

Employer loses appeal over 'shifting reasons' for firing

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The 1st U.S. Circuit Court of Appeals extended the definition of "shifting explanation" when it recently ruled that an initial absence of an explanation for an employee's termination can be grounds for a discrimination claim, lawyers say.

In *Vélez v. Thermo King de Puerto Rico*, the 1st Circuit held that a U.S. District Court judge's ruling in favor of an employer on an age discrimination claim was improper.

Thermo King had fired the plaintiff after the company's private investigator alleged that the man had stolen company property and sold it. But because the company failed to articulate its reason for the firing at the outset and then offered "shifting explanations" as the lawsuit advanced, a three-judge 1st Circuit panel ruled that there were triable issues on the question of pretext.

The ruling seems to extend the definition of "shifting explanation" to include "going from no explanation to actually providing an explanation," said Boston attorney David Conforto, who represents employees. "It appears to be the first time the 1st Circuit has held that an employer's failure to articulate the reasons for a termination before litigation equals pretext for discrimination."

Vélez "isn't the usual case where [the employer] changed their story to something completely different," said Lisa M. Burnett, a lawyer at Foley Hoag in Boston who has written a client alert warning employers about the case. "All the reasons that [Thermo King] gave were legitimate, and they were not inconsistent with each other. Normally, you wouldn't expect an employer to get in trouble over that."

Robert S. Mantell, president of the Massachusetts Employment Lawyers Association, agreed that the decision breaks some new ground but said he was not surprised by the ruling.

"When a company tells the [Equal Employment Opportunity Commission] one thing, and then the court another thing, that's a problem," said the Boston attorney, who represents employees at Rodgers, Powers & Schwartz in Boston.

The 21-page decision is Lawyers Weekly No. 01-305-09. [The full text of the ruling can be found by clicking here.](#)

Carlos M. Vergne-Vargas of Puerto Rico was counsel for the employee on appeal. The employer was represented by Puerto Rico attorney Edwin J. Seda-Fernández.

'Be really consistent'

Burnett said Vélez serves as a warning to employers who may be tempted to avoid discussing the reasons for an employee's termination out of caution or even politeness.

"I think the problem here was that they were almost trying to be too nice when they fired [the plaintiff], and that ended up costing them at summary judgment," she said. "If they had brought out all of the reasons for his termination at the beginning, they probably would have been better off."

In light of the decision, Burnett is advising her clients to "be really consistent in the reasons that you're giving when you're discharging someone" and "not to hold back."

Conforto agreed that the decision might encourage employers to "come clean with the reason why employees are let go and not hide the ball. Employers have to tell the person why they're let go to prevent any type of shifting explanation argument from arising later on," he said.

If detailed justification for the termination is provided upfront, attorneys representing employees will be better able to evaluate claims at the outset of a case, he added. "There, we would know exactly what the reasons were for the termination versus with an employee who comes in and says, 'Well, I don't know why I was let go.'"

Mantell, who prevailed in *Haddad v. Wal-Mart*, a high-profile discrimination case recently decided by the Supreme Judicial Court, said he finds another element of the Vélez ruling interesting: its conclusion that the company's

employment policy was too vague.

"That was an issue in Haddad," he said. "[The court found that] it's unfair to hold employees responsible for complying with vague policy."

The language could open a new avenue for claims based on the "fairness" of a termination, he said.

"In this way, discrimination law may be in a sense coordinating with unemployment benefits law, which has long recognized that it is unfair to terminate someone where the policy is not clear," he said. "That's just a short step away from this line of cases - the Haddad case and this case."

'Different reasons at different times'

José Vélez worked for defendant Thermo King in Puerto Rico from 1978 to 2002, when he was fired at the age of 56. Until shortly before his dismissal, Vélez's employment record was unblemished.

When Vélez was fired, Thermo King did not give him a reason. After Vélez filed an administrative complaint, the defendant's human resources director responded with a claim that the plaintiff had been terminated because he had accepted gifts from Thermo King suppliers.

When Vélez later filed suit in federal court, Thermo King's answer stated that he had "received gifts, favors, services, gratuities, and products from Thermo King's suppliers and vendors without authorization of Defendant and in clear violation of a Company policy."

Further, Thermo King asserted for the first time that the plaintiff was fired because he had "sold Thermo King's property to other employees and admitted to Thermo King that he sold items received from vendors and suppliers."

The District Court granted summary judgment for Thermo King in January 2008, and Vélez appealed.

In awarding Thermo King summary judgment, the trial judge determined that Vélez could not raise a genuine issue of material fact of whether Thermo King's stated reasons for firing him were a pretext for age discrimination.

The 1st Circuit disagreed, finding that there were "genuine issues of material fact relating to the defendant's stated reason for firing the plaintiff," Judge Kermit V. Lipez wrote for the unanimous panel.

"Thermo King did not initially provide Vélez with any reason for firing him," he wrote. "One month later, [Thermo King told] the EEOC that Vélez had been fired for violating the company's policy on receiving gifts from suppliers. It was not until over a year later that Thermo King, responding to this lawsuit, first said that Vélez had been fired for stealing and selling company property."

"The fact that the employer gave different reasons at different times for its action surely supports a finding that the reason it ultimately settled on was fabricated," the court concluded.

Those shifting explanations became more suspicious when considered along with Thermo King's "ambiguous" company policy about gifts from suppliers and the company's disparate response to similar conduct by employees other than Vélez, Lipez wrote.

Although Thermo King argued that the plaintiff's admitted acceptance of gifts from suppliers was a "clear violation" of company policy, "the record permits a contrary finding," Lipez wrote, pointing out that the policy by its own terms did not apply to items of small value or even to selling gifted items.

"Nonetheless, in light of the shifting explanations given for Veléz's dismissal, the inescapable ambiguity about whether the Code of Conduct even precludes Vélez's admitted behavior in accepting and selling the small value gifts adds to the suspicion that the company's reliance on the policy may be pretextual," the judge found.

Lipez also stressed that Vélez's evidence of disparate treatment was "unusually strong." Vélez showed that at least three younger Thermo King employees were not fired despite their complicity in the theft and/or sale of company property.

"Based on the evidence in this case, a jury could find that such disparate treatment existed, exposing the pretextual nature of Thermo King's proffered explanation for firing Vélez and revealing that Thermo King's true motivation was age discrimination," Lipez said.