

Evaluating a Claim of Pretext in Terminations

The Merriam-Webster Online dictionary defines pretext as a purpose or motive alleged, or an appearance assumed, in order to cloak the real intention or state of affairs. In employment law, it is a reason given for a termination that is not found by the court to be an honest reason in an illegal discrimination case.

When there are “glaring contradictions” between the employee’s performance evaluations and the employer’s reason for taking the adverse action, the 10th Circuit may find pretext.

10th Circuit Court examples

Cole V. Ruidoso Mun. Schools, 43 F.3d 554 (10th Cir. 1996) In Cole, the reason for the termination was her inability to resolve faculty disputes that had begun to affect the quality of education at the school. In her evaluations, she got the highest possible marks on establishing and maintaining, with cooperation of staff, an environment conducive to learning. During the proceedings, the employer actually changed its offered reasons for the termination from alleged budgetary reasons to alleged staff and quality problems.

Whittington V. The Nordam Group, Inc. (10th Cir. 2005) This is a Reduction in Force (RIF) case based on age that follows a similar analysis. At the time of the RIF, the employer alleged that RIF criteria, “performance evaluations” and “disciplinary records” were the reasons that Whittington was terminated. He was the only supervisor terminated in the RIF and the oldest in his job category. That category included both production supervisors and

leads, but they both had identical job descriptions. The final selection was due to a two-supervisor situation in his unit and an additional “time on the job” criteria, which was added later, resulting in the retention of the younger man who had 5 years more experience in the job.

The personnel record showed, however, that Whittington was the only “outstanding” employee on the RIF and had an unblemished record. His former supervisor testified that he had the skills to competently supervise any of the cells in the division.

The Tenth Circuit upheld the trial court’s judgment for Whittington. It reasoned that the employer’s stated rationale for discharging him contained contradictions and procedural irregularities, which taken together could lead a reasonable jury to conclude that age was a motivating factor in the decision. The court also declined to establish a rule that a five-year age difference was insignificant.

What These Cases Mean for Counties

These cases highlight the importance of following developed criteria when terminating employees and being consistent when giving reasons for termination. Be sure to include all reasons when explaining a termination. A court or jury is far more likely to uphold a termination when the decision follows developed criteria and the stated reasons for the decision are consistent.

For more information, contact CTSI at 303-861-0507.