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## EMPLOYMENT LAW

### Employer Investigations Need Not Be Worthy of 'Sherlock Holmes'

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*Special to the Legal*

Cases decided by the U.S. District Court for the Northern District of Alabama are rarely the subject of this column. But the recent case of *Jernigan v. Dollar General*, No. 2:11-cv-01448-WMA (N.D. Ala. Jan. 31, 2013), vividly illustrates a core concept of discrimination law that has often been applied by courts in the Third Circuit: that when an employee is accused of wrongdoing, an employer does not need to prove the employee's guilt beyond a reasonable doubt in order to take an adverse action.

#### CASH MISSING

Mary Jernigan, 49, was the "third key manager" for a Dollar General store in the Birmingham, Ala., area. In that role, she was often responsible for counting down the cash register drawers and for making bank deposits. She was supervised by an assistant store manager and store manager, both of whom were younger than her, according to the court's opinion.

On June 25, 2009, Jernigan prepared



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the afternoon deposit. She counted the cash register drawers twice and then placed the cash in excess of \$100 in a deposit bag. She sealed the bag, wrote a deposit slip for \$1313.58 and took the bag to the bank where it was deposited. The next day, however, the bank notified Dollar General that the deposit was short \$150. Jernigan was suspended pending investigation shortly thereafter, the opinion said.

As part of the investigation, the store manager spoke to the bank manager about the bank's investigation. In accordance with Dollar General's policies, the loss prevention manager interviewed Jernigan and reviewed relevant documents. He then submitted his report to the area human resource manager, who recommended that Jernigan be terminated — which she was.

Jernigan was terminated, not for theft, but for "failure to protect company assets." As the court noted, "Dollar General interprets its rule regarding protection of assets to make the buck stop with the last employee who handled missing money, whether or not the shortage can be proven to have been caused by that party's negligence or misconduct." While the court observed that the policy may be "unwise or unfair," it does not violate any anti-discrimination laws.

#### AGE DISCRIMINATION CLAIM

Jernigan brought suit against Dollar General, claiming that her age was the "but for" cause of her termination in violation of the Age Discrimination in Employment Act. Her principal argument was that "not only [did she] not take the money but ... the investigation of the incident was inconclusive and did not establish how the loss of the money occurred," the opinion said. She pointed out that Dollar General did nothing to investigate the bank teller, nor did it review any other information from the bank. Nor was there any evidence that the company reviewed video

footage of Jernigan preparing the deposit, which apparently was available, the opinion said.

## SHERLOCK HOLMES NOT NECESSARY

The court rejected this argument, noting that not only was there an investigation, but there was no evidence that the company departed from its normal investigative procedures. The loss prevention manager “was not required to duplicate the performance of Sherlock Holmes” in order to provide a credible basis for Dollar General’s termination decision. While the LPM “may not have lived up to Jernigan’s standards ... Jernigan was not authorized to set the standards for Dollar General’s investigations.” The court found that under the circumstances, “it certainly was not possible to prove beyond a reasonable doubt that any particular person or persons committed a criminal act, and such was not required of Dollar General.”

In order to establish pretext, Jernigan was required to show that Dollar General’s decision was not an honest one. The court held that “Dollar General may have been wrong to believe [the bank] over Jernigan” but such a choice was not “irrational.” “The mere fact that this investigation was inconclusive and provided no basis for deciding exactly what happened is not enough to discredit defendant’s stated reason for its decision,” the court said.

The court went on to reject Jernigan’s attempt to show disparate treatment through evidence that the company considered the assistant manager “loose operationally” — finding that she had

failed to demonstrate that the incidents in question made her “similarly situated” to the manager in question. Summary judgment was, therefore, granted to Dollar General.

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## THIRD CIRCUIT LAW

The law in the Third Circuit would almost certainly dictate the same result. Initially, the U.S. Court of Appeals for the Third Circuit recently applied the Supreme Court’s *Gross v. FBL Financial Services*, 557 U.S. 167, 176, (2009), “but for” standard to an ADEA disparate treatment case in *Abels v. Dish Network Service LLC*, No. 12-1291, 2012 U.S. App. LEXIS 25384, \*14-15 (3d Cir. Dec. 12, 2012).

More significantly, the Third Circuit has consistently held that an employer’s legitimate belief that the employee has engaged in wrongdoing supports summary judgment over an employee’s protestations of innocence. In *Watson v. SEPTA*, 207 F.3d 207, 222 (3d Cir. 2000), the court affirmed summary judgment in favor of the employer in practically the same language used by the *Jernigan* court: “The employment discrimination laws involved here

permit an employer to take an adverse employment action for a reason that is not ‘true’ in the sense that it is not objectively correct. For example, if an employer sincerely believes that an employee has stolen company funds and discharges the employee for this reason, the employer should not be held liable under the statutes in question just because it turns out that the employee did not steal the funds and that the employer’s reason for the discharge was in this sense not ‘true.’”

This is consistent with the well-settled law in the discrimination context that it is the perception of the decision-maker that is at issue — and the employee’s evidence must be directed to disproving that the decision-maker relied upon the reason set forth, not the absolute truth of the reason itself. In the context of employee misconduct or malfeasance, the employer need only show that the decision-maker relied upon credible facts and made a rational decision regarding the employee’s involvement. Under those circumstances, without evidence of disparate treatment, the employer’s decision will stand against an assertion of pretext. •