

# Discrimination Victims: Show Me The Pudding!

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There is no question that discriminatory acts occur every day. Bias based on race, national origin, religion, sex or gender, pregnancy, age, disability, sexual orientation and gender identity, continues to be a problem in employment, in housing and in public accommodations. This is true even when such discriminatory acts violate the law. While Florida does not have any law that protects people from discrimination based on sexual orientation or gender identify, Broward County, Miami Dade County and Palm Beach County have ordinances that provide such protection. The U.S. Congress is reviewing legislation that will add those classifications to federal law.

If you have been a victim of discrimination, the issue is not whether discrimination exists, the question is "how do you prove it"? Discrimination is difficult to prove. Judges think narrowly as to what is relevant to your allegation. If you allege you were fired because of your race, you will need to prove that the person who made the decision was substantially motivated to terminate you because of your race. Some judges would demand nothing less than for you to bring the person or persons responsible for making the decision and get them to testify that the reason they fired you was because of your race. How often is that going to happen?

In the summer of 2009 the U.S. Supreme Court determined that in order to prove age discrimination you had to show "but, for" causation. Meaning that "but, for" your age, you would not have been terminated. Attorneys representing employers would argue that means if the company had any other reason for the termination, or if you had some other reason for the termination, you could not prove age discrimination. If the company has financial issues (who doesn't); or claims you were making too much money (after 20 years of promotions and salary increases); or claims you had a bad attitude (because younger people with less experience you trained were promoted over you); or claims you had performance issues (because you were never properly trained on the new computer programs); or claims you had absentee issues (because of doctor appointments or caring for a loved one); or because you claim that it was not only age discrimination but also for discrimination based on gender, religion or race: then that would be enough to lose an age discrimination case based on a narrow interpretation of the Gross v FBL Investments majority opinion.

Even if the 2009 Congress reverses that decision (see bill entitled "Protecting Older Workers Against Discrimination Act" H.R. 3721/S. 1756 and contact your Congressional Representatives to support it) proving discrimination is the substantial motivating factor in the decision is still difficult. In most discrimination cases the employee has the burden of proof. You must prove by a preponderance of the evidence (the greater weight, more than 50%) that you were terminated, demoted, not promoted, not hired or otherwise negatively affected in the terms and conditions of employment because of your protected category (race, religion, national origin, age, disability, gender, sex, orientation or

gender identity). If there is no direct evidence of discrimination, i.e. "I am firing you because of your race!", then you need to prove discrimination through circumstantial evidence.

Most courts recognize what's known as a shifting burden of proof in discrimination cases using circumstantial evidence. The employee has the initial burden of proving four elements of a prima facie case by the preponderance of the evidence. Generally, the employee has to prove:

1. Membership in a protected class
2. Qualified for the position
3. People outside the protected class were treated differently
4. Replacement by person outside the protected class.

While some courts use slight variations based on the facts and issues, the employee generally has to prove those four elements by the greater weight of the evidence. If the employee meets that burden, then the employer merely has to articulate a legitimate, nondiscriminatory reason for making the decision you are complaining about. They just have to say: financial issues; you were making too much money; you had a bad attitude; performance issues, etc. Then the burden falls back on the employee to prove that what the employer said was not true, and that really, ultimately, you were mistreated because of your protected status.

Proving retaliation cases is easier, you just have to prove: 1) protected conduct; 2) adverse employment action; 3) causal relationship between 1 and 2. Protected conduct is complaining about illegal discrimination. If you complain about harassment but don't mention its based on race, sex, religion, national origin or some other protected status, you will not be protected from retaliation. If you complain to human resources but don't say the complaint is based on race, religion, sex, etc., then they will most likely bury your complaint and take no action. If you specifically complain that you are being treated differently based on a protected category, human resources is required to investigate in good faith and take prompt remedial action.

If instead of investigating your complaint, the company investigates you, puts you under the microscope, scrutinizes your work, demotes you, finds reasons to discipline and terminate you, then you should be able to prove retaliation. Be aware that this often happens. The company will often make you a target because you complained, rather than investigate and take action against a manager who is biased or sexually harassing subordinates. That is why it is so important to file a formal complaint specifically alleging why you feel you are a victim of illegal discrimination. But remember, filing a complaint and proving illegal discrimination is very different.

If the proof is in the pudding, you need to be able to show what is in the pudding, who put it there and who witnessed it. Proving discrimination is not like tasting pudding. You can look at a bowl filled with what looks like a chocolate dessert worthy of Bill Cosby, but you need to taste it to know how it feels in your stomach. If you are a victim of discrimination, you have that queasy feeling in your gut

that tells you that you are being treated differently because of your race, religion, gender, etc. But a Judge does not taste that pudding. A judge cannot feel the slap of discrimination, all they get are people bowing down to them and waiting for them to rule from on high. That is another reason proving discrimination is so difficult.

If you need some help determining whether you have a case and how to pursue it, contact Randy Fleischer in Davie Florida at 954 472-8401.