

NEWS & INSIGHTS

A Case in Point: When unequal discipline becomes evidence of discrimination

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The Case

Last week, the U.S. Court of Appeals for the Fourth Circuit, which is the federal appellate court for the U.S. district courts located in several states, including South Carolina, held that a former employee sufficiently alleged a racial

discrimination claim where she claimed that multiple white or non-black similarly situated employees (comparators) engaged in similar conduct to her own but received more favorable treatment.^[1] This case is a stark reminder that consistent enforcement of policies and procedures, including disciplinary action for violations, is critical to the defense of discrimination claims, which often can hinge on comparator evidence.

The Facts

Wanda Johnson, an African American police officer employed by Baltimore City, was involved in an altercation at a nightclub while attending her bachelorette party. A fellow officer, Marlon Koushall, struck Johnson's friend in the face during the altercation. An investigation ensued and Koushall was ultimately indicted and convicted for his conduct. Johnson testified before the grand jury against him. Koushall was suspended, but never terminated. The City's Internal Affairs Department filed disciplinary charges against Johnson relating to her alleged involvement in the altercation, including charges for committing an assault, failing to notify her supervisors of the assault, and making false statements in her interview. Following the charges, Johnson was suspended without pay. Thereafter, she alleges she was forced to resign in lieu of termination.

The Law

Title VII of the Civil Rights Act prohibits an employer from discharging or otherwise discriminating against any individual because of such individual's race.^[2] A plaintiff can establish a claim through direct evidence or through a burden shifting analysis, which requires a showing of the following: 1) membership in a protected class; 2) satisfactory job performance; 3) an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination.^[3] The fourth element can be met by establishing "similarly situated employees outside the protected class received more favorable treatment."^[4]

With regard to disciplinary decisions by an employer, the plaintiff must show that her prohibited conduct was comparable in seriousness to the misconduct of similarly situated employees outside her protected class and the disciplinary measures enforced against her were more severe than those enforced against other employees.^[5] Because there is no "bright line" rule defining exactly what makes two employees "similar," and, therefore, proper comparators, courts consider whether employees 1) held the same job description, 2) were subject to the same standards, 3) were subordinate to the same supervisor, and 4) had comparable experience, education and other qualifications.^[6]

The Court's Analysis

The Court held that Johnson had alleged sufficient facts to demonstrate similarly situated employees (i.e., comparators) outside her protected class received more favorable treatment. Johnson's comparators were other Baltimore police officers who were not black, were charged with conduct such as assault and making false statements and who were suspended but not terminated. The Court found that "while no single comparator perfectly aligns with every incident of [Johnson's] conduct, the analysis does not require a one-on-one fit."^[7]

Comparators do not have to be similar in all respects, only in all *relevant* respects.[\[8\]](#)

The Takeaway

Before making a disciplinary decision regarding an employee, employers need to consider how other similarly situated employees have been treated in similar situations, understanding that the circumstances of the prior misconduct or policy violation does not have to be exactly the same as in other instances involving discipline. Although being too lenient with discipline in the past does not mean an employer must continue this practice, failure to consider prior treatment of similarly situated employees may inadvertently lead to a claim of discrimination based on one or more protected classifications under the federal discrimination laws.

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[\[1\]](#) *Johnson v. Baltimore City, Maryland; Baltimore Police Department*, [Opinion No. 25-1124](#)

[\[2\]](#) 42 U.S.C § 2000e-2(a).

[\[3\]](#) Opinion, p. 9 (citations omitted).

[\[4\]](#) *Id.* at 10(citations omitted).

[\[5\]](#) *Id.* (citations omitted).

[\[6\]](#) *Id.* at p. 11 (citations omitted).

[\[7\]](#) *Id.* at p. 14. (citations omitted).

[\[8\]](#) *Id.* at 16 (citations omitted).

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