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Court Expands Employee's Ability to Use Evidence of Comparators

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An employee may use evidence of how an employer treated similarly situated individuals to establish an element of his or her prima facie case and to establish evidence of pretext, according to the 7th U.S. Circuit Court of Appeals. Also, employees may use the same evidence regarding treatment of comparators to establish causation when the timing of an adverse employment action was suspicious.

Denise Coleman started working for the U.S. Postal Service in 1974. William Berry became Coleman's supervisor in April 2005. Almost immediately, Coleman complained of mistreatment by Berry and another supervisor, William Sove. Later, when Coleman requested accommodations related to an upcoming surgery in June 2005, she felt the mistreatment continued. Coleman filed a pre-complaint request with the Equal Employment Opportunity Commission claiming discrimination by Berry and Sove.

In July 2005, Coleman checked herself into a psychiatric unit. In her admission interviews, among other complaints, her physician identified Coleman as "endorsing ... homicidal ideation" concerning Berry. Coleman's physician informed Berry of the homicidal ideation on the date of Coleman's discharge from the psychiatric unit. The Postal Service immediately placed Coleman on emergency off-duty status without pay. After an internal investigation, the Postal Service terminated Coleman. Coleman grieved the termination decision, and an arbitrator reinstated her without back pay.

Coleman also filed two complaints with the EEOC related to her employment and termination. After Coleman's EEOC charges were denied by an administrative law judge and the EEOC, she filed suit under Title VII. The district court entered summary judgment in favor of the Postal Service because Coleman failed to establish her prima facie case and failed to show that the legitimate, nondiscriminatory reason for the termination offered by the Postal Service was pretextual. Coleman appealed.

The 7th Circuit's opinion suggested that the similarly situated analysis has too often been used as a roadblock for employees attempting to establish their prima facie case. The court advocated a flexible approach, particularly where a work rule violation—as opposed to work performance—was the issue. The court also stated that the conduct for which discipline was imposed did not have to be identical for persons to be similarly situated. As long as the employees violate the same work rule and the same decision-maker imposes discipline, employees can be similarly situated, even if they have different direct supervisors.

The court then tackled the employee's burden to show that the proffered legitimate, nondiscriminatory reason was pretextual. Importantly, the court stated that comparator treatment is relevant to show pretext, and the same evidence that Coleman used to establish her prima facie case could also show pretext. The court also stated that the arbitrator's ruling that reinstated Coleman, while not binding, contained factual predicates and analyses that gave "some boost to Coleman's claim that the Postal Service's asserted reasons for terminating [Coleman] were pretextual."

Finally, the court held that the same comparator evidence discussed above, when combined with suspicious timing, was sufficient to defeat the Postal Service's motion for summary judgment on the retaliation claim. While the 7th Circuit reiterated that timing alone was not sufficient to establish causation, timing plus evidence of pretext in the form of comparator evidence was sufficient for Coleman's retaliation claim to proceed to trial.

Coleman v. Donahoe, 7th Cir., No. 10-3694 (Jan. 6, 2012).

Professional Pointer: The 7th Circuit's use of the arbitration decision to support a finding of pretext indicates that employers should consider restricting the admissibility of such decisions by agreement.

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