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EMPLOYMENT LAW

'Similarly Situated' Analysis Warrants Summary Judgment

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Special to the Legal

The analysis of whether employees are "similarly situated" often determines the success or failure of an employer's defense to a claim of discrimination. The analysis should extend beyond superficial similarities in order to determine whether an employee can establish that his claim is viable. This was emphasized in the recent decision *Fleet v. CSX Intermodal,* No. 17-3562, 2018 U.S. Dist. LEXIS 120256 (E.D. Pa. July 18, 2018).

17 MONTHS OF EMPLOYMENT

John Fleet worked for the freight-handling company CSX Intermodal Terminals Inc. from November 2015 until his termination on March 3, 2017. Fleet is African-American and a diabetic.

Fleet appears to have been a troubled employee from the start. Shortly after his hiring, he got into a verbal altercation with a co-worker for which he received "counseling." He also received counseling for violating safety rules on six occasions between May and August 2016. Additionally, in May 2016, Fleet was counseled against eating a sandwich during a safety meeting, also in violation company policy. Fleet did not dispute that he began eating a sandwich as the meeting commenced, but subsequently claimed that he was discriminatorily disciplined, comparing himself to a Caucasian co-worker who finished a sandwich at the beginning of a safety meeting. Fleet complained about this perceived disparate treatment by calling CSX's ethics hotline in November 2016. During that same call, he complained that his supervisor was following him to the bathroom and around work. Fleet had previously reported that he was diabetic and had missed a few days of work for a diabetic episode. Fleet's request for FMLA leave for his diabetes was approved when he applied in November 2016, on the one-year anniversary of his hiring.

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INFLAMMATORY COMMENTS ON THE RADIO

On Dec. 30, 2016, Fleet heard a co-worker complaining over the radio about workers "taking too many breaks." Fleet perceived this complaint to be directed at him. A third co-worker, Mike Pote, also commented that Fleet was a "bum" for taking so many breaks and that he should stop [bs-ing]. Fleet admitted that he and Pote had "a back-and-forth argument over the radio, each exchanging words and cursing each other out." Fleet subsequently drove to Pote's location, where Fleet confronted Pote about his comments on the radio. A witness to the exchange observed that Pote refused to engage in the back-and-forth argument.

The incident was reported to management and the preliminary investigation resulted in Fleet being told to go home "until his next scheduled shift." Fleet, however, refused to leave

his manager's office, instead demanding that his manager "call somebody about the situation." Fleet also "called [him—the manager] a racist." Fleet ultimately left the manager's office but sat in his car on CSX property for another 45 minutes. When the manager approached Fleet's car, Fleet again was verbally aggressive and termed the decision to send him home as "bull----."

INSUBORDINATION

A few days after the incident, Fleet was charged with "insubordination" for his behavior toward the manager, in addition to "unprofessional conduct" based upon his exchange with Pote. Significantly, Pote was also charged with engaging in "unprofessional conduct" but, of course, did not exhibit the same insubordinate behavior. Fleet was ultimately terminated, while Pote received a seven-day suspension.

Fleet filed a charge with the Equal Employment Opportunity Commission (EEOC) in which he checked the box for "race" as the basis for his claim. The charge listed Dec. 30, 2016, as the date of discrimination and the commission's finding was that "there is no belief that your discharge was based upon your race."

Fleet's complaint in court, however, claimed not only discriminatory discharge but a hostile work environment, disability claims and those for retaliation. The court found that Fleet had failed to exhaust his claims of disability discrimination and retaliation and granted summary judgment to CSX on such claims.

NOT SIMILARLY SITUATED

Fleet opposed summary judgment, claiming that although he admittedly refused to leave the workplace and argued with his manager, he was "not insubordinate, only upset about being sent home." He tied his behavior back to race, claiming that it was justified because the underlying decision was motivated by racial animus. Further, Fleet claimed that he was similarly situated to Pote who, while severely disciplined, was not terminated for his behavior. Fleet added that Pote was, on Dec. 30, 2016, on a "last-chance agreement" for failing a drug screening. The court found, however, that insubordination was classified as a "major" violation of CSX's Discipline Policy whereas the "unprofessional conduct" engaged in by both Fleet and Pote was classified as "serious," a lower-level designation. The court also noted that CSX produced evidence that a Caucasian employee has previously been terminated for insubordinate behavior similar to that exhibited by Fleet.

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Fleet argued, nonetheless, that his discipline was racially discriminatory and that he "believed" he was treated more harshly than similarly situated Caucasian co-workers. The court rejected this assertion, citing *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) for the principle that "the object of Rule 56 is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." As such, summary judgment was granted as to Fleet's claim of discriminatory discharge.

While the court found that Fleet had failed to exhaust his administrative remedies in relation to pre-Dec. 30, 2016, actions, it nevertheless determined that the written counseling Fleet received for eating during the May 2016 safety meeting was not an "adverse employment action" sufficient to state a viable claim. The court found that "performance improvement plans, negative reviews, verbal reprimands and 'write-ups' do not constitute adverse employment actions under Title VII without 'material change in the terms or conditions of … employment.'" Fleet was unable to present evidence that he has suffered any change in his employment status due to the referenced counseling.

Finally, the court granted judgment to CSX on Fleet's claim of FMLA retaliation, finding on a fundamental level, that the decision-makers were unaware that Fleet had been granted FMLA leave. The court rejected Fleet's argument that his termination "could have been" retaliatory as conjecture.

We often observe in this column the critical importance of treating similarly situated employees the same. CSX did so, in this matter, by distinguishing the behaviors of Pote and Fleet. It also, importantly, classified the basis for Fleet's termination as "insubordination," rather than just a final step in a disciplinary continuum. By doing so, CSX, again, distinguished between the behavior of Pote and Fleet, thereby enhancing its defense. •