

First Circuit Holds That Employer's Shifting Explanation for Termination Was Sufficient to Raise Jury Question in Age Discrimination Case

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A recent decision by the Court of the Appeals for the First Circuit is a reminder that employers should carefully and thoroughly articulate their reasons for terminating an employee at the time of the termination. In *Velez v. Thermo King de Puerto Rico, Inc.*, the Court reversed a district court's grant of summary judgment to the employer in an age discrimination case because, in its view, the employer had changed its explanation for the plaintiff's termination.

In *Velez*, Thermo King conducted an internal investigation into whether employee Jose Velez had stolen company property and then sold it for his own benefit. Several employees reported that they had purchased company property from Velez. When interviewed, Velez denied that he had stolen any company property. However, he admitted that several company vendors had given him low-value items as gifts, which he had occasionally sold to co-workers. Thermo King terminated Velez's employment, but gave him no reason for the termination. At the time, Velez was 56 years old.

Velez filed a charge of discrimination with the Equal Employment Opportunity Commission and the Puerto Rico Department of Labor, alleging that he was fired because of his age in violation of the Age Discrimination in Employment Act and Puerto Rican law. In response to the charge, Thermo King's human resources director reported that Velez had been fired for accepting gifts from company vendors.

Thereafter, Velez sued Thermo King in court for age discrimination. Thermo King asserted in the litigation that Velez had been discharged for admittedly accepting gifts from company suppliers in violation of the company's code of conduct and also for selling company property to co-workers. The federal district court granted summary judgment to Thermo King, explaining that these were legitimate non-discriminatory reasons for the termination.

On appeal, the First Circuit reversed the grant of summary judgment. Because Thermo King initially had given no reason for the termination and cited only to Velez's receipt of gifts from vendors in the agency proceeding, the Court characterized Thermo King's explanation for the termination as "shifting" and held that a jury could conclude "that the reason it ultimately settled on was fabricated." Further, it rejected Thermo King's argument that Velez had admitted to violating company policy by accepting gifts from suppliers, because the company's code of conduct specifically exempted items

of small value. Although the Court acknowledged that the employer was in the best position to interpret its own policy, it found that the policy was ambiguous as to whether Velez had violated it, particularly in light of the company's shifting explanations for the termination. Finally, the Court explained that there was evidence that younger employees who admitted to buying stolen property from Velez were not terminated. The Court held that this evidence could cause a jury to reasonably conclude that Thermo King's shifting explanation for the termination was a sham for unlawful age discrimination.

Velez underscores that employers should provide a comprehensive explanation for an employee's termination at the outset, not when litigation occurs. Thermo King's focus at the agency stage only on what Velez had admitted and not on what it had learned in its internal investigation enabled Velez to suggest that the employer's explanation for the termination had changed over time. The bottom line is that an employer should not hold back its legitimate reasons for an employee's termination, even when the employee denies having engaged in any wrongdoing. Because the ultimate focus of any discrimination case is the employer's motive, *Velez* demonstrates that an employer's failure to articulate its real motivation for an adverse employment decision until litigation ensues could be the difference between summary dismissal of the case and an expensive jury trial.

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