served as Pender's second violation of the town's zero-tolerance policy for racism in the workplace. While Pender's explanation should have done more harm than good to his employment status given the zero-tolerance policy, the town chose to promote Pender, and ultimately to terminate Alston. Unfortunately for Alston, this counter-intuitive HR decision marked only the beginning of the cascading destruction of his career as a firefighter as well as his sobriety and mental health.

The aftermath

As noted above, in 2010, Alston brought civil rights claims against the Town under 42 U.S.C. §§ 1981, 1983 and 1985.[2] In 2021, the Town settled with Alston for $11 million. To some, the settlement award may seem excessive, but as Alston has acknowledged, it will never make him whole. Herein lies the absurdity of the legal fiction that money can right civil wrongs. One of the many implications of health inequities and reduced life expectancies is that, Black people especially, don't have the luxury of waiting on settlements to one day be made whole. Ta-Nehisi Coates described this aspect of his own mortality, writing, "You must wake up every morning knowing that no promise is unbreakable, least of all the promise of waking up at all." Mortality ought to be urgent enough for radical change in the legal system, but if that were true, Black Lives Matter would have already achieved it.

In hopes of pursuing change that falls somewhere between the status quo and radical re-imaginings, this paper seeks to highlight three of Brookline's failures: (1) how the Town of Brookline leveraged white fragility against Alston; (2) the Town's weaponization of mental health and mental health professionals; and (3) the Town's use of non-cooperation agreements.

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Coddling white fragility

As coined by Robin DiAngelo, white fragility encapsulates the defensive actions that white people take when confronted with racism.[3] DiAngelo conceptualizes these actions as "an outcome of white people's socialization into white supremacy and a means to protect, maintain and reproduce white supremacy."[4] In addition to causing significant harm to Alston, these responses prolonged the litigation and abused the Town's resources.

The Town protected white supremacy by continuing to promote Pender despite his use of the n-word and despite his continued retaliatory behaviors. As a consequence of white supremacy, Pender was seen as extremely apologetic for his actions. He was also seen as deserving of continued promotions in order that one mistake wouldn't derail his career. Even when Pender was disciplined for his voicemail by way of a 42-day suspension, he was instantaneously credited with 42 days of paid vacation days. This shows how Pender was protected from all consequences.

Additionally, Pender maintained white supremacy by admonishing Alston for coming forward. Days after Alston raised concerns about the voicemail incident, Pender told Alston that it was "the stupidest thing [Alston] could have ever done." He then asked Alston, "Are you after my job or something?"[5] These comments from Pender demonstrate maintaining white supremacy. Denigrating Alston's decision to come forward and to challenge the racism he experienced is a form of retaliation that enforces a culture of silence: white supremacy can thrive if individuals do not report it or problematize it the way Alston did.

The Town also reproduced white supremacy by tokenizing Black voices. In September of 2013, Nancy Daly, a white town official, circulated a letter from a retired Black firefighter criticizing Alston and asserting that, "it was insulting to all firefighters for Alston to claim that he could not count on fellow firefighters to save him in a life-threatening situation." This letter did not comment on the actual issues at hand; however, it was a Black voice that seemed to contradict Alston. Using a Black person to reflect the views of all Black people is a tactic to create the illusion of division and erode the credibility of a complaint of racism. White supremacy is maintained by this practice of discrediting Black people. In disseminating this letter, Pender also used this tactic when he spoke to five new minority firefighter recruits at his station. Allegedly these recruits agreed with Pender that Alston was drawing out the n-word incident and acting unreasonably. This account is problematic, given that the recruits were new and likely going to agree with anything their new supervisor would have said. Further, any offhand comments by individuals who were not intimately familiar with the situation must be evaluated critically. Instead, the comments by the recruits were used as true perspectives—not because of the context, but merely because the recruits were Black and Brown. Daly and Pender perpetuated a narrative that Alston was unreasonable and unwilling to move beyond the voicemail incident.

Both Pender's and the Town's response to Alston's sharing of his concerns were rooted in the assumption that both Pender and the Town are not racist. In fact, the town often cited its "zero tolerance" policy for workplace racism and retaliation. This was problematic because, instead of addressing Alston's complaint, Pender and the Town focused on their reputations and public image instead of the substance of protecting employees from discrimination.

Gaslighting and weaponizing mental health professionals

At the end of his shift on December 19, 2013, Alston found the word "leave" written in the dust on the door next to the seat on the firetruck to which he had been assigned. He called this display to the attention of two coworkers, Ryan Monahan and Cormac Dowling. Chief Ford was informed of the incident, and he reported it to both DeBow and Murphy. Three days later, Alston referred to the incident in front of coworkers and stated that "people go postal over matters like this." That night, Ford interviewed Alston about his statement and—concerned about Alston's mental state—placed him on paid leave, pending a psychiatric evaluation. From that point forward, Alston never resumed work as a firefighter.

A particularly concerning response to Alston's complaints of racism was the Town's practice of gaslighting. Gaslighting is defined as a form of manipulation where one individual makes another question his reality.[6] In other words, rather than address the racism Alston brought to the HR department's attention, the HR department focused on undermining Alston's experience of racism.

As another example, after Alston reported Pender for his use of the racial slur, the Town promoted Pender to higher positions and continued to afford him opportunities. Within four months of the voicemail incident, Pender was invited to the White House to accept an award for his heroism during a 2008 fire. At one point, Alston reached out to the fire chief to express his frustration with how Pender was seemingly rewarded for his behavior. In response, the fire chief suggested that Alston seek mental health counseling. In addition, Alston's long-term colleagues began to isolate and shun him. It is common knowledge that firefighters work in a fire "house" sharing meals, and essentially living together until they are dispatched for an emergency. In Alston's case, his colleagues would leave the room as soon as he entered, ignore him and leave him out of social events. This isolation, however, was not solely at the hands of other white firefighters: recall the retired black firefighter who wrote a widely-circulated letter disparaging Alston.

Equally concerning is how the Town weaponized mental health professionals by picking and choosing which parts of Alston's mental health assessments to give weight to. The simplest explanation is that the Town only used the damning parts of the evaluations to keep Alston out of work (a positive cocaine test, outbursts, anger), but never implemented the proposed accommodations that would have facilitated his return to work (enforcing the non-retaliation policy, disciplining individuals who were antagonizing Alston). The mental health professionals that Alston met conditioned his return to work on the elimination of a racially-biased environment. In other words, the onus was placed on the Town to accommodate Alston by ceasing to subject him to racial stress. Despite requiring Alston to attend these sessions and relying on information

gleaned from Alston's private sessions to make determinations about Alston's employment status, the Town never made the accommodations the mental health professionals recommended.

Rather than improve the situation which would have improved Alston's mental health, the Town consistently made the situation worse and blamed Alston for his worsening mental health.

Enforcing non-cooperation agreements

In order to succeed on his equal protection claim, Alston needed to prove that he was treated worse compared with others who are similarly-situated, and that this treatment was on the basis of race. The First Circuit found that Alston did not meet his burden because he did not proffer evidence that non-Black firefighters were treated more favorably.[7]

A likely part of this difficulty was the Town's use of non-cooperation agreements in settlement cases with other Black firefighters. These agreements functioned to bar firefighters who participated in previous settlements from "voluntarily cooperat[ing] or assist[ing] any person or entity…in the prosecution of any claims against the defendants." Additionally, some of the non-cooperation agreements mentioned Alston by name and prohibited individuals from cooperating with the federal court complaint.

It is important to consider the relative positioning and power of the firefighters who signed the non-cooperation agreements as compared to the Town. If they experienced similar racial discrimination to Alston, as well as the backlash that followed, signing such an agreement in exchange for money and the end of the process might seem like the only option. Further, if the firefighters retained legal counsel to aid in the process, there may be incentives for counsel to encourage settlements rather than substantive change, or even cooperation, down the line with other firefighters who experience discrimination. The attorney pay structures must be examined in considering who the litigation process is serving. These considerations serve to highlight some of the limitations of the status quo processes that continue to be overlooked.

The First Circuit court of appeals held that non-cooperation agreements are permissible in the interest of allowing private parties to settle and bargain with one another outside of court. Arguably, this saves the court system from overuse by encouraging parties to resolve matters on their own. This is an interesting take coming from a justice system that purports to rely on the truth; if silence can be bought, then the true nature of systemic racism will always be obscured. Allowing the Town to bargain for the silence of other firefighters who experienced the same discrimination as Alston makes it nearly impossible for Alston to prove his claim. It serves to erase any record of the systemic nature of the Town's racism, and makes Alston's claim less credible. Here, the Court remarked that Alston did "not make the slightest effort" to identify facts to show a disparity in treatment between white and Black firefighters; this remark contravenes any notion of justice. In reality, the Court-backed non-cooperation agreements served to thwart any of Alston's efforts to identify disparities.

Alston deserves compensation for the past 11 years of harm caused by his employer; however, if the goal is to deinstitutionalize workplace racism, the legal community must reckon with the shortcomings of the litigation processes and attempt to develop changes to workplace policies and mechanisms of enforcement that actually root out racism. There are a number of reasons that litigation alone cannot fix workplace racism: access to civil litigation is limited, litigation is expensive, takes a substantial amount of time and compounds stress to those who have been harmed. Litigation processes are adversarial with clear winners and losers, and do not support continuing relationships. In this case, Alston cannot work for the Town of Brookline, despite the Town's apology, $11 million and recognition of its harmful actions against Alston. Further, as long as the harms of workplace racism are reduced to monetary quantities, employers will continue to commit so-called efficient breaches, or strategically calculated violations of antidiscrimination policies, in order to avoid the process of rooting out policies—both formal and informal—that allow racism to flourish.

Looking beyond litigation is not a lofty, abstract idea. As demonstrated here, there are policy decisions that employers have the power to make each time they are presented with a complaint from an employee.

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1. Lorde, Audre. "The Master's Tools Will Never Dismantle the Master's House." 1984. *Sister Outsider: Essays and Speeches.* Ed. Berkeley, CA: Crossing Press. 110114. 2007. Print.
2. The operative complaint named a long list of defendants, including the Town, the Brookline Board of Selectmen (the Board), the Town's counsel and human resources director, and select members of the Board (Nancy Daly, Betsy DeWitt, Ben Franco, Kenneth Goldstein, Bernard Greene, Nancy Heller, Jesse Mermell and Neil Wishinsky). All of the individual defendants were sued in both their personal and official capacities.
3. DiAngelo, *White Fragility*.
4. Page 112 (*White Fragility* chapter).
5. *Alston v. Town of Brookline*, 997 F.3d 23, 30 (1st Cir. 2021).
6. "APA Dictionary of Psychology." *APA.org*. American Psychological Association.
7. "In his briefing, Alston does not make the slightest effort to identify any facts in the record that might show such a disparity in treatment." *Alston v. Town of Brookline*, 997 F.3d 23, 41 (1st Cir. 2021).