BusinessManagement DAILY

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Respond to shifting burdens of proof in discrimination lawsuits

Over the years, the Supreme Court has developed a framework for testing whether an employer's actions are evidence of discrimination or the result of legitimate business practices. The test is somewhat complicated.

If you're sued, your attorneys will use the evidence you have (mostly your employment records, policies and handbooks) to construct a defense to allegations that you discriminated on the basis of race, religion, national origin, disability, sex or age.

The test (often referred to as the *McDonnell-Douglas* burden-shifting test) has three parts that shift the burden of proof of wrongdoing back and forth between the plaintiff and the employer. It works like this:

Step 1: Burden on the employee

The plaintiff must first present some proof that she was the victim of discrimination and was a member of a protected class, such as being a woman, a minority, over age 40 or disabled. Then she must show evidence that the protected characteristic was a possible factor in an adverse employment decision.

Assume a black man presents evidence that he was the only worker in five years fired for poor performance. He has made a *prima facie* case.

Step 2: Employer's burden

Now the burden of proof shifts to the employer, which must show that it had a legitimate reason to act against the employee.

In our example, the employer shows the court its employee handbook, which states that workers whose productivity falls below a certain level are subject to dismissal, as well as work logs demonstrating how the plaintiff's productivity dropped below that level. The employer has now met its burden of proving that it had a legitimate, nondiscriminatory reason for the dismissal. The burden of proof then shifts back to the plaintiff.

Step 3: Back to the plaintiff

The plaintiff must now prove that the reason raised by the employer in Step 2 was merely an excuse to cover up racial discrimination. He can do this by showing that white workers with similar productivity records were not fired or that managers discussed ways to "get rid of" black workers.

Your best defense

Employers can weather the shifting winds of litigation by showing that they have specific procedures and expectations for employees and that they carefully document all employment decisions. Apply your rules equitably to everyone, and keep records showing that you've been scrupulously fair in enforcing the rules.

7600 Leesburg Pike, Suite 300, Falls Church, VA 22043-2004 (800) 543-2002

Train all supervisors to avoid even the appearance of prejudice. Point out that they also must not tolerate racism, sexism, ageism, or religious, ethnic or disability discrimination in their departments. If they turn a blind eye to prejudice at any level, their inaction will be the focus in court.

Making a prima facie case under McDonnell-Douglas

The landmark 1973 Supreme Court decision in *McDonnell Douglas Corp. v. Green* laid out a burden-shifting framework for trying discrimination cases. It also spelled out what an employee must establish to even bring a hiring discrimination lawsuit under Title VII of the Civil Rights Act. An employee must show that he or she:

1. Belongs to a protected class
2. Applied for and was qualified for a job the employer sought to fill
3. Was nevertheless rejected, and that
4. Thereafter the employer continued to seek applicants with complainant's qualifications.