

# Employment Discrimination Ruling Carries Many Lessons

BY MARK E. TERMAN, ESQ.

**A** recent U.S. Supreme Court ruling making it easier for workers to win discrimination suits against their employers has some important lessons for businesses. The decision in *Desert Palace Inc. v. Costa* deals with job discrimination cases in which race, sex, religion or national origin is a factor, among others, in an employee's termination or disciplinary action.

## THE CASE

A former employee of Desert Palace, a large hotel operator, sued the company for gender discrimination. During the trial, the jury heard evidence that the plaintiff was the company's only female warehouse worker, she was singled out for "intense stalking" by one of her supervisors, she received harsher discipline than men for the same conduct, she was treated less favorably than men in the assignment of overtime and supervisors repeatedly "stacked" her disciplinary record and used or tolerated sex-based slurs against her.

Company witnesses testified that the plaintiff constantly had problems with management and co-workers, which led to a series of escalating disciplinary sanctions ranging from warnings to denial of privileges to a suspension.

The plaintiff was fired after she had a physical altercation in a warehouse elevator with a male co-worker. The male employee, who had a clean disciplinary record, received a five-day suspension.

## MIXED MOTIVE

At the close of evidence, lawyers presented arguments about what legal standards will be given to the jury in this "mixed motive" discrimination case. This meant that there was evidence that the decision to fire the employee was based on lawful, good faith business reasons (she was always at odds with and ruining the morale and productivity of her co-workers and supervisors) and on an unlawful factor (gender).

The company's counsel argued that precedent in mixed motive cases required "direct evidence" of discrimination, such as writings or decision-makers' testimony, that said the plaintiff was fired because of her gender.

Plaintiff's counsel argued that recent federal civil rights law amendments do not impose a direct evidence requirement, but rather only require evidence that gender was a "motivating" factor to establish that the employer engaged in an "unlawful employment practice."

There was no "smoking gun" direct evidence at this trial. The judge instructed the jury that the employer could be liable if it believed that gender discrimination was a motivating, but not the only, factor for the termination. With that requirement eased, the jury rendered a verdict of more than \$360,000 for the plaintiff.

## LESSONS LEARNED

By ruling that the plaintiff didn't need to present direct evidence of discrimination, the Court opened the door for plaintiffs to recover for discrimination, even if companies have a non-discriminatory reason for actions against employees.

To state the obvious, employers must not base personnel decisions even in part on unlawful factors such as age, race, color, national origin, disability, religion, gender or sexual preference.


Also, this ruling eliminates an employer's chance to pick apart a case where no direct evidence of discrimination exists.

But the Supreme Court left untouched the employer's opportunity to fend off claims for monetary damages in cases where the jury believes that the employer would have taken the same disciplinary steps against an employee in the absence of illegal motivating factors.

In these cases, plaintiffs may only win court orders to stop future unlawful employment practices and, possibly, recover their attorneys' fees.

But as a practical matter, many plaintiffs are not willing to go through litigation if their financial outcome is slim to none.

## DOCUMENTATION IS KEY

Finally, discipline and termination decisions—and the events leading up to them—should be well thought-out and documented. Documentation need not be formal or lengthy, but should be made at about the same time as the events themselves and show that the problems were brought to the employee's attention. It should also show that the employee had a fair chance to correct the problems and that any discipline is meted out in an even-handed way among all employees for similar level offenses. 



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