

Supreme Court and Eleventh Circuit Clarify Discrimination Law **BY Keith White and Kimberly Doud**

To establish a claim of discriminatory failure to promote, a plaintiff must prove that he or she was: (1) a member of a protected class; (2) qualified and applied for the promotion; (3) rejected despite these qualifications; and that other equally or less qualified employees who are not members of the protected class were promoted. Once the plaintiff has established a *prima facie* case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. If the employer meets this burden of production, usually by showing that the selected applicant was more qualified, the plaintiff must then establish that the employer's proffered reasons for the employee's rejection were *pretextual*.

Several years ago, the Eleventh Circuit colorfully described its standard for establishing *pretext* as being when "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." In the absence of a contrary decision by the U.S. Supreme Court, a decision of the Eleventh Circuit controls in Florida. Recently in *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), the United States Supreme Court unanimously rejected this standard as unhelpful and imprecise. In doing so, the Court noted other standards articulated in the federal courts; however, the Court declined to define a precise standard that would govern pretext claims based on superior qualifications.

The case arose when two African-American male superintendents applied for promotions to shift manager positions. A white, male plant manager ultimately selected two white males to fill the positions. Evidence existed that the plant manager had on some occasions referred to each of the African-American male superintendents as "boy," which the superintendents argued was evidence of discriminatory animus.

In addition to overruling the Eleventh Circuit's pretext standard regarding qualifications, the Court found that the term "boy," standing alone, could be evidence of discrimination depending on the speaker's meaning as derived from context, inflection, tone of voice, local custom and historical usage. Therefore, the Court ruled that the Eleventh Circuit's decision that modifiers or qualifications were necessary in all instances to render the disputed term probative of bias was erroneous.

Ash is instructive because it reiterates the need for appropriate, professional language in the workplace. Management level employees should take care not only in the words they choose and how they use them (inflection and tone), but also in the local custom and historical usage of those words. For example, the Merriam-Webster Online Dictionary includes as its first definition of "boy" the following: "*sometimes offensive*: a male servant."

Since *Ash*, the Eleventh Circuit has clarified the standard necessary for a plaintiff to rebut a proffered legitimate and non-discriminatory reason for the failure to promote: the plaintiff must show that the disparities between the successful applicant and his or her own qualifications were "of such a weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." Although this remains a high standard, it is still unclear how courts in the Eleventh Circuit will evaluate qualifications in failure to promote cases and whether plaintiffs will be more successful in surviving summary judgment. Therefore, it

is essential that management, human resources, and legal counsel conduct an appropriate comparative analysis of all applicants' qualifications before making promotion or hiring decisions.