

Is a Policy Still a Policy if It's Not in Writing?

Will a court acknowledge a company "policy" that doesn't exist on paper? One court recently did—even though the policy wasn't written anywhere—because the policy was being followed by all managers. Still, when in doubt, it's best to write it out...

Case in Point: Roberta Hollins applied for a customer service job at a Missouri transportation company. Hollins had a criminal record of two misdemeanor shoplifting convictions and admitted to that on her employment application. Hollins, who is black, was rejected for the job and a white male was hired instead.

The EEOC filed a race discrimination lawsuit in support of Hollins. It cited, among other comments, a customer service manager's statement that hiring Hollins would be "opening up a can of worms."

The company's response? It said skin color wasn't an issue because it had long followed a rule—albeit an unwritten one—that rejected job applicants with theft-related convictions. Hollins argued that because the company had no such *written* corporate policy against hiring people with criminal theft convictions, it could not fall back on that defense in court.

The result: The court sided with the company and dismissed the case in the initial summary judgment phase. The main reason was that the company was able to present evidence that it had previously disqualified 28 applicants over an 18-month period because of convictions related to theft. And it proved that no employees currently working at the customer service center had such convictions on their records.

As the court said, "The plaintiffs argue that a reasonable jury could conclude that the policy did not exist because it was not in writing, but they do not cite any legal authority for the proposition that a policy must be in writing to be effective." (*EEOC v. Con-Way Express Inc.*, 8th Cir., 9/22/10)

3 Lessons Learned ... Without Going to Court

1. Put your policies in writing. That way, there's less room for misunderstanding. The employer in this case was very lucky that the oral policy was being applied consistently across the board. That was risky.

2. Audit for policies that aren't in writing. Employees are likely taking actions based on some of your "unwritten" rules. Discover those unwritten rules and decide whether you should put them on paper. There's a lot of risk for inconsistency when rules aren't written.

3. Train employees on all policies. This increases compliance and minimizes risk.