

Discipline and discharge: Avoid 'nearly identical employee' issue

By Matthew Deffebach

In today's corporate America, even a stabbing sometimes just isn't a good enough reason to fire someone without bringing on a lawsuit.

With an ever-expanding list of laws affecting a company's decisions regarding employees, management must carefully explore the ramifications of every determination along the life of an employee's career, from hiring to firing.

Any mistake can lead to charges that a company's decision was motivated by discrimination or retaliation for some real or imagined slight. Accordingly, every discharge, demotion or similar disciplinary measure carries a risk of expensive and time-consuming litigation.

Even without direct "smoking gun" evidence of discrimination, an employee in a protected class (sex, race, national origin, disability, etc.) may establish a disparate treatment claim if a "similarly situated" employee outside of the protected class who engaged in similar misconduct was treated more favorably by management.

Of course, the crucial question often becomes which employees are considered "similarly situated" under the law.

Comparable seriousness

A recent decision by the Fifth Circuit Court of Appeals concerning disparate treatment claims provides an illuminating example.

Javier Perez, a lieutenant with the Texas Department of Criminal Justice, was accused in August 1996 of stabbing an ex-inmate of a TDCJ facility while off-duty. Police charged Perez with felony assault.

During a subsequent Internal Affairs investigation, Perez refused to cooperate or provide a statement in his defense. According to the TDCJ, Perez engaged in behavior that "jeopardized the integrity of the agency," so the department terminated his employment.

Perez claimed the TDCJ had treated non-Hispanic employees in similar situations more favorably and sued for national-origin discrimination. He relied on comparisons with two Anglo employees, Shannon Clover and Arlen Parma, to make his case.

Clover was a lieutenant at another TDCJ unit when he was arrested for driving under the influence and killing a motorist, later pleading guilty to a misdemeanor. TDCJ reprimanded Clover and placed him on probation. Parma had entered into a plea bargain and received deferred adjudication after a drunken assault on his mother's boyfriend, which also led to a TDCJ reprimand.

During the trial, the jury sided with Perez after being instructed by the court that Clover and Parma's misconduct must be of "comparable seriousness" to Perez's misconduct for them to be similarly situated comparators. The jury believed that Clover and Parma, because they were not Hispanic, received more favorable treatment -- reprimands -- as compared to Perez's employment termination.

Nearly identical

Upon appeal, though, the Fifth Circuit Court of Appeals concluded that the "comparable seriousness" jury instruction was erroneous. Rather, for employees to be similarly situated to support a disparate treatment claim, the employees' misconduct must have been nearly identical to that engaged in by the plaintiff.

Under this "nearly identical" standard, the Court noted "significant distinctions" potentially existed between Clover, Parma and Perez; therefore, the jury may have found that the individuals were not similarly situated if given the proper "nearly identical" instruction.

The Fifth Circuit justices found that, for a comparator to be "similarly situated," a plaintiff would have to demonstrate that the comparator was treated differently under "nearly identical" circumstances.

In deciding that Perez's comparators may not have been nearly identical, the Court of Appeals relied on the type of illegal misconduct and Perez's response to TDCJ's investigation into his misconduct. Specifically, TDCJ argued that, unlike Clover and Parma, Perez had refused to explain his actions in response to the TDCJ inquiries and only Perez was accused of assaulting an ex-inmate.

The TDCJ claimed that an assault on an ex-inmate might suggest illegal activity within the prison.

These factors explained why TDCJ launched an Internal Affairs investigation concerning Perez but not Clover and Parma.

Relevant distinctions

The Court of Appeals reasoned that the distinctions proffered by TDCJ, while seemingly not relevant under the rubric of comparable seriousness, could be relevant to whether Perez, Parma and Clover's respective circumstances were nearly identical.

Aside from the legal significance of avoiding an erroneous jury instruction, the Perez decision serves as a helpful and practical reminder to employers in evaluating discharges and other ultimate employment decisions (suspensions, demotions and changes in compensation) that may affect employees in a legally protected category, such as race, sex or national origin.

If a branch manager discharges an African-American employee for theft of office supplies, but the same manager does not discharge a Caucasian employee for forgery of a check, are those employees similarly situated? Does it matter if the discharge occurred during the same time period or several months later? Moreover, would it make a difference if different supervisors made the discharge decisions or if the decisions occurred at different branch locations?

The prudent employer isolates the particular circumstances at issue and then evaluates whether it had consistently treated other employees the same for similar acts of theft. In other words, what distinctly different circumstances justified discharging the African-American employee but not the Caucasian?

The best solution for defending against disparate treatment claims continues to be the consistent and even-handed treatment of employees for their similar "bad acts."

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