FOURTH STUDY COMMISSION—PUBLIC LAW AND CIVIL LAW

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Response of the United States Delegation:
Honorable M. Margaret McKeown, U.S. Circuit Judge
United States Court of Appeals for the Ninth Circuit
San Diego, California, United States of America

Topic: The Motivation for an Employee's Dismissal

In the United States, employees are protected by a combination of federal and state laws that cover a broad range of areas, from the minimum wage, overtime pay and workplace discrimination. This summary focuses on federal laws, although the states have their own employment laws that mirror federal law plus often provide more robust protections. Employees who challenge dismissal, including dismissal based on discriminatory practices, may file a lawsuit under either state or federal law, with remedies ranging from compensation for lost wages to punitive damages.

[1] Laws and Regulations

The federal mandate prohibiting employment discrimination is enforced by the Equal Opportunity Employment Commission ("EEOC") established under Civil Rights Act of 1964. The EEOC interprets and enforces federal antidiscrimination laws. The key federal statutes regulating discrimination against employees are:

(1) the Equal Pay Act of 1963 ("EPA"), which mandates equal pay for equal work by men and women;
(2) Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits the dismissal of an employee based on race, color, religion, sex, or national origin;
(3) the Age Discrimination in Employment Act of 1967 ("ADEA"), which prohibits age discrimination against individuals age 40 and over; and
(4) the Americans with Disabilities Act of 1990 ("ADA"), which protects those with mental and physical disabilities.

Historically, antidiscrimination laws have not covered discrimination based on sexual orientation and gender identity. However, that is beginning to change. Recently, discrimination against transgender individuals has been deemed sex discrimination under Title VII, and pursuant to a recent Executive Order signed by

President Obama, federal employers and federal contractors cannot discriminate based on sexual orientation. Additionally, a number of states prohibit employment discrimination based on sexual orientation or gender.

[2-3] Is there an obligation for the employer to give reasons for the dismissal?

In general, the answer is no. Absent a specific agreement or other understanding, the employer has no obligation to offer a reason for termination. As a practical matter, whether for legal or business reasons, an employer may often choose to advise the employee of the reason for dismissal.

The employment-at-will doctrine provides that employers can terminate employees for any legal, nondiscriminatory reason. This means that an employee can be dismissed for good cause, bad cause, or no cause at all. Conversely, under the at-will system, employees may leave their position at any time. At-will employment remains the norm in the American workplace, with all but one of the states adopting it as the default rule.

The at-will rule is not ironclad—a termination will be unlawful if it undermines public policy. For example, employers cannot dismiss an employee for refusing to commit an illegal act, invoking statutory protections, such as the right to family/medical leave, or reporting an employer's violation of the law.

In addition, employers and employees often enter into employment contracts that specify their rights and obligations. At-will employment and employment contracts are not mutually exclusive. These contracts can include an at-will proviso or displace at-will employment with specific requirements for termination. As a practical matter, many top-level executives and professional sports players have conditions of dismissal spelled out in their employment contracts. "Just cause" termination requirements are often found in union collective bargaining agreements and as part of the terms of certain public employment positions. These provisions guard against arbitrary dismissal. Employees also may be protected in certain circumstances by unwritten implied contracts.

[4] If the employer doesn't give the real reasons for the dismissal to the employee, can he still invoke them in court?

Employers are not required to disclose their reasons for dismissing an employee. If an employer is later sued, the employer is free to invoke a previously

undisclosed reason for the termination, even if that reason was never given to the employee.

Employers, however, may risk legal liability if they give conflicting reasons for firing an employee. Courts often interpret such inconsistencies as evidence of pretext—that is, an insincere reason offered as a legal veneer for discrimination. *See Villiarimo v. Aloha Island Air, Inc.* 281 F.3d 1054, 1063 (9th Cir. 2002) (noting that "shifting" and "conflicting" justifications for firing an employee can be proof of unlawful motive).

[5] What is the nature of judicial review on the ground of a dismissal: can the judge substitute his or her assessment for that of the employer and give the decision that should have been made?

Before filing a lawsuit, federal law generally requires an employee to first file an administrative complaint with the EEOC, typically within six months of being terminated. The EEOC only files employment discrimination charges in select cases. If the EEOC determines no discrimination occurred, the agency will issue the employee a "right-to-sue" letter and dismiss the charge. That letter leaves the employee free to pursue a lawsuit against the employer. If the EEOC finds potential discrimination, the agency will attempt to mediate the dispute through a process called "conciliation." Failing that, the EEOC has the power to sue the employer for violating federal discrimination laws.

Discrimination claims often lack direct evidence—rare is the case where the employer openly admits to discrimination. More often, employees or the EEOC must prove discrimination through circumstantial evidence. Recognizing this dilemma, the Supreme Court established a framework for evaluating such evidence in the landmark case of *McDonnell Douglas Corp. v. Green*. 411 U.S. 792 (1973). The employee must first establish a prima facie case that she was singled out because of a protected characteristic (such as age, race, sex or disability), which is a relatively low threshold. Once the employee shows such differential treatment, the employer must articulate a legitimate business reason for dismissing the employee—such as poor performance reviews, breach of company policy, or erratic attendance. The burden then shifts back to the employee to prove that the employer's articulated business reason is merely pretext for discrimination.

Using this framework, courts make an initial legal determination as to whether the uncontroverted evidence demonstrates that the employee was unlawfully terminated. Any material factual dispute between the parties must be resolved at a

trial, and the employee is entitled to ask for a jury to weigh the evidence. In this process, judges and juries do not decide whether the employee *should* have been fired, nor do they substitute their assessment for that of the employer. Rather, the factfinder's job is to weigh the evidence benchmarked against the appropriate legal standard—that is, to determine whether it is more likely than not that discrimination was the employer's true motive. Specifically, the employee bears the burden to show that the illegal reason was a substantial motivating factor in the dismissal.

6) What are the consequences on the employer for not giving reasons or for giving inadequate reasons:

- **The nullity of the dismissal?**
- **An obligation to continue the contractual relationship (reinstatement)?**
- **Sanctions?**
- **Civil sanctions provided by the law?**
- **Financial sanctions (damages) for a wrongful dismissal?**

Employees who have been unlawfully dismissed enjoy wide-ranging remedies. In some cases, the court might order reinstatement—giving the employee her job back. The employee may be awarded money damages to compensate for lost wages and emotional distress. These compensatory damages are intended to redress concrete losses. Additionally, employment contracts may contain a contractual provision that provides a predetermined amount of liquidated damages if an employee is dismissed.

Punitive damages, also known as exemplary damages, are a settled feature of the justice system in the United States. These damages serve to punish the defendant and deter future wrongdoing. Punitive damages are a valuable tool in circumstances where an employer's conduct is egregious. Awards can easily run into millions of dollars. For example, an employee who was subject to constant racial epithets by his co-workers was awarded $1 million dollars in punitive damages. *See Swinton v. Potomac Corp*, 270 F.3d 794 (9th Cir. 2001). In another example, an employee who sued for religious discrimination was awarded $360,000 in compensatory damages and $2.6 million in punitive damages. *See Zhang v. Am. Gem Seafoods, Inc*., 339 F.3d 1020 (9th Cir. 2003). In 2014, a jury awarded $185 million dollars to an employee who was fired because she was pregnant. Punitive damages not are without constitutional limits. In a non-employment case involving a $2.5 billion punitive damages jury award against oil giant Exxon, the Supreme Court reduced the award to $507 million and held that

excessively large punitive damages awards may violate a defendant's rights under the Due Process Clause of the United States Constitution.

Resources

Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html.

Mack A. Player, Federal Law of Employment Discrimination. (5th ed. 2004).

Rutter Group Practice Guide: Federal Employment Litigation. Gerald E. Rosen et al. eds., 2015). Ch. 11.

Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment under Title VII*, 87 CAL. L. REV. 983, 986 (1999), available at: http://scholarship.law.berkeley.edu/californialawreview/vol87/iss4/7.

U.S. Equal Employment Opportunity Commission http://www.eeoc.gov/laws/index.cfm (last visited June 11, 2015).