

## Manager/Supervisor Risk Management

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A twice weekly e-mail training for YCPARMIA members

### TOPIC: EMPLOYMENT DISCRIMINATION

The California Fair Employment and Housing Act protects the right of all people to seek, obtain and hold employment without discrimination based on race, religion, color, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, pregnancy, sexual orientation or age (over 40). These are the protected classes, and form the basis for any discrimination claim. In simple terms the claimant must be able to prove that they were discriminated against because they are a member of one or more of these classes.

A quick comment on why we are concentrating on the state DFEH instead of the federal EEOC. There is an agreement between the two agencies which provides that a charge filed with one is forwarded to the other, and the EEOC automatically defers jurisdiction to the DFEH. The DFEH is also broader with more protected classes, and offers more generous damages and time limits. DFEH receives about 18,000 claims a year; in these claims the top five protected classes are sex (31%), mental or physical disability (20%), race/color (20%), age (15%) and national origin/ancestry (7%). Termination (50%) and harassment (25%) are the main adverse employment actions alleged in the DFEH complaints.

Taking a very general approach, the prima facie case requires that the Plaintiff prove that they:

- were a member of a protected class;
- were qualified for the position sought or was performing competently in the position held;
- suffered an adverse employment action (e.g. termination, demotion, denial of promotion), and
- some other circumstance suggests discriminatory motive.

The employer, in turn, tries to rebut the allegations by producing evidence that they had a legitimate, nondiscriminatory reason for their employment decision. The plaintiff then has a chance to show that the employer's proffered non-discriminatory motive was false, or a pretext.

If you, as a supervisor are considering taking an adverse employment action against one of your people, get the early involvement of your HR Department or legal counsel. Recognize the obvious; the first question you are going to be asked is whether the claimant is a member of a protected class. With their help, you need to set out and document the basis of your decision with an eye towards proving that you have a legitimate and nondiscriminatory reason for what you are proposing. Make the adverse employment decision a group decision. Most important of all, recognize the importance of paper, especially employee evaluations. If the adverse employment action is inconsistent with these past evaluations it becomes difficult to sell the nondiscriminatory reasons for the employer's actions.

The issues of whether a person is a member of a protected class, whether they are qualified, and whether there was an adverse employment action are pretty straight forward. The real battle is over whether the employer's motive was discriminatory.

Next topic: Discriminatory Motive