

When Silence is not Golden: Hard Lessons for Employers

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The U.S. Circuit Court of Appeals for the First Circuit has given employers good reason to depart from a long-accepted employment-law practice. When terminating employees, many employers have taken the advice given to Bambi by his mother: “if you can’t say anything nice, don’t say anything at all,” and have stated no reason for the termination. Now, in *Velez v. Thermo King de Puerto Rico*, No. 08-1320 (1st Cir. Oct. 16, 2009) the court reversed the District Court’s summary judgment ruling in favor of the employer and held that failure to state a reason for termination could be evidence of age-based discrimination.

The facts are simple. Plaintiff Jose Velez worked for the defendant, Thermo King, for 24 years until he was fired at the age of 56. At the time of his discharge, his position at the company was "Tool Crib Attendant," and he had been in that role for approximately eight years. As Tool Crib Attendant, he was in charge of maintaining, dispatching, and safeguarding the company's tools and maintenance materials, as well as preparing purchase requisitions for new tools and materials. Until shortly before his dismissal, his employment record with Thermo King was unblemished. In September 2002, Velez arrived at work to discover that the padlock securing an expensive chipping hammer had been broken and the hammer, which was worth over \$1,000, was missing. He immediately reported the incident to management. Instead of reporting the theft to authorities, Thermo King hired private investigators to conduct an internal investigation into the disappearance of the chipping hammer as well as other irregularities with respect to its tools and materials. The internal investigation uncovered allegations that Velez had stolen company property and sold it for his own profit.

According to Thermo King, another employee reported having paid Velez \$80 for four gallons of gray floor paint that were the property of Thermo King and admitted to facilitating the sale of four additional gallons of the floor paint to another third employee. He reported paying Velez another \$80 on the third employee's behalf and arranging for the paint to be delivered to her home. He further reported purchasing from Velez a Leatherman knife, which he believed to be the property of Thermo King and for which he paid \$20, and said that Velez had offered to sell him a paint spray gun for another \$80 but that he had refused the offer. He also admitted to stealing an impact gun, soldering rods, an adjustable wrench, and other lightweight tools from Thermo King, and reported that a fourth employee had also stolen tools. Other employees reported during the investigation that co-workers had stolen several drills and other tools from Thermo King. However, no employee other than Velez was disciplined in any way.

Velez claimed that his termination came as a surprise to him and that, at the time he was fired, Thermo King gave him no reason for its decision. However, after he filed an Administrative Complaint alleging age discrimination, Thermo King responded by reporting that Velez was fired because he accepted gifts from suppliers. Worse, after Velez went on to file a lawsuit in federal court, in Thermo King’s formal Answer, it

stated that Velez was fired for accepting gifts from suppliers in violation of company policy *and* selling Thermo King's property to other employees. To compound matters, Thermo King's formal company policy was far from clear and it terminated only Velez, allowing younger employees accused of similar offenses to keep their jobs.

The Court found that three specific factors, taken together, are "more than sufficient" to support a fact finder's conclusion that Thermo King was motivated by age-based discrimination: 1.) Thermo King's shifting explanations for its termination of Velez; 2.) the ambiguity of Thermo King's company policy and the resulting uncertainty as to whether Velez violated it; and, most importantly; 3.) the fact that in response to arguably similar conduct by younger employees, Thermo King took no disciplinary action at all. The Court considered these factors as sufficient for reversal of the District Court's grant of summary judgment for the employer. Therefore, Velez offers three lessons for employers: offer a reason for the employment decision, review the specifics of company policy before acting upon it, and treat similar situations similarly.

Offer a reason for termination. Thermo King's problems began when, at the outset, it offered Velez no reason for his termination. The Court found that Thermo King's late and inconsistent explanations for Velez's termination constituted "shifting explanations," which factor into the three stage burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and used by the 1st Circuit in age discrimination cases. Using the *McDonnell* framework, a plaintiff must establish a presumption of age based discrimination by showing that he was at least 40 years old at the time he was fired; was qualified for the position he had held; was actually terminated, and the employer subsequently filled the position, thus demonstrating a continuing need for the plaintiff's services. Contrary to the District Court, the Appeals Court found that Velez easily met the four prongs and thus shifted the burden of production to Thermo King to show that it had a legitimate, non-discriminatory reason for the termination. Thermo King could not prove the negative.

Be certain of company policy when acting upon it. Thermo King's company policy included the following statement: "If you are offered or receive any substantial gift or favor, it should not be accepted and your supervisor should be notified. This guideline does not apply to items of small value commonly exchanged in business relationships, but even in this case, discretion and common sense should be your guide." Of course, "common sense" is rarely common. Thermo King's policy left open the possibility of different interpretations. Velez admitted to accepting pens, caps, and "simple" knives. As these could be considered items of small value, the company policy offered scant justification for termination. In most situations, the company is in the best position to assess the meaning of its own policy, however, here, the Court looked to the policy and found that the ambiguity as to whether Velez's behavior violated the policy added to the suspicion that the firing was pretextual.

Treat similar situations similarly. Thermo King's defense was compromised when it was shown that younger employees had not been fired after admitting to stealing for their own benefit, knowingly buying stolen items or facilitating the sale of stolen goods. Velez was accused of selling company property for his own benefit. While

Velez's alleged offense was not precisely the same as the other employees, an exact correlation is not necessary. When considering any termination, an employer should make a conscious effort to determine whether other individuals who had demonstrated similar behavior were also terminated.

The *Velez* decision presents yet another reason for employers to make a careful, reasoned, unanimous decision prior to any employee termination. Often, different managers have different reasons for reaching the same ultimate decision. If an employer cannot "get its story straight" and communicate simply, directly and unambiguously, it may well suffer unfortunate results.