

1st Circuit: Inconsistent Explanations for Termination Cited in Reversal of Judgment

11/6/2009

By Michael G. McClory

Although the U.S. Supreme Court recently held that the federal Age Discrimination in Employment Act places the burden on the plaintiff to prove that age was the “but-for” cause for the complained-of adverse action, plaintiffs who do not have direct evidence of age discrimination still may prove their cases by using the long-standing three-stage burden-shifting framework set forth by the Supreme Court in 1973, according to the 1st U.S. Circuit Court of Appeals.

Thermo King de Puerto Rico hired José Vélez in 1978 and employed him until terminating him in 2002 following an internal investigation into stolen company property. When interviewed during the investigation, Vélez admitted to periodically receiving gifts of low value from suppliers and occasionally selling those items to co-workers. Vélez, who was 56 years old at the time of termination, had an unblemished employment record with Thermo King up until that time. When it terminated Vélez, Thermo King did not offer a reason for termination.

In 2002, Vélez filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) and the Puerto Rico Department of Labor’s Anti-Discrimination Unit. Responding to that charge, Thermo King explained that it had terminated Vélez because he violated company policy by accepting gifts from Thermo King suppliers. Vélez disputed that the receipt of gifts violated policy. Without making a finding, the EEOC issued a right to sue letter, and in 2003 Vélez filed a lawsuit.

Responding to the lawsuit, Thermo King explained that it had also terminated Vélez because he sold the gifts from Thermo King suppliers, along with other Thermo King property, to company employees. The trial court granted **summary judgment** in favor of Thermo King, and Vélez appealed to the 1st Circuit.

The 1st Circuit reversed the grant of summary judgment and remanded the case to the trial court. Explaining its decision, the 1st Circuit harmonized the recent Supreme Court decision in *Gross v. FBL Fin. Servs. Inc.*, 129 S. Ct. 2343 (2009), with the burden-shifting framework previously established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In *Gross*, the Supreme Court held that a plaintiff must “establish that age was the ‘but-for’ cause of the employer’s adverse action.” The 1st Circuit explained that in the absence of direct evidence, such as an eyewitness to the age discrimination, the three-part *McDonnell Douglas* burden-shifting framework applied. Under that framework:

The plaintiff must establish a **prima-facie** claim by showing that he or she was at least 40 years old at the time of termination from a position for which he or she was qualified and that the employer subsequently filled the position.

The employer must articulate a legitimate nondiscriminatory reason for the termination.

The plaintiff may prove that the reasons offered were not true but were instead a pretext for discrimination.

Quoting *Gross*, the 1st Circuit said that “[u]ltimately, the plaintiff’s burden is to prove ‘that age was the “but-for” cause of the employer’s adverse action.’ ”

Applying this to reverse the grant of summary judgment in favor of Thermo King, the 1st Circuit said that there was sufficient evidence for a finder of fact to rule in favor of Vélez.

The appellate court noted that Vélez could establish a prima-facie case because all parties agreed that

he was over 40 years old and had been terminated, the evidence—including his 24-year employment history—would allow a finder of fact to conclude that he was qualified for the position, and Thermo King replaced him.

Moreover, the appellate court also concluded that the evidence would allow a finder of fact to determine that Thermo King's explanation for the termination was a pretext for age discrimination. "We find several aspects of the evidence that, taken together, are more than sufficient to support a fact-finder's conclusion that Thermo King was motivated by age-based discrimination, and which thus raise a genuine issue of material fact that defeats summary judgment," the court stated. "These include Thermo King's shifting explanations for its termination of Vélez, the ambiguity of Thermo King's company policy and the resulting uncertainty as to whether Vélez violated it, and, most importantly, the fact that in response to arguably similar conduct by younger employees, Thermo King took no disciplinary action."

Vélez v. Thermo King de Puerto Rico, 1st Cir., No. 08-1320 (Oct. 16, 2009).

Professional Pointer: *Vélez* highlights the importance of at least two things. First, employers should have clear, easily understood policies. The appellate court noted that Thermo King's policy permitted receipt of "items of small value commonly exchanged in business relationships" without defining "small value" and without saying anything regarding the selling of such items. As a result, the ambiguity in the policy could permit a fact-finder to conclude that Vélez did not actually violate the policy. Second, employers should provide a coherent and consistent explanation for termination—or other adverse action—at the time of termination.

Michael G. McClory is an attorney with Bullard Smith Jernstedt Wilson, a Worklaw® Network member firm in Portland, Ore.

Editor's Note: This article should not be construed as legal advice.

Society for Human Resource Management

1800 Duke Street
Alexandria, Virginia 22314
USA

Phone US Only: (800) 283-SHRM
Phone International: +1 (703) 548-3440

TTY/TDD (703) 548-6999
Fax (703) 535-6490

Questions? [Contact SHRM](#)
[Careers](#) @ [SHRM](#)

©2009 SHRM. All rights reserved.