

Keep some records from HR decision-makers

Sometimes, it makes a lot of sense to build a virtual wall between HR staff who handle discrimination complaints and manage litigation and those who review applications and requests for promotion.

That helps thwart claims alleging failure to promote or failure to hire, since the decision-maker won't know about earlier litigation and therefore can't use that knowledge to reject an application—which a jury could see as retaliation.

Recent case: Charmaine, who is black, filed a discrimination lawsuit against her employer, the Long Island Rail Road, over a demotion and performance improvement plan she had been placed on.

As the case worked its way through the legal system and after it was over, she regularly applied for promotions and job openings. Then, after the railroad had rejected each of her applications, she sued again. This time, she claimed retaliation. She alleged she had been turned down because she had filed her earlier lawsuit.

But the LIRR came to court armed with documents showing that the HR staff in charge of each position she had applied for had no knowledge of her previous complaints or lawsuits. The HR office was organized so the professionals who reviewed applications had access to personnel records, including attendance records and discipline, but had no access to internal complaints, EEOC filings or litigation.

Because that part of HR didn't know about Charmaine's past litigation, the court reasoned, it could not have been a factor.

In addition, the railroad presented extensive information on the specifics of each rejection, including company policies that prohibited promoting employees with specific attendance violations or who were on a performance improvement plan.

Charmaine couldn't show that these weren't legitimate reasons or that she had been treated differently than other similarly situated workers outside her protected class. (*Fraser v. MTA Long Island Rail Road*, ED NY, 2018)