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## **Biased information taints neutral decision**

**By Lawrence Peikes**

Tackling the issue for the first time, the [1st U.S. Circuit Court of Appeals](#) ruled that an employer may be held liable for discrimination when unbiased decision-makers rely on information manipulated by another employee harboring a discriminatory motive.

During 12 years with Hertz Equipment Rental Corp., John Cariglia was promoted three times and held the position of national equipment sales manager. When Hertz president Daniel Kaplan eliminated that position in 1992, Kaplan asked Cariglia to become branch manager of the founding Boston office. Over the next four years, Cariglia revived the office, turning a branch that suffered three straight years of financial losses into the most profitable branch in the Northeast. Not surprisingly, Cariglia received above average ratings on each of his 1993-1995 performance evaluations from James Heard, the division vice president for the Northeast region.

Following a profitable year in 1994, Cariglia and Heard discussed a strategy to diminish tax liability by incurring additional expenses to offset the branch's profits. They decided to allocate between \$25,000 and \$30,000 to repaint large lifts, known as "booms." Although Cariglia advised Heard that the booms could not be repainted immediately because they were being rented to customers, Heard indicated that it was unimportant when the booms were actually painted, as long as the money was expensed in 1994. Moreover, Heard knew that it was customary not to repaint the booms until shortly before resale.

In June 1996, motivated by his perception that Cariglia was "over-the-hill," Heard ordered an audit of the Boston branch. When the audit turned up no inappropriate conduct, Heard ordered the auditor to "dig deeper," until eventually, the auditor returned a report rating the Boston branch as "poor," and listing five areas of concern.

In response to the audit and concerns about business practices at the branch, Kaplan and Gerry Plescia, Hertz's vice president of operations, requested an internal security investigation. The investigation, conducted by Hertz's local investigator, elicited no evidence of any wrongdoing on the part of Cariglia, but again identified five areas of concern, including the payment to a vendor to paint booms that had yet to be painted. Despite knowing that the plan was, and always had been, to paint the booms when Hertz was preparing to sell them, Heard informed Kaplan and Plescia that the booms remained unpainted and that the money paid could not be accounted for. Based on this information, Kaplan and Plescia terminated Cariglia.

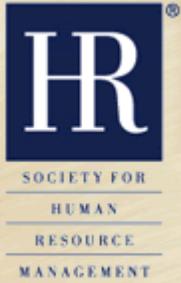
Cariglia filed a discriminatory termination action, based on Massachusetts state law, in Massachusetts Superior Court. Hertz removed the case to federal court, and the district court found for Hertz on all of Cariglia's claims. Specifically, the court held that although there was evidence of Heard's discriminatory animus, there was no discrimination by Hertz because Heard was not the decision-maker, and there was no evidence that Heard's discriminatory animus was shared by or otherwise "infected" the people who actually made the termination decision. The court also declined to impose liability on Hertz on the basis that Cariglia's termination did not result from Heard's actions. Cariglia appealed.

Although the 1st Circuit agreed that Heard was not a decision-maker, the court refused to allow Hertz to "launder" its decision to terminate Cariglia by attempting to remove Heard's influence from the decision, noting that the decision was predicated on false and misleading information presented by Heard.

Addressing the trial court's determination that Cariglia failed to demonstrate that his termination was "because of" discrimination, the appellate court ruled that the proper inquiry was not whether Heard had ever discussed his age bias with the decisionmakers, but rather whether Heard's conduct had infected the discharge *process* by manipulating the information relied on by the decision-makers.

The court held that if the district court finds on remand that Heard failed to reveal pertinent information about the 1994 conversations involving painting of the booms, then the process by which Cariglia was discharged was infected by Heard's non-disclosure.

[\*Cariglia v. Hertz, Equipment Rental Corporation, 1st Cir., No. 02-2199, April 5, 2004.\*](#)



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**Professional Pointer:** Employers cannot insulate themselves from liability for discriminatory employment decisions merely by having a tiered system for making employment decisions. This case suggests that introducing more people into the decision-making process actually increases the risk of having a biased supervisor contaminate decisions, rather than making them more objective. To remove the threat of liability, employers must identify the source of all information being relied on and fully investigate before making decisions that may adversely affect a person's employment. HR professionals can play a critical role in the termination process by asking the questions that will ensure that all material information has been disclosed and considered, and by testing the validity of the non-discriminatory reasons offered. Tough questioning and checking to see that decisions are fully supported by documentation remains the best way to prevent discipline and discharge decisions from becoming infected by those with improper motivations.

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