

2nd bite of the apple does the trick: Case dismissed

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Getting a discrimination lawsuit dismissed without a trial is never easy. Fortunately, there are multiple ways to mount a legal defense against a discrimination claim filed by one of your employees that can resolve the case in your favor before you need to face a jury. A recent case filed by the former deputy chief of the Bedford police force is illustrative.

Burden-shifting framework

In our December 2018 issue, we introduced you to Carla Beels Spencer, an openly gay woman who was terminated from her job as the deputy chief of police by the town of Bedford (see "Virginia court examines whether sexual orientation is protected by federal law" on pg. 3 of that issue). Spencer sued the town, alleging she was fired after only eight months on the job because of her sex (i.e., because she's a gay woman), in violation of Title VII. She didn't pursue a specific claim based on her sexual orientation, presumably because the status of Title VII's protection for sexual orientation remains in flux.

As we reported in December, Bedford's attempt to have Spencer's entire case dismissed based on the facts she alleged in her complaint was rejected by Judge Norman Moon of the federal district court in Lynchburg. Judge Moon dismissed a portion of Spencer's lawsuit, but he let the remainder of the case proceed to the discovery, or fact-finding, stage. Following discovery, Bedford again requested summary judgment, asking Judge Moon to dismiss the case without a trial.

At the summary judgment stage, Title VII claims based on indirect evidence of discrimination (like Spencer's case) are examined under the burden-

shifting framework enunciated by the U.S. Supreme Court in its 1973 decision in *McDonnell Douglas Corp. v. Green*. First, the employee must establish a *prima facie* (or "first impression") case of actionable employment discrimination. Then, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. If the employer is able to do that, the burden shifts back to the employee to prove the employer's reason is a pretext (or smokescreen) for actual discrimination.

Court's assessment

Using the *McDonnell Douglas* framework, Bedford argued in its summary judgment motion that Spencer both (1) failed to establish a *prima facie* case for her remaining discrimination claims and (2) failed to show its stated reasons for firing her weren't the true reasons but were simply pretext for discrimination.

In assessing Bedford's motion, Judge Moon concluded that Spencer was able to establish a *prima facie* case of discrimination by showing she (1) is a member of a protected class (i.e., she is a woman), (2) was doing a satisfactory job, (3) suffered an adverse employment action when she was terminated, and (4) was treated differently than similarly situated employees outside her protected class. At this point, the burden shifted to Bedford to provide a legitimate nondiscriminatory reason for terminating her.

The primary reason Bedford gave for firing Spencer (among other performance-related secondary reasons) was that she hadn't completed the police department's National Law Enforcement Challenge application and had lied to the police chief about her efforts to do so. The burden then shifted back to Spencer to prove the city's stated reason was a mere pretext for sex discrimination.

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Spencer faced an uphill battle in proving pretext, Judge Moon explained, because when "the hirer and firer are the same individual [as was the case here] and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." Further, Bedford was able to bolster its defense with e-mails that contradicted her discrimination claims as well as evidence that she lied about when she obtained certain documents requested by her supervisor.

Although Spencer clearly didn't agree with Bedford's explanation for her termination, Judge Moon noted such disagreement wasn't sufficient to show the employer's "decision to fire her for falsifying her records was dishonest or not the real reason for her termination." Without additional proof, the judge wouldn't allow Spencer's personal opinions to change his analysis of the deficiencies in her case.

Based on Spencer's lack of evidence, Judge Moon ruled there was no genuine dispute over the material facts in the case, and those facts failed to demonstrate Bedford had discriminated against her. Accordingly, he dismissed all of her remaining discrimination claims. *Spencer v. Town of Bedford*, C.A. No. 6:18-cv-31 (W.D.Va., May 23, 2019).

Bottom line

Judge Moon's decision in this case provides insight into the evidence you will need to get an employment discrimination case dismissed before you have to go through an expensive, and often unpredictable, jury trial. The lesson here may seem obvious, but it can be easy to forget: A legitimate reason for terminating an employee should always carry the day.

You should be proactive in gathering and preserving documents and other evidence of your nondiscriminatory reason for firing an employee contemporaneously with the decision to terminate her and any related internal investigation. That evidence will be crucial in convincing a court that any adverse action you may have taken against the employee was based on objective performance factors and wasn't tainted by discriminatory motives or stereotypes.