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A Costly Reminder About the Importance of Consistent Application of Company Policies

By Lynn Urkov Thorpe, Esq.

Most employers have incorporated the rules mandated by discrimination laws into their day-to-day policies and practices. One would think that a bedrock, common-sense principle - treat employees the same way regardless of race, sex and other protected classes - would be firmly ingrained in corporate America. However, a recent Seventh Circuit decision, [Eaton v. Indiana Department of Corrections](#), Case No. 10-3214, 2011 WL 3966145 (7th Cir., Sept. 9, 2011), demonstrates that inconsistent application of company policy by managers can undo the best intentions of employers. As a result, the employer in that case was stripped of its summary judgment win and now faces a trial because of fact issues on this point.

Ms. Eaton was a correctional officer with the Indiana Department of Corrections ("DOC"). She was warned about excessive absenteeism and told that if her attendance did not improve, she would be moved from her current (and in her view, more desirable) schedule to a different work shift. Several months later, she was reassigned to this new work shift but did not end up working the new hours because she took FMLA leave. When she returned from her leave, she was assigned to her original work shift. A short time later, Ms. Eaton was in a car accident that aggravated a pre-existing back injury. She was given work restrictions by her doctor, but she did not report these restrictions to the DOC until a later date.

Several months later, Ms. Eaton refused overtime. A hearing was held, and at that time Ms. Eaton disclosed her medical restrictions and stated that she did not report them earlier because

of her concern that she would be switched to the undesirable shift. DOC told her she could submit her restrictions and her current work schedule would not be altered. Shortly thereafter, she used vacation time to visit an injured family member. On her return, she was assigned different job duties. She repeatedly refused this assignment due to severe back pain and requested a different assignment. She also characterized the proposed new job as "the worst" job a corrections officer could have. Although Ms. Eaton pleaded with her supervisor to give her another assignment and insisted she did not want to quit, her supervisor demanded she turn in her badge. She did. Eventually, the supervisor agreed to allow Ms. Eaton to return to work for her next scheduled work shift, but the supervisor soon changed his mind and barred Ms. Eaton from entering the facility when she showed up for her next shift. She never returned to work.

The district court granted summary judgment to the DOC on the sex discrimination claim (Ms. Eaton abandoned her ADA claim), finding that Ms. Eaton had not established a *prima facie* case because she had not identified anyone outside of her protected class who was similarly situated and treated more favorably than she was. Ms. Eaton appealed, arguing that she had identified a male corrections officer who was similarly situated and treated more favorably. The Seventh Circuit (covering Illinois, Indiana, and Wisconsin) agreed with Ms. Eaton and reversed.

The starting point for the analysis on appeal was defining "similarly situated." The Seventh Circuit noted that comparators "must be similar enough that any differences in their treatment cannot be attributed to other variables" but "not construed so rigidly or inflexibly that it [becomes] a useless analytic tool." In short, a plaintiff must generally show that "the comparator had the same supervisor, was subject to the same employment standards and had engaged in conduct similar to that of the plaintiff."

Ms. Eaton had identified a male corrections officer who reported to the same supervisor as she did who had also refused an assignment, but the district court concluded that they were not similarly situated. In that instance, when the supervisor insisted that the male officer work the assignment, the officer became angry and quit. He returned to work less than an hour later, and his supervisor allowed him to return in his prior position without any discipline. The district court distinguished this conduct from Ms. Eaton's by noting that, unlike the male corrections officer, Ms. Eaton had never actually quit (rather she just left), the male officer did not turn in his badge, and the male officer returned to work less than an hour later instead of the next work shift. In contrast, the Seventh Circuit concluded that there were sufficient similarities in their conduct - both refused an assignment from the same supervisor, both left the facility, and both returned to work promptly - in refusing to accept a work assignment that the jury should be allowed to decide if the difference was based on sex discrimination. In fact, the Court noted that Ms. Eaton's conduct might be considered less egregious because she made it clear that she did not want to quit and her refusal to work was based on her medical restrictions.

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The DOC made another argument to attempt to distinguish the conduct of Ms. Eaton and the male officer that the district court accepted: their different disciplinary history. The Seventh Circuit quickly dispatched that argument because the DOC did not attempt to justify Ms. Eaton's termination based on her disciplinary record. Accordingly, any difference in their disciplinary record was not relevant. Indeed, the Seventh Circuit reiterated that similarly situated in all material respects includes the common-sense caveat that the employer needs to actually consider the same factors when making the adverse employment decisions for the employees it claims are similarly situated.

Thus, *Eaton* serves as a reminder to carefully consider disciplinary action to ensure that employees who report to the same supervisor and perform similar work are treated in a like manner. An employer who fails to do so may find itself justifying its decision in a court room instead of in a human resources office.

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