Tenth Circuit Rules On "Termination By Committee"

Insights
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On January 21, a federal appeals court addressed whether an employee terminated by group decision (six managers) can be considered "similarly situated" to employees who were disciplined less severely by a *different* decisional group, consisting of some but not all of the same managers. Reversing the summary judgment decision of a Wyoming trial court, the U.S. Court of Appeals for the 10th Circuit stated:

Although there is no clear legal rule as to how much overlap is needed among decision maker groups for employees to be similarly situated, requiring absolute congruence would too easily enable employers to evade liability for violation of federal employment laws. The district court erroneously... insist[ed] that the composition of the decision-maker groups be precisely the same in every relevant disciplinary decision. We disagree because there is more than enough overlap to conclude the employees identified here were similarly situated to [employee].

The 10th Circuit cited the fact that five of the six decision makers who terminated the employee also participated in at least one decision in which a similarly situated employee was treated more favorably after violating the same or comparable safety rules. The 10th Circuit covers the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. *Smothers v. Solvay Chemicals, Inc.*

Facts

Steven Smothers, a maintenance mechanic for a chemical producer at a Wyoming facility, suffered a neck injury in 1994, which led to degenerative disc disease and a number of surgeries and medical procedures. The employer, Solvay Chemicals, granted Smothers' request for intermittent leave under the Family and Medical Leave Act (FMLA) because of the related conditions. According to the district court's opinion, "Some of Smothers' work partners and supervisors complained about the hardship created by Smothers' work absences," and the superintendent asked Smothers if he would work days when more employees were available to cover his work if he were absent. Smothers declined.

In 2008, Smothers proceeded to remove a part connected to a hydrochloric acid pump without following the employer's "lockout" safety procedure. A coworker offered to assist Smothers with the repair, but Smothers declined the assistance and engaged in an argument with the coworker. The coworker complained to a manager about Smothers and Smothers subsequently admitted to

removing the pump piece without following the appropriate safety procedure.

Smothers, who had been employed for eighteen years, was terminated for the safety violation and the dispute with the coworker related to the safety violation. The decision to terminate was the result of a decision by a group of six managers.

The employee filed suit against the employer claiming that the termination violated the Americans With Disabilities Act (ADA), was retaliation in violation of the FMLA and also violated state law (breach of implied employment contract). The employee claimed the real reason for the termination was unlawful retaliation and discrimination; i.e., that the employer had grown frustrated with his use of intermittent FMLA leave for a condition which also qualified as a disability under the ADA.

In support of his claims, Smothers argued that other workers had engaged in safety violations of comparable seriousness (failure to follow the lockout procedure) but had not been terminated. The employer countered that those employees were not similarly situated to Smothers because the decisions as to discipline involved different decision makers.

The employer moved for summary judgment the federal district court for the District of Wyoming granted the employer summary judgment on all three of Smothers' claims. As to the ADA claim, the district court found Smothers was not disabled, but also concluded that, as to the ADA and FMLA claims, there was insufficient evidence of pretext, rejecting Smother's similarly situated argument and stating,

Pretext cannot be inferred where one supervisor treats an employee one way and a different supervisor (or group of supervisors) treats another employee a different way given that a supervisor or a group of supervisors may see safety infractions differently.

The district court also found that the violations committed were not comparable. Smothers appealed.

The 10th Circuit's Decision

The court of appeals reversed the district court's grant of summary judgment, noting that there was evidence that other employees were treated more favorably after committing serious safety violations.

The employer argued that the comparators cited by the employee as having been treated more favorably were not similarly situated because different decisionmakers were involved in determining the appropriate discipline. The employer, who uses group decision making to determine discipline for safety violations, argued that the composition of the group that terminated Smothers was different from the composition of the group that disciplined other employees Smothers identified as treated more favorably.

treated more favorably.

The 10th Circuit rejected this argument, pointing out that five of the six decision-makers who terminated the employee also participated in at least one decision in which an employee was treated more favorably after violating the same or a comparable safety rule. In a footnote, the 10th Circuit also stated it was undisputed that the site manager was the ultimate decision maker in all discipline cases, but that its conclusion "did not rest solely on [the site manager's] role because he was many levels removed from Mr. Smothers' direct supervisor."

The 10th Circuit concluded that the district court erred by "insisting that the composition of the decision maker groups be precisely the same in every relevant disciplinary action." The Court found that there was "more than enough overlap" to conclude that the employees treated more favorably were similarly situated.

Thus, the court of appeals found that the employee established a material question of fact as to whether he was punished more harshly than similarly situated employees after comparable safety violations and as to whether the stated reason for firing him was a pretext. And the court concluded, "the showing of pretext for purposes of the FMLA claim extends to the ADA claim."

What It Means For Employers

Employees may show that an employer's defense is a pretext by providing evidence that they were treated differently from other similarly-situated, non-protected employees who violated a work rule of comparable seriousness. To be "similarly situated," the comparator employee must share the same supervisor or decisionmaker. As the 10th Circuit noted, "This is because different treatment by itself does not always indicate pretext."

Employers often cite the fact that different decisionmakers were involved in a discipline decision to show that an employee is not "similarly situated." That argument is often persuasive when a single decisionmaker is involved in a disciplinary decision.

But this case clarifies that, where employers use group decision making to determine employee discipline, an employee need not show "absolute congruence" of the decision-making groups in order to show that another employee is similarly situated for purposes of making a pretext argument under the FMLA or ADA.

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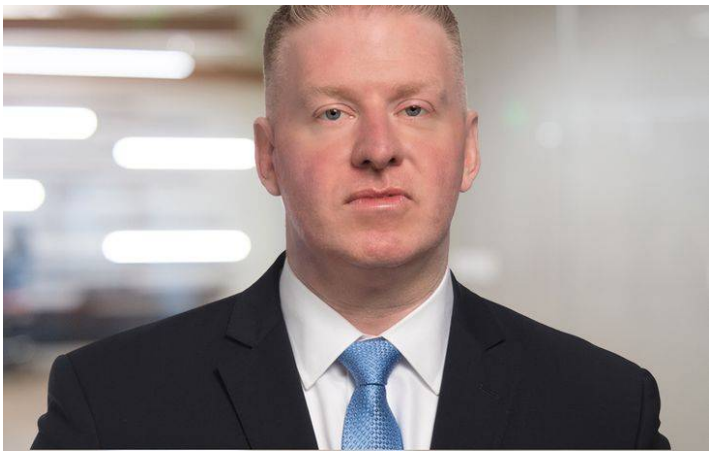

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