

AUG 27 2008

Dillon v. Ridge, 06-17297

SELNA, J., concurring in part and dissenting in part:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I concur in the court's decision to affirm summary judgment on Dillon's claim that he was denied a performance appraisal out of retaliation. However, I respectfully dissent from the court's decision to affirm summary judgment on Dillon's retaliatory termination claim, because I believe that Dillon has presented sufficient evidence to support a reasonable jury finding that the Asylum Office terminated him because he opposed its allegedly discriminatory practices.

As the court notes, the Asylum Office contends it terminated Dillon because of specified instances of insubordinate conduct. However, each of the examples of purported insubordination also represents an incident in which Dillon voiced his opposition to the policies he perceived to discriminate against Latino applicants. Thus, the actions the Asylum Office describes as insubordination are actions Dillon interprets as his ethical and conscientious pursuit of the correct and fair application of immigration law. In my view, the ambiguity inherent in the Asylum Office's proffered examples of insubordination permits an inference in Dillon's favor.

Moreover, Dillon provides additional supporting evidence of impermissible motive, including a few instances in which his disagreements with his superiors at the Asylum Office regarding legal issues impacting Latino applicants were not

well received. For example, Dillon broached his concern that the “one year rule” and its exceptions had a discriminatory effect on applicants of Latin American origin with the director of the Asylum Office and “immediately felt that [he] had made a mistake in bringing the issue to her” and that she was “hostile” to it. That director testified, describing a disagreement over a particular asylum application from a Mexican petitioner, that “Mr. Dillon didn’t want to follow the office policy. He . . . believed that headquarters was wrong and . . . didn’t want to make the changes that we did, that[,] by policy[,] we’ve always made in our office.”

All of Dillon’s disagreements with his supervisors related to his concern that Latino asylum applications were not being handled properly. This common thread could be viewed by a jury as circumstantial evidence of the fact that the Asylum Office’s true motive for terminating him was that he opposed the Asylum Office’s discriminatory policies.

In cases where, as here, the dispute centers on the employer’s real reasons for taking a particular adverse action, those motives present an “elusive factual question.” *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 733 (9th Cir. 1986). For this reason, “the decision as to any employer’s true motivation plainly is one reserved to the trier of fact.” *Lowe v. City of Monrovia*, 775 F.2d 998, 1008 (9th Cir. 1985) (quoting *Peacock v. DuVal*, 694 F.2d 644, 646 (9th Cir. 1982)).

Moreover, “very little evidence is necessary to raise a genuine issue of fact regarding an employer’s motive.” *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004) (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996)). I believe that Dillon has provided sufficient evidence create a genuine issue of fact as to whether the Asylum Office’s proffered reason for terminating him was pretextual.

Accordingly, I would reverse the district court’s grant of summary judgment for the Asylum Office on Dillon’s retaliatory termination claim.