

# RECENT RULINGS PAVE WAY FOR MORE WORKPLACE BIAS CLAIMS: 5 STEPS FOR FLORIDA EMPLOYERS TO REDUCE RISK OF TRIAL

Insights  
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Two recent court rulings provide a roadmap for Florida employees and their attorneys to take their claims all the way to trial by building a convincing mosaic of circumstantial evidence. This means that now more than ever, employers must be on their game when demonstrating the reasons for taking adverse employment actions. These decisions from the 11th U.S. Circuit Court of Appeals – which covers Florida, Georgia, and Alabama – serve as a reminder for employers to stay focused on the ultimate question in every workplace discrimination or retaliation claim: Is there enough evidence to show that an adverse employment action was unlawful? Read on for the key takeaways from the rulings and five practical steps you can take now to reduce your risk of going to trial in light of these rulings.

## More Than One Route

You may be familiar with [the three-part burden-shifting framework](#) that is generally used to prove discrimination and retaliation when there is no direct evidence. Under this framework:

- an employee must establish an initial case of discrimination;
- then the employer has the opportunity to show a legitimate, nondiscriminatory reason for the adverse employment action; and
- then the burden shifts back to the employee to show that the employer's reason is actually a pretext for unlawful

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But in two recent rulings (which you can find [here](#) and [here](#)), the 11th Circuit reminded employers that this framework is not the only way to prove such claims. Indeed, employees can rely upon a range of circumstantial evidence to support their claims. Specifically, the 11th Circuit identified three nonexclusive categories of circumstantial evidence that can raise a reasonable inference of unlawful conduct:

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- evidence of suspicious timing;
- ambiguous statements by the employer; or
- other information from which unlawful intent may be inferred (such as evidence of systematically better treatment of similarly situated employees or pretext).

Ultimately, the employee must present a story, supported by evidence, that would allow a reasonable jury to find that the employer engaged in unlawful retaliation or discrimination. What can you do to demonstrate that there is not circumstantial evidence of discrimination or retaliation? Below are five steps you can take now to help you defeat such claims in the early stages of litigation.

### **Step One: Develop Job Descriptions for Each Position**

Job descriptions not only help attract suitable candidates for roles, they also provide clarity on the expectations and duties associated with each particular job. Effective job descriptions should reduce any misunderstandings between you and your employees regarding their roles.

Ultimately, job descriptions can serve as a benchmark for key performance indicators for performance reviews and create a clear understanding of each employee's responsibilities from their first day of employment.

### **Step Two: Create an Effective Performance Management System**

To reduce the risk of suspicious timing and ambiguous statements, employers should create an effective performance management system that requires goal setting, on-going monitoring, and year-end feedback. Performance feedback should include tangible examples of successes and opportunities for improvement. The process should be

transparent to employees and consistent from year to year. Here are a few practical tips to consider:

- Develop an annual timeline with designated periods for goal setting, mid-year check-ins, and year-end evaluations.
- Train your managers on the importance of effective performance management to make it a priority rather than a bureaucratic task.

It is vital that managers provide honest feedback and constructive criticism to avoid the appearance of ambiguous statements. For example, if an employee receives average performance reviews and is fired for poor performance, the employee may argue that the performance reviews and the reason for the termination are in conflict.

### **Step Three: Establish Written Workplace Policies and Procedures**

Consider providing a copy of the company's workplace policies and procedures to each employee during onboarding and ensure that each employee signs an acknowledgement. Managers should also be trained to recognize policy violations and understand the importance of consistent and uniform practices in the workplace.

By clearly communicating the policies and procedures, employers can increase transparency and set expectations for progressive discipline. Additionally, by providing examples of policy violations, managers can reference them in any written disciplinary action and demonstrate that progressive discipline should not come as a surprise to the employee.

### **Step Four: Be Consistent with Progressive Discipline**

No termination should come as a surprise. Employers should establish a progressive discipline policy in writing that is signed and acknowledged by every employee. Managers should undergo training to understand the progressive discipline policy and how to document policy violations to establish a clear record. Human Resources should also track and monitor disciplinary actions to ensure consistency across the organization. By ensuring consistency, employers can not only eliminate arguments of systematically better

treatment of other employees but can also demonstrate consistent application of the workplace policy at issue.

### **Step Five: Document Conversations**

By following up with employees via email or text message, you can create a written record of workplace conversations and reduce the risk of those conversations being misconstrued in the future. Creating written records can help you demonstrate what was discussed and agreed upon, or any action items identified during the conversation. Additionally, written communication can demonstrate that the employer took reasonable steps to communicate clearly and follow up with employees regarding their concerns.

### **Conclusion**

Implementing these best practices can promote clarity and accountability, and it creates protection for employers while establishing and maintaining expectations in the workplace. If you have any questions about strategies or best practices, feel free to contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [our Florida offices](#). We will continue to provide tips, guidance, and updates on this and other workplace topics, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox.