

THE INSIDE PERSPECTIVE

LABOR AND EMPLOYMENT LAW SOLUTIONS FOR EXECUTIVES AND HR PROFESSIONALS



SMITH MOORE LLP
ATTORNEYS AT LAW

December, 2005

Great Minds Don't Necessarily Think Alike (About Discrimination)

To succeed with a discrimination claim in court, employees who have no direct ("smoking gun") evidence of discrimination must first be able to prove:

- (1) membership in a protected class (e.g., hispanic, female)
- (2) adverse employment action (e.g., termination)
- (3) satisfactory job performance, and
- (4) replacement by a person outside of the protected class (e.g, white, male).

The purpose of requiring this prima facie case is to screen cases out of the court system that do not give rise to an inference that discrimination might have occurred. The employer who hires a female candidate to replace a discharged female employee is not generally thought to have discriminated against the discharged employee based on her gender – the new hire tends to disprove any bias against females.

However, replacing a minority employee with another individual from the same protected group may not be enough to avoid a discrimination claim. Discrimination cases turn on proving the motivation of the person who made the decision in question. When the hiring manager is not the same person as the terminating manager, the hiring manager's decision to hire a minority candidate does not necessarily mean that the terminating manager's decision to discharge a minority employee was free from discrimination.

The lesson for employers is clear:

- To protect against discrimination claims, ideally the decision maker for termination and replacement should be the same person or group.
- The decision maker is the person or persons who actually make the decision.
- The employer cannot insulate itself from liability by establishing a "formal" decision maker who merely rubber stamps a decision effectively made by someone else.

TIP

Replacing a minority employee with an individual from the same protected category may not, in some cases, be enough to avoid a meritless discrimination claim. To reduce the possibility of such a claim, employers should consider vesting authority for hiring the replacement in the same person(s) who make the discharge decision.



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