

He Never Applied, But Can He Still Sue for Hiring Discrimination?



When people file discrimination lawsuits (age, race, sex, etc.) based on a hiring decision, they are typically people who have applied and been officially rejected for a job. But what if someone simply hears that the employer is favoring one gender over another for a certain job; can that person still fire off a failure-to-hire sex discrimination lawsuit?

Case in Point: David, a hospital registered nurse in Missouri, was interested in a transfer to an operating room position. He asked his supervisor if she would consider him or train him for the job. (David had no experience as an OR nurse and wasn't qualified for the job without specialized training.)

During the conversation, which took place in front of at least two other people, the supervisor told David she wanted to fill the position with a woman in order to have the right patient-to-staff mix, based on gender. She said, "I hate to discriminate against you because you're a man, but the doctors want more female nurses in the OR."

The hospital has a nondiscrimination policy, plus a policy that gives patients the right to have a health care provider of the same sex in the room during treatment.

David complained to HR that he hadn't been considered for the promotion. Still, he never filled out the paperwork needed to officially apply for the job. A woman was ultimately hired for the position.

Then David brought his complaint to the EEOC, which sued the hospital on his behalf, alleging sex discrimination.

The hospital argued that David, in fact, never applied for the job or expressed further interest after he complained about the female-preference comment.

Result: The court tossed out the case. It reiterated that, "an employee who does not formally apply must make every reasonable attempt to convey his (or her) interest in the job to the employer before he or she may prevail in a discrimination claim ... Here, (David) did not make every reasonable attempt."

The court noted that, under rare circumstances, an employee or applicant may be excused from actually applying for a position if there's an atmosphere in the workplace that makes it perfectly clear it would be pointless to apply. That wasn't the case here, so he cannot sue. ([*EEOC v. Audrain Healthcare*](#), No. 13-1720, 8th Cir., 2014)

3 Lessons Learned ... Without Going to Court

1. Think twice before settling bias suits by people who don't apply. Applicants (or employees looking for

transfers or promotions) have to make a reasonable effort to apply for a job before they can sue for hiring discrimination.

2. Recognize the significance of this case. It was an important test case for the EEOC. A win likely would have opened the litigation floodgates to failure-to-hire claims in which the applicant or employee didn't apply for an open position and could still sue. The commission wanted to expand the scope of cases where not applying doesn't forestall a lawsuit alleging failure to hire or promote. Currently, applicants and employees have to show that applying would be futile before they can skip that step. That's a high burden for them to meet.

3. Manager training could have avoided all of this. This case also highlights the high cost of not training supervisors to watch both what they say and how they say it. While it might have been fine for the supervisor to explain why the hospital believed it needed a woman in the operating-room job, coming right out saying so was probably what triggered this EEOC lawsuit.