

December 2002 What Would You Do?

Your biggest competitor was just hit with a class action sex discrimination lawsuit. Your company is about to restructure. Gordon Gossip tells you that employees are meeting to discuss their belief that the selection criteria may be unfair. What Would You Do?

Big money and bad publicity – two characteristics of a successful discrimination class action and two reasons to take Gordon’s comment seriously. Class claims of employment discrimination are on the rise. Rather than be blind-sided, you can take action now to increase your chances of defeating a class action later.

- **Are you a target?**

Although no company is immune from a class action, certain types of organizations are more apt to be targeted. Class claims are often aimed at large, publicly traded companies, entities with well-known names and establishments that have a relationship with the public.

In addition to recognizing whether you are a typical target, there are several signs that a class claim may be brewing. First, when a company in your industry is sued, it frequently leads plaintiffs’ attorneys to sniff around similar entities. Second, internal complaints from groups of employees, a wave of EEOC charges, a sharp increase in employee requests to see their files or similar signs of employee discontent are red flags. Third, massive corporate restructuring or downsizing is often perceived as unfair and may lead affected employees to consider group legal actions.

- **What makes or breaks a class action?**

Group employee discrimination claims generally focus on an employer policy or practice that often unintentionally causes protected groups (i.e. women or minorities) to receive less favorable treatment. Frequently, these claims rely on practices that afford management considerable discretion. The class argues that, without the aid of objective criteria, management is able to promote, hire or retain employees who are like them (most often, white men) and exclude equally qualified minorities.

To succeed on a claim, the class must do more than merely allege disparity. They must prove it. The hallmark of the current swell in discrimination class actions is statistical evidence. In a recent class race discrimination lawsuit, for example, the plaintiffs pointed to statistical data that broke down the race of executives and management employees as compared to hourly workers. According to the Plaintiffs’ figures, blacks held 24 % of the lowest four paying job positions at the company. Yet, blacks held only 1.9 % of the highest four positions in the company (13 out of 692 positions). Based on these statistics, the plaintiffs argued that the company had a glass ceiling that kept blacks from advancing to upper management. The judge concurred, finding sufficient evidence of pervasive discrimination to certify the class discrimination claim.

- **Audit your practices and know what your statistics show!**

The key to avoiding class action claims is to safeguard against the type of evidence that attorneys rely on when they bring these suits. Put yourself in the shoes of the Plaintiffs' attorney – what type of things would she like to see?

Before you embark on this self-evaluation, ask your attorney to direct your work and communicate all results and steps with counsel so that that your analysis is protected from disclosure under the attorney-client privileges. Otherwise, you might be creating discoverable evidence for the plaintiffs' lawsuit.

Start your evaluation by auditing employment decisions, like hiring, promotions and layoffs. If your review shows a disparate impact on a particular minority in your workforce, you need to dig further into the reasons for this result and take steps to change it. Make sure that your company has and follows objective criteria for employment decisions. Ironically, objectivity is most important, yet least often occurs, in decisions related to upper management. Thus, the perception of an impenetrable glass ceiling exists at many corporations.

You should also conduct your own statistical analysis of your workforce. If that analysis demonstrates a dearth of any minority group in upper management positions as compared to your general workforce, the result should give you pause. Investigate the reasons for these results. Are minorities not applying for these positions? Are qualified minority applicants rejected? Once you understand the reasons for any disparity, work to change the trend.

Successful class action lawsuits generally carry multi-million dollar price tags. A company is well advised to take proactive steps now to avoid claims later.

The What Would You Do? is based on a fictional situation. The response is not intended to provide legal advice but only to provide a general discussion of potential issues. Individual situations may require different action.

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