

OK to add more reasons for termination, as long as they're consistent with first rationale

Some former employees who sue over alleged discrimination try to discredit their employers' explanations for discharge, arguing that the employer provided inconsistent or shifting reasons.

Even so, employers have a great deal of flexibility about how they explain the reason an employee was fired. In fact, Title VII doesn't require employers to provide the employee being fired with any reason for the discharge at the time he is let go.

Plus, if an explanation is provided, there's nothing preventing the employer from expanding that explanation later during the litigation process, as long as the expanded rationale is consistent with the original explanation.

Recent case: Aaron worked as an account executive for a company that makes packaging and displays for retail merchants. Aaron got mediocre reviews, with an overall rating of 3 out of a possible 5, and lower scores on some factors. He was told he did not communicate effectively in the office.

Aaron's problems accelerated after he was assigned a new supervisor, a Jewish woman. Aaron is not Jewish.

Around the same time, one of the accounts he managed began lodging complaints about display shipments that arrived late or not at all. The new supervisor leaned on Aaron to improve. After more missed deadlines and poor communications, he was fired.

At the time, he was told that the reason was "difficulties interacting with coworkers and failure to support" the client that had complained about late shipments.

He sued, alleging that he had been fired because he is a man and not Jewish. He told the court his female supervisor had only hired women and that other management-level employees had made pro-Jewish comments such as welcoming a "Jewish resurgence" and supporting building a "Jewish empire" at work.

The employer countered with a long list of additional reasons why Aaron was fired, including additional examples of poor performance.

Aaron argued that such shifting explanations for his termination proved that the real reason was an anti-male, pro-Jewish bias at the company.

The court disagreed. It noted that employers don't have to provide a discharge reason at the time of termination at all. If they do, however, it's perfectly legal to add additional reasons later. There's no problem, as long as the new reasons are consistent with the original explanation and expand on it. The court threw out Aaron's lawsuit. (*Rooney v. Rock-Tenn Converting Company et al.*, 8th Cir., 2017)

Final note: Should you avoid providing a discharge reason when you terminate an employee? That depends on the circumstances.

If you use a progressive discipline system and the employee worked his way through various steps, you may want to mention the previous disciplinary steps. If you skipped steps, but have a clear policy that gives you the option to move to discharge in some circumstances, be sure to explain that in an internal memo (even if you don't provide the employee with a detailed explanation).

Finally, you should consider giving the employee a fairly broad explanation that you can expand upon later with specific examples. It also doesn't hurt to run the discharge by your attorney, who can help you decide how much detail, if any, to provide to the fired worker.