

'Firing manager' should be same one who did the hiring

When you need to terminate an employee, it makes sense for the same manager who hired the employee to also pull the trigger on the firing. That bit of legal strategy—the so-called "same actor defense"—could help you defend a discrimination lawsuit down the road.

Reason: If the supervisor who fires an employee also hired the individual, it will be a lot harder for the employee to claim the termination was due to discrimination (at least when the employee alleges discrimination based on an obvious characteristic, such as race or gender).

If you use the same-actor defense, it's up to the fired employee to overcome the inference that the decision was *not* discrimination. This defense is no guarantee, but it does force employees to prove that underlying discrimination is the real reason for the discharge.

Recent case: Sygma Networks used a four-person hiring committee to choose Gladys Antonio, a black woman from Zimbabwe, for an accounting position. The decision was unanimous, and all four committee members knew Antonio's race and nationality.

Months later, one of the committee members and Antonio's direct supervisor told Antonio she had offensive body odor and that the reason might be her culture. Antonio complained, and the company warned the supervisor to be more sensitive.

Nine months after that, Antonio failed to show up to work for four days. The hiring committee fired her for job abandonment. (She said that she had returned to Zimbabwe for a visit but phone problems prevented her from notifying the company about her flight delay.)

She filed a race discrimination lawsuit, claiming the firing was retaliation for her odor-comment complaining. A federal appeals court disagreed, concluding that it made no sense for the same committee, obviously aware of Antonio's race and national origins when it hired her, to fire her for those very reasons a year later. Antonio would have to come up with convincing proof that more was at work. Without more proof, the court applied a presumption of legitimacy to the committee decision. (*Antonio v. The Sygma Network*, No. 05-1374, 10th Cir., 2006)

Replacing disabled worker with another can limit bias claim

To prove discrimination, employees must show that it's more likely than not that their employer discriminated based on the employee's protected characteristic (age, disability, gender, race, etc.).

That's difficult to prove if the same supervisor who hires the employee in question also does the firing. Plus, discrimination is nearly impossible to prove if the replacement shares the same protected characteristic as the fired employee.

Recent case: The Children's Museum of Pittsburgh fired Yvonne Wilson, a 57-year old female with disabilities, for alleged insubordination. The museum replaced her with a 59-year old deaf woman who needed multiple accommodations. Wilson sued for age and disability bias, but the trial court dismissed the case, saying that Wilson couldn't show enough bias. (*Wilson v. Children's Museum of Pittsburgh*, No. 05-CV-1748, WD PA, 2006)