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'It's Not My Fault' Argument Fails to Establish Discrimination

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Special to the Legal

"It is not my fault that I didn't do a good job." How many times have employers or their counsel heard this explanation for an employee's poor performance? In *King v. Greyhound Lines*, No. 11-7819, 2014 U.S. Dist. LEXIS 10680 (E.D. Pa. Jan. 28, 2014), the manager claiming discrimination asserted not only that his admitted errors were not his fault, but also that he had been set up to fail by discriminatorily different training at the beginning of his employment. Not surprisingly, summary judgment was granted to Greyhound and the case is an illustration of the difficulty in attempting to establish pretext by claiming that "it is not my fault."

PLAINTIFF HIRED AS BUS TERMINAL MANAGER

Alfred King, an African-American male, was hired in the fall of 2009 by the district manager, Evan Burak (a Caucasian), as the city manager at Greyhound's Philadelphia bus terminal. In that role, King was essentially responsible for the entirety of the terminal's operations.

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It was Greyhound's policy to provide each city manager with "on-boarding" training at the beginning of his or her employment to ensure complete knowledge of the job. Each district manager had the discretion to tailor the training to the new hire's particular circumstances. Consistent with this approach, Burak created a detailed training plan for King and saw to it that King went through his training between October 2009 and January 2010, the opinion said. The training was split between King's home terminal in Philadelphia and a terminal in Dallas. King testified, however, that he never received significant portions of the training set forth in Burak's plan.

Burak was new to the district manager position and his on-boarding program changed over time. Specifically, after speaking with managers from other districts in early 2010, Burak began to send his new city managers to Richmond, Va., for their entire six-week training. Notably, however, Burak sent King's successor (also African-American) to Richmond for only part of his on-boarding training, with the rest being conducted at the Philadelphia terminal, according to the opinion.

DETERIORATING PERFORMANCE

A few months after King completed his training, Burak gave him a verbal performance rating of "satisfactory," along with a small raise. At the same time, Burak indicated that there were several areas in which King should improve his performance, the opinion said.

King's first formal written evaluation in October 2010 was mixed. King's performance, however, deteriorated thereafter. In early 2011, King was seven hours late for a meeting with Burak. He also hired an employee who had not yet passed a criminal background check (contrary to Greyhound policies), who turned out to be a convicted sex offender, the opinion said. Furthermore, the performance of the Philadelphia terminal did not meet Greyhound's statistical

criteria. In this light, in February 2011, Burak placed King on a performance improvement plan, warning that he would be terminated without improvement. A subsequent performance evaluation in March continued King's downward trend and he was terminated in April 2011, according to the opinion.

The court went on to find that King's performance failures could not reasonably be attributed to any training disparity, to the extent that any existed.

DISCRIMINATION ALLEGED

King brought suit against Greyhound claiming race discrimination in both disparate treatment and retaliation. At the close of discovery, Greyhound moved for summary judgment.

Initially, King claimed that he was subject to disparate treatment on the grounds that comparable managers received "comprehensive training" while he then had an "abbreviated and erratic overview" at the beginning of his employment. King claimed that the managers sent to Richmond for the entirety of their training received a superior training experience, which qualified as an "adverse employment action." The court found that King established a prima facie case even though Greyhound established that Burak's opinion of the efficacy of the Richmond training changed over time—he stopped sending managers away from home for all of their training in early 2011. The court found that while this argument was relevant to establishing a legitimate, non-discriminatory reason for the disparate training, it did not diminish the "issue of fact" as to whether King had received inferior training to his fellow managers.

DIFFERENT TRAINING NOT ENOUGH

The court found, however, that "while King's reliance on the inference created by evidence that similarly situated individuals received different training suffices to establish his prima facie case, it is not sufficient to establish pretext." The evidence was, in its entirety, that "both protected and non-protected members received all of their training away from home, just as both protected and non-protected members were trained in whole or in part at their home terminal," the opinion said. "Being random with respect to race is not evidence of racial discrimination," the opinion said. King could not establish pretext by pointing to one member of a protected group who was subject to discrimination while ignoring "many other members of the non-protected group [who] were treated equally or less favorably." As such, Greyhound was granted summary judgment with respect to King's claim of disparate treatment.

NO PROTECTED ACTIVITY

King's claim of retaliation was also dismissed. King had claimed that an email that he had sent claiming that he was being "singled out" rose to the level of "protected activity" upon which a retaliation claim could be based. The court disagreed.

Specifically, the court found the protected activity does not encompass "very generalized complaints about unfair treatment. At a minimum, the conduct must convey a protest of discriminatory practices such that it will be understood that a complaint about an unlawful employment practice has been advanced."

While summary judgment was granted based upon King's failure to establish a prima facie case, the court went on to find that his performance failures could not reasonably be attributed to any training disparity, to the extent that any existed. The court noted that "an argument that [the employee's] deficiencies were not [his] fault or were due to circumstances beyond his control will not suffice to establish pretext." The court also found that King was unable to identify any coworkers whose performance was worse than his.

As noted, the case is the latest in a line to join the "it was not my fault" pretext graveyard. It is also useful to employers in finding that a single comparator who was treated better than the plaintiff will not establish discrimination in a sea of similarly situated employees who were not favored in any meaningful way. •