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EMPLOYMENT LAW

How Analogous Must Comparator Be to Be Deemed Similarly Situated

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Special to the Legal

In *Peake v. Pennsylvania State Police*, No. 15-2669, 2016 U.S. App. LEXIS 4712 (3d Cir. Mar. 15, 2016), the U.S. Court of Appeals for the Third Circuit provided helpful guidance on the factors to consider when determining whether individuals are similarly situated. In doing so, the decision reaffirms that the analysis requires a sharply focused, fact-intensive inquiry, which takes into account various factors, including the individuals' job functions, supervisors and the specific deficiencies or misconduct alleged.

In 2009, William C. Peake, an African-American man, enlisted with the Pennsylvania State Police. Peake and other prospective troopers were required to complete an 18-month probationary period, consisting of six months of formal education at the Pennsylvania State Police Training Academy followed by a 12-month field training program. Peake successfully completed his six-month education term at the academy. When Peake graduated from the academy, he was one of four African-Americans in the 88-person cadet class.



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During the field training program, the State Police conducts periodic reviews of each trooper's performance and a general investigation report is completed seven or eight months into the field training program to assess whether a trooper should be retained, according to the opinion. The investigation report is reviewed by a probationary trooper review panel. When a trooper is found deficient, the panel performs a review of the investigation report and makes a recommendation to the commissioner of the state police. The commissioner makes the ultimate decision regarding a trooper's retention.

POOR PROBATIONARY PERFORMANCE

The State Police assigned Peake and seven Caucasian probationary troopers to the Uniontown barracks of Troop B, the opinion said. During his probationary period, Peake mishandled accident

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investigations by misclassifying two serious traffic accidents. In addition, Peake submitted both untimely reports and reports containing inaccurate factual information and grammatical errors. Critically, Peake also failed to attend magistrates' hearings, which resulted in charges being dropped in two instances. Finally, Peake exhibited problems with both his written and oral communication. As a result of these deficiencies, Peake's supervisors and colleagues, and outside agency personnel, raised concerns

about Peake's overall competency, the opinion said.

PROBATION ENDS IN TERMINATION

At the conclusion of Peake's probationary period, the commissioner terminated Peake's employment. Relying on the recommendation of the administrative panel, which was based on the investigation report, the commissioner determined that Peake did not meet the standards for a trooper given his lack of solid job knowledge and basic police skills along with officer/public safety concerns.

Only one other individual in Peake's 88-person cadet class, Trooper No. 9, a white male in Troop M, was terminated at the conclusion of the probationary period. Peake brought suit against the State Police under Title VII alleging race discrimination.

ALLEGED COMPARATORS

In support of his claim of race discrimination, Peake argued that he was given less favorable treatment than Caucasian troopers who had performance deficiencies during their probationary period. Peake identified three or four white probationary troopers in his barrack who were not terminated despite performance deficiencies and one white trooper in other barrack who, although ultimately terminated, was given what he perceived to be more of an opportunity to remediate his poor performance.

ALL PERFORMANCE DEFICIENCIES ARE NOT CREATED EQUAL

In deciding the matter, the Third Circuit performed a virtual yard stick matching exercise comparing Peake's behavior with that of his alleged

comparators. Peake came up short every time. First, the Third Circuit found that Peake was not similarly situated to the three or four Caucasian probationary troopers in Troop B. While these troopers had a combination of at-fault automobile accidents, incidents involving in bodily harm to the public and inferior productivity to Peake, the court found that they were not valid comparators because Peake's termination was not attributable to any of those specific areas of misconduct. Further focusing its analysis and signaling that the focus should remain on comparable conduct, the court noted that Peake could not "offset his deficiencies by noting areas in which he outperformed some of his colleagues in Troop B."

EVALUATORS ARE THE MOST DISTINGUISHING FEATURE

Likewise, Trooper No. 9 was also not a valid comparator. Trooper No. 9, according to Peake, had deficient driving skills, difficulties becoming familiar with the geographic area of his patrol region, difficulties with report writing, trouble conducting magistrate hearings and had at one time fallen asleep while driving. Notwithstanding the fact that Peake and Trooper No. 9 were both deficient in report writing, the Third Circuit found that they were not similarly situated because their respective performance problems were dissimilar. Further distinguishing the two was the fact that Peake and Trooper No. 9's evaluative processes were conducted by different people because they were assigned to different barracks. This was highlighted as the "most distinguishing feature" between Peake and Trooper No. 9.

Of particular significance to the court was the fact that 13 out of the 19 individuals interviewed pertaining to Peake's performance recommended that he not be retained while Trooper No. 9 only had one individual out of 16 recommend that he not be retained.

The Third Circuit upheld the district court's grant of summary judgment reasoning that Peake failed to introduce valid comparator evidence and had not established that his termination gave rise to an inference of discrimination. The court also agreed with the district court that even if Peake had established a prima facie case of discrimination, he did not show that the State Police's legitimate nondiscriminatory reasons for his termination were a pretext for racial discrimination. In doing so, the court dismissed Peake's arguments concerning the State Police's decisions to place Peake on desk duty and not to provide him with a written action plan. The court was also unpersuaded by Peake's arguments that it was rare for a probationary trooper not be retained at the conclusion of the 12-month training program.

Peake serves as a reminder that all performance deficiencies are not created equal and provides helpful guidance on the fact-intensive inquiry that is necessary to determine whether individuals are in fact similarly situated. •