

The Critical Impact of Pretext in Employment Discrimination Cases

Working Together

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“I can’t believe you are firing me for ‘performance issues’. I received ‘exceeds expectations’ in all categories of my last five performance evaluations. You gotta be kidding me!”

“I don’t understand why you denied me the promotion to assistant manager on the basis that I don’t have a college degree. None of the last three employees that you promoted to assistant manager had a college degree. What gives?”

The above might be typical remarks of disgruntled employees who received adverse employment actions. As is almost always the case in employment discrimination cases, the employer’s proffered reason for taking the adverse action is hotly disputed. The employee claims it is merely a subterfuge; a “pretext” for a discriminatory motive.

Regardless of whether you wear an employer/management hat or you wear an employee/ union hat, the critical role that the issue of pretext usually plays in employment discrimination and retaliation cases cannot be overstated. For employers defending claims of disparate treatment, effectively rebutting allegations of pretext is critical. For employees asserting claims of disparate treatment, it is imperative to show that the employer’s proffered legitimate, non-discriminatory reason lacks credence. It is not surprising that the issue of pretext often determines the outcome in employment discrimination cases.

While there are many cases that offer a legal definition for the term “pretext,” it is essentially a false reason given for an adverse employment action that masks the employer’s true motive for the action. Proving pretext means offering evidence that the employer’s proffered reason for the adverse employment action at issue is false, phony or a sham. In other words, demonstrating pretext means showing that the employer’s stated reason for the adverse employment action is not the real reason for the action, and was intended to cover up or camouflage the employer’s discriminatory intent.

From the employee’s viewpoint, pretext may be proven in many different ways. For example, the employee may show inconsistency in the manner that the employer administers discipline. In short, any evidence that shows that the employer is not administering discipline in an evenhanded and non-discriminatory manner may demonstrate pretext. Pretext may also be demonstrated by showing that an employer’s asserted reason for taking an adverse employment action against an employee has shifted or changed over the course of litigation. For example, if an employer fires John for excessive absenteeism, and then shifts its position to

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say that the real reason for firing John was due to budgetary constraints, the finder of fact (judge or jury) may conclude that the employer should not be believed, and that its asserted reasons for John's termination are pretextual. Pretext may also be established through comparative evidence that similarly situated employees not in the plaintiff's protected class were treated more favorably. For example, five white employees were permitted to modify their work hours to attend evening college classes, but the employer would not permit Mary (who happens to be African-American) to modify her work schedule to attend an evening college class. Such a scenario may be viewed as evidence of pretext.

The issue of pretext is equally compelling in failure to promote cases. In such cases, the employee must first establish a prima facie case of discrimination by showing that he or she is a member of a protected class (for example, a woman, Hispanic or African-American), that he or she applied for and was qualified for the promotion, that he or she suffered an adverse employment action, and that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. If the employee satisfies this burden, the employer must then put forth a legitimate, non-discriminatory reason why it did not select the employee for promotion. The employee must then show that the employer's asserted non-discriminatory reason is a pretext for discrimination.

An employer's vague or subjective explanation for an adverse employment action may lead to a finding of pretext. For example, in Frederick M. Abrams v. Department of Public Safety, Abrams, an African-American detective in the Connecticut Department of Public Safety, alleged that he was wrongfully denied a transfer to the Department's homicide unit. Summary judgment was entered against him, but the Second Circuit Court of Appeals found possible pretext in the statement by Abram's supervisor that Abrams "did not fit in," and that another applicant was a "better fit." The Court concluded "the 'fit in' statements raise a genuine dispute as to whether the proffered reasons for Abrams's non-assignment to the [homicide unit] were pretextual," and sent the case back to the District Court for trial.

There are several key take-aways that employers should be mindful of in regard to pretext. First, properly document all employment related decisions by articulating clear and unambiguous reasons for adverse employment actions. Be honest and direct with your employees and focus on objective criteria rather than subjective beliefs or views. Second, recognize that changing the stated reason for the adverse employment action can be detrimental to your credibility, and may lead to a determination that your reasons are pretextual. In short, don't offer changing or inconsistent reasons for your decision. Lastly, be consistent and fair in administering employee discipline. Inconsistency opens the door for a finding of pretext and is usually viewed by juries with a healthy dose of skepticism.

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