

Clear and Consistent Reasons for Termination Essential in Defending Discrimination Suits

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In most discrimination cases employers are required to articulate a legitimate, non-discriminatory reason for taking an adverse action against an employee. When an employer is able to do so, and the employee is unable to prove the offered reason is false, the employee will normally lose the case. For this reason it is important that employers carefully determine the reason for any adverse decision, clearly communicate it to the employee, and not deviate from it in subsequent communications or litigation proceedings.

A recent First Circuit decision points out why this approach is crucial. In *Velez v. Thermo King*, 2009 U.S. App. LEXIS 22718 (1st Cir. 2009), the Court of Appeals found an employer's failure to initially state a clear reason for an employee's discharge, followed by changes in its reasoning, was sufficient to believe it fabricated the reasons for termination.

The plaintiff, Jose Velez, worked for Thermo King for some 24 years, most recently as a Tool Crib Attendant. The company terminated him after believing he had stolen company property and sold it for his own profit. Thermo King, however, never provided Velez with a specific reason for his termination. Shortly after being discharged Velez filed an age claim with the EEOC.

In response to the EEOC complaint, the company stated Velez was fired for accepting gifts from Thermo King suppliers. In response to his later ADEA suit the company stated he was fired for receiving supplier gifts, *and* for selling company property and vendor gifts to other employees in violation of company policy.

The Court was troubled by the lack of consistency in the company's position, as well as the ambiguity of the policy later relied on. It also cited the treatment of younger employees who were not discharged after being accused of similarly violating company policy. It went on to state that Thermo King's shifting explanations, ambiguous policy, and disparate treatment of younger employees support the conclusion that its explanations for Velez's discharge were pretextual and that a jury could reasonably find the true motivation was age.

This case highlights the importance of having clear policies that are consistently enforced, providing employees accurate reasons for their termination, and adhering to the proffered reasons in any subsequent discussions or litigation.

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