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Inconsistent Reasons for Termination Defeat Summary Judgment

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Special to the Legal

An employee's termination routinely goes through a well-established process. The termination decision is made by the employee's manager. It is then reviewed by a more senior manager either internally or through a grievance-like process. This is often memorialized in email or a more formal document. Either before or after this review, the employee will be told of the reason for the termination. The employee then applies for unemployment compensation and the employer responds, in writing, as to why the employee was terminated. If the employee believes that he or she was discriminated against, a charge is filed with the U.S. Equal Employment Opportunity Commission and the employer (now likely represented by counsel) responds with a position statement — after which the termination decision may proceed to litigation.

Thus, in most situations, the employer will have three or more occasions to explain the



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basis for the termination decision, likely in writing and likely without counsel's involvement. That is, the employer will have at least three occasions to ensure that it truthfully and consistently states the reason for the termination decision, even before the employee has filed a discrimination claim.

The need for consistency in explaining the basis for a termination decision was highlighted in the recent decision of *Eastman v. ReSearch Pharmaceuticals*, No. 12-2170, 2013 U.S. Dist. LEXIS 107935 (E.D. Pa. Aug. 1, 2013), where summary judgment was denied largely because of inconsistencies in the employer's explanation of the termination decision.

BACK PAIN ON THE JOB

Linda Eastman was a clinical research associate for ReSearch Pharmaceutical Services Inc. Her job was primarily to travel to the sites of clinical drug trials to monitor and manage the activities associated with the trials.

In late November 2010, Eastman contacted her manager, Tricia Byrne, asking to reschedule a site visit because of back pain, according to the opinion. Byrne said that the visit needed to occur and offered to send a replacement. Eastman, however, said that she would make the visit, which required her to drive from New Jersey to the office of Dr. Jeffrey Lumerman in Garden City, N.Y. While on site, Lumerman observed Eastman's mobility issues and offered to examine her, the opinion said. She accepted and after the exam, Lumerman told Eastman to go back to her hotel room and take a Valium (muscle relaxant), which he gave to her without a prescription.

Eastman returned to her hotel, took the medication and then got on a conference call with her

manager and others. During the call, Eastman laughed about a mishap earlier in the day. Eastman also discussed her back pain with Byrne and told her that she had taken a Valium pill given to her by Lumerman, the opinion said.

REASON(S) FOR TERMINATION

Byrne was troubled by Eastman's conduct on the call and spoke to her manager who, in turn, relayed the incident to human resources. Within a few days, two senior managers and the executive director of human resources, Jim Jackson, spoke with Eastman and, at the conclusion of the call, Jackson terminated Eastman. According to Eastman, Jackson told her that she was fired for violating the company's drug policy by taking a controlled substance without a prescription. During discovery, Jackson agreed that he discussed the drug policy, but claimed that he also told Eastman that she was fired for "unprofessional behavior."

Shortly thereafter, Eastman sent an email to RPS's CEO to explain the circumstances of the telephone call and her conduct. RPS's vice president of global human resources responded and, during an email exchange, advised Eastman that she was not fired for taking a controlled substance without a prescription. During discovery, the global HR VP testified that Eastman was terminated for "unprofessional behavior" in the way that she conducted herself on the conference call.

To add to the confusion over the basis for the termination, Jackson testified during Eastman's

unemployment compensation hearing that Eastman was terminated for "unprofessional behavior" and not for violating the drug policy. During his deposition, however, Jackson returned to his contention that both Eastman's behavior and her violation of the drug policy led to her discharge. He testified that he did not list Eastman's drug use as a reason during the unemployment proceedings because he wanted her to receive benefits. The court noted that "Jackson admitted that he has misstated the truth with regard to Eastman's termination."

RPS vacillated between two seemingly legitimate reasons for Eastman's termination, either of which would likely have supported summary judgment.

INCONSISTENCY DEFEATS SUMMARY JUDGMENT

After finding that Eastman's back condition could establish that she was "disabled" under the Americans with Disabilities Act Amendments Act's relaxed definition of what it means to be "substantially limited" (which is "not meant to be a demanding standard"), the court turned to whether there was a genuine issue of fact as to the legitimate, nondiscriminatory basis for Eastman's discharge (both her unprofessional behavior and

violation of the company's drug policy). The court found that there was, based on the well-settled law that an employee may be able to establish pretext "if ... the reasons given for her termination did not remain consistent."

As discussed, RPS vacillated between two seemingly legitimate reasons for Eastman's termination, either of which would likely have supported summary judgment. The court noted that, even though Eastman understood throughout that she was fired for taking Valium without a prescription, "at various times defendant ... emphatically asserted that [she] was not fired" for this very reason.

The message of the case is "communication." RPS knew why it had terminated Eastman but did not communicate (at least not carefully) the decision to those with a need to know (i.e., throughout human resources). Communication would not have compromised the internal review, but would have allowed a decision to be made as to whether the basis for termination was well-founded and legitimate. Further, once the company made a decision to contest Eastman's unemployment compensation, it was critical that the true reason(s) for the termination be communicated, with an eye toward future litigation — a lesson that will (likely) be painfully learned by RPS. •