

DEFINING “PRETEXT” IN DISCRIMINATION CASES

By Karen Sutherland

An employee can take a discrimination case to a jury by showing that he or she: 1) belongs in a protected class (*e.g.* because of race, religion, national origin, age, sex, etc.) 2) was discharged; 3) was doing satisfactory work when the termination decision was made; and 4) was replaced by someone not in the protected class (in the case of age, this means being replaced by someone significantly younger). If the employee establishes these elements, a presumption of discrimination exists and the employer must produce evidence of legitimate, nondiscriminatory reasons for the adverse action. If the employer does so, then the employee must show that the employer’s stated reasons were “pretextual” and “unworthy of belief.” Recent cases have addressed what constitutes a “pretextual” reason for taking an adverse action. Because these cases are fact-specific, they are described in detail below.

In *Griffith v. Schnitzer Steel*, the Washington Court of Appeals reversed a jury award of over \$2 million because there was insufficient evidence that the employer’s reasons for termination were “pretextual.” The employee claimed that he was Mormon and the scrap metal industry was controlled by “Jews and Italians” and that individuals who are Jewish “have a tendency to stick together,” that a co-worker made polygamy jokes, and that another co-worker asked him why he was running a scrap yard when he was not Jewish. The employee also claimed age discrimination based on the fact that he was replaced by a younger manager. The employer’s reasons for termination were that the employee had customers pay in cash after hours to avoid paying employees overtime, paid bonuses for not documenting work-related injuries, let an employee run an undocumented company store and keep the profits, and for other “disturbing management practices” in addition to monetary losses. The Court of Appeals held that the employer’s justifications were either undisputed or challenged only with the employee’s “irrelevant subjective assessments and opinions” and reversed the jury verdict.

In *Renz v. Spokane Eye Clinic*, a Washington State Court of Appeals case, the employee claimed she was fired because she complained about her boss’s offensive “sexually laden” comments about her “eating his banana,” that she should “be sure to use protection” on a dinner date, and that he had said, “on your knees again? Didn’t you spend most of your weekend that way?” Her boss overheard her tell a co-worker about his comments and extended her probationary period shortly thereafter. When the employee complained to management, her boss was ordered to have no further contact with her and the employer sent her to two other locations for a week to be evaluated by two other supervisors. The other two supervisors determined that she had not made sufficient progress in the areas of customer service, listening skills, problem solving complaints with customers, and determining patient’s needs, and her employment was terminated.

The court in the *Renz* case outlined the following standard for proving pretext: 1) the employer’s reasons have no basis in fact; 2) even if based in fact, the employer was not motivated by the stated reasons; 3) the reasons are insufficient to motivate an adverse employment decision. The court held that one could conclude that the employee was treated differently after her complaint, and that conflicting reasons for termination or evidence rebutting the accuracy of the reasons create “competing inferences” that a jury should decide.

In *Ash v. Tyson Foods, Inc.*, a February 2006 U.S. Supreme Court case, the Court held that the term “boy” is not always evidence of racial animus, but is not always benign: “[t]he speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.”

As a result of these cases, the outcome of future cases will often present fact issues that will require resolution at trial, as opposed to being resolved through summary judgment.

This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at ksutherland@omwlaw.com