BARNES & THORNBURG LLP

A Smorgasbord Of Termination Reasons That Might Be Used Against You

May 13, 2016 | | Employment Discrimination, Currents - Employment Law

Douglas D. Haloftis
Partner

One of the most frequently asked questions in employment law counseling is “Can I terminate Employee X?” The better and more salient question is “For what reason(s) should I terminate Employee X?” Not all reasons are created equal. There is a perception that the more reasons provided the greater the strength of the employer’s defense. And it’s true. Each discrete reason proffered by the employer must be rebutted. So, the more, the better? No, says the Fifth Circuit Court of Appeals in a recent case, *Burton v. Freescale Semiconductor, Incorporated*. A case so rich in its parsing of the law of “legitimate, non-discriminatory reasons” that an entire law review article could be devoted to it. Nicole Burton was a “temporary employee” of Freescale Semiconductor, where she had been placed by a staffing agency, Manpower. The first two years of her employment in circuit board assembly were uneventful. She received neutral to positive employment reviews. But her fortunes changed in year three when she broke a so-called “wafer” - the board upon which microchips are seated during construction. The incident was reported and she was counseled by a Manpower supervisor. Burton subsequently inhaled fumes while on the job. A few weeks later she experienced chest pains and heart palpitations and visited the emergency room on two occasions. Burton came to believe that her symptoms were caused by her exposure to the fumes. She notified both Freescale and Manpower and then filed a workers’ compensation claim. About three weeks after her workers’ compensation claim, Burton’s manager, Bruce Akroyd, decided to terminate Burton. Burton had been caught using the Internet (an accusation which she disputed). Akroyd decided (and testified) that the incident was the “last straw.” The record, however, indicated that Akroyd was not aware of any other reasons for Burton’s termination at the time he actually made the decision. Burton was not immediately informed of Akroyd’s decision; instead, she would stay on for a few weeks to train a replacement. As the time for terminating Burton drew near, Manpower began asking for supporting documentation of Burton’s poor performance. Akroyd directed Burton’s supervisors to generate such documentation, and they did, cataloging Burton’s past shortcomings. Manpower resisted the termination because of the paltry “contemporaneous” documentation and the recency of Burton’s workers’ compensation claim. Freescale, nonetheless, insisted. Jerry Rivera, a supervisor at Manpower, was instructed to terminate Burton’s employment for “poor performance” and to inform her that it was based on four discrete incidents – two which occurred *after* Akroyd had made the decision to terminate Burton. Burton sued, claiming disability discrimination and workers’ compensation retaliation. In defending the case, Freescale and Manpower reached back into Burton’s work history to add to the list of Burton’s transgressions. Critical work assessments described in a

RELATED PRACTICE AREAS

Arbitration and Grievances
EEO Compliance
Labor and Employment
Workplace Culture 2.0

RELATED TOPICS

Discrimination
Employee Termination

two-year-old performance review and a subsequent review that indicated she had “snapped at a trainer” were now included among the broken wafer, along with the unauthorized use of the Internet and information in emails solicited near the time of her termination that reported that Burton had improperly leaned on workstations, failed to keep her nose covered, and failed to proactively complete tasks absent direction. A fully loaded arsenal of “legitimate, non-discriminatory” reasons, you say? Not quite held the Fifth Circuit, when reversing the summary judgment granted to Freescale and Manpower. The ultimate issue is the employer’s reasoning “at the moment” the questioned employment decision is made. *A justification that could not have motivated the employer’s decision is not evidence.* And with that sleight of hand, the “old and cold” complaints about Burton’s performance in stale performance reviews of years earlier and the post-termination-decision emails containing the litany of shortcomings were gone – each vanquished as irrelevant by the court. Now the employers were still left with two of the four incidents upon which they had originally relied: the broken wafer and the internet use. However, Burton had worked for an additional six months after the warning about the broken wafer, meaning, in the court’s mind, that it “clearly was not a sufficient justification for her termination” but rather a single substantiated shortcoming which left the door open for Burton to establish pretext. Burton and Manpower were not out of the ring yet: they still had the internet use. Burton had admitted that she did not dispute that her supervisor (mistakenly but honestly) believed that she was using the internet. But, alas, the memory of Akroyd – the decider – failed him during his deposition. First, he testified that he didn’t know if Burton’s internet use was one of the things that motivated his decision. Later, he testified that he learned of it the day he made his decision from Alvarez, Burton’s supervisor, and that it was indeed the “final straw.” However, Alvarez testified that she never talked to Akroyd about Burton’s performance. Alvarez tried to “clarify” her testimony later, saying that she did recommend Burton’s termination but “slightly before” the date of the internet-use incident. Where the district court had attempted to “reconcile” Alvarez and Akroyd’s testimony as “clarifying” as opposed to “conflicting,” the Fifth Circuit viewed such efforts as the improper “weighing of the evidence” for summary judgment purposes. If the reversal of the summary judgment were not enough, the Fifth Circuit continued to pour salt on the wound. It observed that a purported reason for a decision that postdates the actual decision is necessarily *illegitmate*. A jury would be entitled to find that the employers’ own proffer of illegitimate reasons to the EEOC was evidence of an improper motive! In other words, the reasons offered by the employers defensively could now be considered evidence against them. This, along with the absence of written documentation of the performance issues where the employers tried to buttress those issues with *documentation compiled after the fact*, were now to be considered as evidence of pretext. Burton stands as a reminder that employers must identify the truly admissible “reasons” for the employee’s termination and be mindful that reasons uncovered only after reaching the decision to terminate will be discarded.