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Postal Case Fails to Get Seventh Circuit's Stamp of Approval

By Suzanne M. Glisch, Esq.

Most employment attorneys and even many non-attorneys who deal with employment law frequently are familiar with the *McDonnell-Douglas* burden-shifting framework, which has formed the basis for employment discrimination litigation for nearly 40 years. But a recent Seventh Circuit decision serves as a reminder that despite the prevalence of the *McDonnell-Douglas* framework in our minds, especially when it comes to "similarly situated" employees, it does not serve as a replacement for consistent enforcement of company policy in the first place.

As set out in [Coleman v. Donahoe](#), 2012 WL 32062, Case No. 10-3694 (Jan. 6, 2012), Denise Coleman began working as a mail processing clerk for the Postal Service in 1974. Once manager William Sove selected William Berry to become Coleman's supervisor in 2005, Coleman alleged that the two men began discriminating against her, and, on more than one occasion, she threatened to file a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). A few months after Berry became her supervisor, Coleman checked herself into the psychiatric unit of a hospital, complaining of depression, anxiety, and insomnia. At some point during her stay, she admitted to having homicidal thoughts towards Berry. Coleman was eventually discharged from the hospital, with her doctor describing her as a "model patient" in "stable condition."

On the day of Coleman's discharge, her doctor contacted Berry to let him know that Coleman had, early in her treatment, expressed threats to his life. Berry immediately relayed this

information to Sove and another manager, Charles Von Rhein, who collectively decided to place Coleman on "emergency off-duty status" without pay, during which time Coleman filed two Charges of Discrimination with the EEOC, alleging race, gender, and disability discrimination, as well as retaliation. The Postal Service conducted an internal investigation of the situation, which included a conversation between Von Rhein and Coleman during which Coleman confirmed having homicidal thoughts about Berry but indicated that she was continuing in outpatient therapy, stable, and ready to return to work. The Postal Service, however, decided to terminate Coleman's employment. Both Von Rhein and Sove signed the Notice of Removal, which stated that by having voiced her threats towards Berry, Coleman had violated the Postal Service's company-wide "no tolerance" ban on violent and/or threatening behavior.

Although she was eventually reinstated by an arbitrator, Coleman continued to pursue her discrimination claims in the United States District Court for the Northern District of Illinois. When the Postal Service moved for summary judgment, Coleman presented evidence of two white, male Postal Service employees who held a knife to the throat of a black co-worker while holding down his legs. Both of these employees received only a week-long suspension after Von Rhein and the employees' supervisor, Brian Turkovich, investigated the incident and concluded that it was merely "horseplay." The district court granted summary judgment in favor of the Postal Service, finding that these employees did not qualify as comparators for Coleman because they reported to a different direct supervisor than Coleman and held substantially different jobs than Coleman. The district court further stated that there was no evidence of pretext with regard to the Postal Service's proffered non-discriminatory reason for terminating Coleman, namely her violation of the "no tolerance" policy.

On appeal, the Seventh Circuit reversed, and in doing so presented a number of good reminders regarding employment discrimination claims:

Pay attention to who the ultimate decision-maker is. The district court found the two white co-workers were not similarly situated to Coleman because their direct supervisor was Turkovich, while Coleman's was Berry. However, the Seventh Circuit pointed out that there was a common investigator and ultimate decision-maker with regard to all three individuals - Von Rhein. Indeed, Von Rhein had both investigated, and approved of, Coleman's termination, as well as the suspension of the two white male employees. As such, the three did deal with the same decision-maker, which the court found determinative, at least at this stage of litigation.

Enforce company-wide policies consistently regardless of job title and duties. The district court found that the two white co-workers were not suitable comparables because they held different job titles and duties than Coleman. However, the Seventh Circuit made it clear that such things were not necessarily controlling in a case like this, which deals with disciplinary decisions based on a workplace rule that applies to all employees. The Court noted that in cases involving the quality of job performance, a difference between a plaintiff's and comparators' positions can be important

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because it can often, by itself, account for the less favorable treatment of the plaintiff. The Court further noted that this was a case involving individuals who were disciplined for violating a general workplace rule - a ban on violent/threatening behavior - that applied to all employees regardless of department or rank. Thus, their job titles and duties were not controlling to the analysis. Here, there appeared to be inconsistent enforcement of a company-wide policy by the same decision-maker, which ultimately contributed to the Seventh Circuit's decision to reverse.

Zero tolerance means zero tolerance. The Seventh Circuit reminded us that "comparable seriousness" in employment cases does not mean identical conduct. Here the court found that directly threatening another employee with a knife in the workplace seemed, at least for purposes of summary judgment, at least as serious - and arguably more so - as Coleman's indirect "threat" against Berry, which was potentially not even a threat considering the context in which it was made. Yet, although both acts violated the Postal Service's "zero tolerance" policy, the Postal Service applied the policy differently, terminating one employee while dismissing dangerous acts of others as mere "horseplay" and thus not covered by the policy. While disciplinary discretion is generally a good thing for employers to maintain, it can, as shown here, sometimes cause problems, especially when the policy in question is described as "zero tolerance." As always, consistency is paramount.

In sum, while the *McDonnell-Douglas* framework remains a tried-and-true analysis, the *Coleman* case is a good reminder that real prevention of legal liability rests not in any legal framework, but in the actions of supervisors and other company personnel before litigation even begins. A zero-tolerance policy is a useful tool, but only if it is enforced in a consistent manner. There can be a natural tendency to treat employees differently based on job title or perhaps even "[super star](#)" status, but as *Coleman* demonstrates, when it comes to general workplace policies, employers do so at their own peril.

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