

## Manager/Supervisor Risk Management

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A twice weekly e-mail training for YCPARMIA members

### TOPIC: DISCRIMINATORY MOTIVE

As stated before, the status of a claimant as a member of a protected class, and the adverse employment action are pretty straight forward issues. Whether the claimant was qualified or performing their job competently is a factual determination that will often turn on documentation. The last element, discriminatory intent, is a more likely area of conflict, with each case turning on its unique set of facts. A limitation needs to be noted – We are confining this training to individual “disparate treatment” cases; the plaintiff is alleging that they were intentionally treated less favorably than other employees because of their membership in a protected class. We are not going to look at “disparate impact” cases where an entire protected class has been negatively impacted by an employer’s actions.

The DFEH looks to see if “whether a preponderance of all the evidence demonstrates that the adverse employment action was caused at least in part by a discriminatory motive.” The evidence can be direct or circumstantial with the claimant trying to show that intentional discrimination occurred by raising a rational inference (we just don’t see employers saying we are firing you because you are a member of a protected class). The employer counters the alleged discriminatory motive by producing evidence that their action was motivated by a “legitimate, nondiscriminatory reason.” The employee then has the opportunity to attack the employer’s reason by introducing evidence to show that it was not true, or a pretext. This back and forth process really illustrates the distinction between allegations and evidence.

Defense of the claim is going to turn on the employer’s ability to justify the action that they have taken against the employee with documentation and evidence to prove that there was no discriminatory intent. Legitimate business reasons for the actions taken, including economic factors, the employee’s unsatisfactory performance, employee misconduct, workforce reduction and realignment are all commonly considered. Strict adherence to the employer’s own policies and procedures is also essential.

The positions of the two sides are polarized based on what each thinks the employer’s intent was that led to the adverse employment action. The employee claimant is positive that they have been discriminated against, and the employer is equally sure that they had no discriminatory intent. When there are possible mixed motives for the employer’s actions, the plaintiff only has to show that their membership in a protected class was a motivating factor, not the only motivating factor.

Defending employment discrimination claims generally turns on the employer’s ability to produce evidence to overcome the inference of discrimination pled by the claimant. It is the documentation that is produced, often in the normal course of business, before the adverse action is taken that is most persuasive, with the employee’s written evaluations probably being the most important.

Next topic: Hostile Work Environment