

7th Circuit: Shifting Explanations for Employee's Termination Warrant Trial of Retaliation Claim

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By Edwin A. Keller Jr.

A black employee who was fired the same day he allegedly submitted a note complaining about alleged race-based discrimination presented sufficient evidence to have his retaliation claim set for a trial, the 7th U.S. Circuit Court of Appeals held.

Kevin Loudermilk worked at Best Pallet Co. as a laborer, where his principal task was to disassemble pallets and stack the wood for reuse. Multiple employees worked simultaneously on a "teardown machine" with laborers at one end breaking pallets into pieces that were passed to other laborers for stacking. Loudermilk contended that each side of the teardown machine should have had at least two workers, but staff was assigned in such a manner that two or more Hispanic workers would work on one side with Loudermilk working alone on the other.

When he complained about not being able to keep up, Loudermilk alleges that the Hispanic workers taunted and hurled racial epithets at him. He maintained that his various verbal complaints about his co-workers' taunts were not addressed by management.

Loudermilk began talking about filing a charge with the Equal Employment Opportunity Commission (EEOC) and took some pictures of the work area, apparently to show the EEOC how the teardown machine was set up and why it needed two employees on each side. Loudermilk asserted that his supervisor told him to stop taking pictures, causing him to reiterate his concerns about being treated differently from his Hispanic co-workers. In response, the supervisor told Loudermilk: "Put it in writing." When Loudermilk purportedly handed his supervisor a note detailing his discrimination claims the next day, he was fired on the spot.

The district court granted summary judgment to Best Pallet after accepting its argument that Loudermilk's supervisor did not read Loudermilk's note before firing him for violating company policy. The court found that Loudermilk's only evidence of retaliatory motive was the timing of his termination in relation to submitting his note, which alone was deemed insufficient.

However, the 7th Circuit disagreed, concluding that the district court failed to consider such things as the existence of evidence that the supervisor admitted to having read Loudermilk's note, but contending that he received the note a few days before firing Loudermilk and the fact that Loudermilk alleges to have made prior verbal complaints before submitting his note. Additionally, the 7th Circuit noted that while Best Pallet contended Loudermilk was fired because he had taken pictures of the work site in violation of company policy, it told the EEOC that Loudermilk was let go as part of a reduction in force only to later abandon that explanation and contend in court that Loudermilk had resigned and/or that his departure was a "mutual decision."

Further, the 7th Circuit explained that an adverse action can follow so close on the heels of a protected activity that an inference of causation is warranted given the context, and

an evaluation of context is essential to determine whether an employer's explanation is fishy enough to support an inference that the real reason must be discriminatory. Ultimately, the 7th Circuit concluded that such an inference of retaliation could be drawn in the case such that the issue should be presented to a jury.

Loudermilk v. Best Pallet Co. Inc., 7th Cir., No. 08 C 6869 (Feb. 18, 2011).

Professional Pointer: When properly viewed, the evidence in this case did not pass the proverbial "smell test." This case serves as a reminder of two important maxims: (1) very close timing between an adverse action and protected activity will result in a much higher probability that a court will find inferences of retaliatory motive; and (2) employers offering multiple, conflicting reasons for an employee's termination invariably signal retaliatory motive.

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Editor's Note: *This article should not be construed as legal advice.*

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