

# Employers Need to Articulate Clear and Reasonably Specific Grounds for Employment-Related Decisions

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## SUMMARY:

***In a recent case decided by the US Court of Appeals for the District of Columbia, when the employer's admissible evidence was limited to a vague reason explaining why it did not promote an employee, the appeals court ruled that the employer failed to meet its burden of proffering a legitimate and nondiscriminatory explanation for its decision. In *Figueroa v. Pompeo*, the court explained that it is the employer's burden to produce evidence of a clear and reasonably specific explanation for its employment-related decisions so that the employee has a full and fair opportunity to present evidence to rebut the employer's explanation.***

In a recent employment discrimination case, an employer tried to defend its decision not to promote a particular employee by asserting that the "candidates who were promoted were better qualified than the plaintiff." However, the United States Court of Appeals for the District of Columbia in *Figueroa v. Pompeo* held that this type of insufficiently substantiated assertion without evidence that demonstrates clear and reasonably specific reasons for the employment decision, will not suffice.

In making this decision, the appeals court focused on the second step of the well-established three-step burden shifting paradigm used by courts when examining employment discrimination cases based on circumstantial evidence of an employer's discriminatory intent. The three-step process is as follows:

- First, the employee must establish a *prima facie* case, which essentially means that (a) the employee must be a member of a protected class and qualified for the position, (b) the employee was rejected for the position, and (c) the employer selected someone outside of the protected class for the position.
- Second, if the employee asserts a *prima facie* case, then the burden will shift to the employer to articulate a legitimate, non-discriminatory reason for its action.
- Third, if the employer meets its burden of production, then the burden shifts back to the employee, who must prove that the employer's stated reasons are merely a pretext for discrimination.

While steps 1 and 3 are the employee's burden, step 2 is the employer's burden. For years, step 2 was a low burden for employers, who could simply take the position that the rejected employee was less qualified for the position and courts would quickly move on to the step 3. However, in *Figueroa v. Pompeo*, the appeals court raised the bar on what is needed to satisfy step 2. The appeals court explained that in order to satisfy step 2, the employer must produce evidence of a "clear and reasonably specific explanation" for its employment decision. While this can be accomplished by using subjective criteria, the employer must present evidence as to how it applied these subjective standards to the employee's particular circumstances. The appeals court emphasized that without specific reasons as to why other applicants were better qualified, an employee is denied the opportunity to disprove his/her employer's assertions.

Moving forward, all employers (especially those in DC) should make sure to have clear and reasonably specific non-discriminatory reasons for hiring, firing, and promotion decisions to defend against employment discrimination lawsuits. While the employer is not obligated to share these reasons with the employee at the time of the employment-related decision, a prudent employer should have the necessary documents to support its decision if a claim should arise. Vague reasons like "we hired the best person for the job" or "the applicant did not meet the requirements," without a more detailed explanation (and evidence to back it up), will not be sufficient to satisfy step 2.

This case reinforces the importance of maintaining strong documentation supporting employment-related decisions that include clear articulation of the reasons for the decision. While we suggest that employers use objective factors when making these types of decisions, subjective factors (if non-discriminatory) can

be used if the employer can articulate a clear and reasonably specific grounds for the subjective assessment and explain why other candidates were evaluated more favorably.

If you have any questions regarding your hiring and promotion practices, please contact the employment attorneys at Paley Rothman.