

LACK OF CONSISTENCY REGARDING THE REASONS FOR TERMINATION CAN BE EVIDENCE OF DISCRIMINATION

By Karen Sutherland

LEGAL BACKGROUND

A recent Washington Supreme Court decision, Johnson v. Express Rent & Own, Inc., highlights the need to clearly communicate among managers regarding the reason(s) for employee terminations. When an employee who is a member of a protected class is terminated and claims that the termination is motivated, at least in part, by the employee's membership in the protected class, then the burden of proof shifts to the employer to show that there was a nondiscriminatory reason for the termination. This is true even in an "at-will" state like Washington where an employer can terminate an employee without cause, that is, without a reason. When the employee provides a non-discriminatory reason for the termination, the burden shifts back to the employer to show that the reason given by the employer was a "mere pretext" for discrimination. As the Johnson case highlights, when management representatives give inconsistent reasons for termination, the court will allow the case to go to a jury on the discrimination issue because the lack of consistency will be seen as proof that the actual reason was something else – namely, a desire to discriminate against the terminated employee based on an unlawful factor such as the employee's age, race, sex, religion, national origin, marital status, etc.

The plaintiff in Johnson presented evidence that two of his supervisors said they did not think he deserved to be fired and that he was doing a good job; although his employer said that profanity was a reason for termination, two supervisors said he used no more profanity than other employees; on a charge that he improperly moved payment due dates on the computer, Johnson's supervisors admitted authorizing this 3-4 times; on the charge that Johnson told customers he owned the store, one supervisor said he had heard Johnson make hundreds of calls and that he had never heard the statement; and on a charge that Johnson was dishonest about a lost TV, one supervisor said that this was not the reason he was fired. Johnson also offered evidence that his supervisors were inconsistent in stating the reason he was fired and whether the firing decision was made by one of them or all of them.

The point of these inconsistencies is that Johnson claimed he was fired because of his age. He was over 40 when he was hired and the same people who hired him later fired him. He did not have any specific evidence of age discrimination, just a comment by his supervisor that he did not fit the image for the company. Johnson interpreted this comment as being about his age because, with one exception, all of the employer's public contact employees were well under the age of 40 and all very much fit a youthful, "GQ" looking mold. The Supreme Court held that this was sufficient evidence for Johnson to take his case to a jury.

PRACTICAL GUIDELINES

- Involve all managers who work with an employee in the employee's performance review process so that there are no managers who are unaware of the performance deficiencies that

you are trying to correct. Otherwise, an uninformed manager may later state that the employee was a good performer and did not deserve to be terminated.

- Do not terminate an employee for disciplinary reasons unless other employees who committed the same misconduct were also terminated. Check with other managers to be sure there has been consistency in the level of discipline for similar acts.
- Meet with all of an employee's supervisors and managers with authority over the employee before termination to go over the reasons for termination and be sure that all of them understand the reasons.
- If there are multiple reasons for termination, be sure all of the employee's supervisors are aware of all of the reasons, including the reasons that did not directly affect their relationship with the employee.
- Find out if anyone on a managerial level who has personal experience with the employee disagrees with the termination decision ahead of time so that you can discuss the reasons with them and address their concerns. Keep in mind that any manager or supervisor could negatively impact your case in court or in an EEOC proceeding by stating that they disagreed with the termination decision, or that they thought the employee was a good employee.
- Appoint one person to be the contact person for information regarding the employee's termination. If the employee (or co-workers) seek information from anyone else, then the inquiries should be directed to the contact person to ensure a clear and consistent message.
- Managers may be questioned in court about informal discussions and break room chitchat about the reasons for termination, so avoid having these discussions.
- Managers who do not have personal knowledge of the employee's performance or the reasons for termination should not speculate with each other or with anyone else inside or outside the organization about the reasons for termination, as their comments and opinions can be admissible as evidence in a lawsuit. Since they are speaking agents of the organization, their comments and opinions may be seen as admissions on the part of the organization.
- Avoid carrying on discussions about potential terminations in e-mail because e-mail is used as evidence in court, and it can often be retrieved after it has been deleted.
- If you put any reason in writing (even an e-mail), be sure to list all of the reasons, or at least indicate that there are other reasons that are not included in this communication.

The above suggestions are broad, general comments only, and are not legal advice. Individual situations require individual analysis. For assistance with a specific situation, contact an attorney with experience in this area, such Karen Sutherland, Chair of the Employment and Labor Law Practice Group of Ogden Murphy Wallace, P.L.L.C. Karen Sutherland can be reached at (206) 447-7000 or by e-mail at ksutherland@omwlaw.com.