

First Circuit Upholds Employer's Win in Retaliation Suit

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Employment, Labor, Workforce Management

On November 1, 2022, in *Dusel v. Factory Mutual Ins. Co.*, the First Circuit Court of Appeals held that “close temporal proximity” alone does not establish pretext as this evidence “must be considered alongside the . . . record.” Nor does mere close temporal proximity establish pretext where the employer has a legitimate business reason for taking adverse action against the employee, and more particularly, where the employer subsequently discovers the employee’s misconduct in a separate, unrelated matter. *Dusel* is a win for employers because it signals that engaging in protected activity will not immunize an employee from the consequences of misconduct that violates company policy if the employer enforces its policy consistently and documents the reasons underlying the employee’s discipline.

Background

The plaintiff Thomas Dusel, worked for the defendant, Factory Mutual Insurance Company, d/b/a FM Global (“FM Global”), a commercial property insurer, for approximately thirty-five years. During that time, Dusel received no discipline. When terminated, Dusel held the titles President and Chief Executive Officer for FM Global’s subsidiary, Hobbs Brook Management (“HBM”), based in Waltham, Massachusetts.

The Investigations

In 2015, an HBM employee complained to the Human Resources department that HBM’s VP, Kevin Casey, engaged in harassing and other inappropriate behavior. HR investigated and concluded it lacked sufficient evidence to establish that Casey had violated company policy. Dusel never observed Casey’s purported misconduct but “participated” in the Casey investigation by voicing his disagreement with its outcome. In 2018, the same employee complained to HR that Casey had engaged in “workplace misconduct” after initially notifying Dusel, who encouraged her to contact HR. In addition, Dusel allegedly participated by “pass[ing] along the employee’s initial complaint to his supervisors and then attending three interviews with HR where he reported witnessing Casey acting aggressively toward employees. Again, HR completed its investigation and concluded it lacked sufficient evidence that Casey had violated company policy.

FM Global Restructures HBM & Dusel Complains

Soon after, in March 2018, FM Global decided to restructure HBM's organization. As part of this decision, FM Global relocated HBM's management team to its corporate headquarters in Rhode Island. For Dusel, these changes meant that he (and Casey) would continue to report to Alex Tadmoury, but at FM Global headquarters. Unhappy with his increased commute and what he deemed "diminish[ed] [] job responsibilities," Dusel complained, through letters sent via counsel, that the company's restructuring reflected masked retaliatory animus towards him for participating in the 2018 investigation. In the last letter sent by his lawyer, Dusel alleged that the company had retaliated against him by rating him as "meets expectations" in his May 9, 2018 performance evaluation.

FM Global Discovers Dusel's Improper Cell Phone charges and Food Theft

In July 2018, FM Global discovered violations of several company policies by Dusel. First, Dusel charged the company for his wife and daughter's phone lines for several years without reimbursing the company, which the company discovered while conducting an audit related to another HBM employee. During the investigation, Dusel removed his wife and daughter from his company phone plan and then told investigators that "none of his family members had phone lines charged to HBM's company account" without clarifying that he had charged his wife and daughter's phone lines until the month before. Second, FM Global contemporaneously discovered—and security footage confirmed—that Dusel had, on eighty-seven occasions, entered the company cafeteria after hours with an empty bag only to leave with the bag overflowing with food. With these discoveries in hand, the company terminated Dusel's employment for violating FM Global's code of conduct and misappropriating company services and property.

Dusel sued FM Global, alleging age discrimination and retaliation in violation of the Massachusetts Anti-Discrimination Statute. FM Global moved for summary judgment, which the district court granted as to both claims, holding that Dusel had failed to state a prima facie case. Dusel appealed, and the First Circuit affirmed on separate grounds.

Decision

In affirming summary judgment for FM Global, the First Circuit held Dusel failed to carry his evidentiary burden to establish that the company's stated reason for his discharge was a pretext for retaliation. The First Circuit concluded that it did not need to decide if Dusel's participation in the Casey investigations and sending letters with "informal" complaints constituted protected activity because Dusel had failed to provide evidence to disprove the company's asserted legitimate, non-discriminatory business reason for terminating his employment, i.e., his improperly charging personal lines to the company's account, attempting to conceal this behavior from FM Global's investigators, and engaging in extensive, surreptitious food theft after-hours.

Moreover, the First Circuit rejected Dusel's argument that the "close temporal proximity" between his alleged protected conduct and his discharge combined with Dusel's "significant track record of positive performance . . . [created] an inference of causal connection [between] his protected activity [and] termination" was sufficient to show pretext. To establish pretext, the court held, a plaintiff must produce enough evidence from which "a reasonable jury could supportably conclude 'that the employer's explanation is not just wrong . . . but so implausible that the employer more likely than not does not believe it.'" While the First Circuit acknowledged that a "close temporal proximity" might support an inference of pretext, it explained that the "evidence must be considered" in context. Looking at the record, the First Circuit found that no reasonable juror could infer pretext based on the time elapsed between Dusel's alleged protected activity and his discharge. In making its ruling, the court emphasized FM Global's uncontradicted evidence that it discovered Dusel's misconduct

through an unrelated matter. The court further noted that Dusei's "significant track record" did not detract from the company's evidence of Dusei's subsequently discovered misconduct, which supported its legitimate, nondiscriminatory reason for terminating him.

Takeaways

Dusei is a favorable decision for employers as it clarifies that engaging in protected activity alone does not shield an employee from the consequences arising from misconduct that violates company policy. Employers who maintain such policies should enforce them conscientiously, consistently, and document all behaviors and incidents that underly employee discipline.

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