

APRIL 26, 2013

DRUG TESTING ONE EMPLOYEE BUT NOT THE OTHER - UNLAWFUL DISCRIMINATION?

TREATING EMPLOYEES THE SAME - ALWAYS REQUIRED?

Employers have always been advised to treat their employees the same, and if they don't, it can be evidence of unlawful discrimination. This issue came up in a recent case involving an employer that required a black employee who was involved in an altercation to go for a drug test but didn't require the white employee, who was also involved, to be tested. The black employee claimed that this was unlawful discrimination and filed a lawsuit. The court said that there was no unlawful discrimination and dismissed the case.

WHO WAS BEHAVING BADLY?

Here's how the court came to its conclusion.

First, the court considered the fact that there was indeed an altercation involving the two employees and that the employer had an established policy that provided for a drug test in certain circumstances. Those circumstances were met because the black employee was reported to have been yelling along with rambling and fast speech. These behaviors were among the behaviors that would permit a supervisor to require a drug test. The white employee, although part of the altercation, had not – at least in the supervisor's opinion – demonstrated the same behaviors. As it turned out, the black employee tested positive for cocaine and was fired. Interestingly, the black employee didn't challenge his termination but only the decision to send him and not his coworker for the drug test.

NO ADVERSE ACTION

Second, the court held that sending one employee and not the other for a drug test was not "adverse action" that could give rise to a claim of discrimination. In order to support such a claim, there had to be a showing of *severe* and *pervasive* conduct that was designed to *harass* and *humiliate* an employee because of membership in a protected class. In this case, there was no severe or pervasive conduct by the employer – it only happened once - and there was no evidence of any design to harass or humiliate. Indeed, the employer had a legitimate basis to require the drug test based on the reported behaviors.

PERCEPTION IS REALITY

Third, the court made it clear that the supervisor's *perception* of the reported behaviors was what was really important. The supervisor could have been totally wrong, and the white employee might have in fact been just as loud and erratic – or even more so – than the black employee. But, according to the court, what counts is the supervisor's *perception* of the relative behaviors and conduct of the two employees. It's not enough, in the court's view, for the black employee to argue that the white employee should also have been tested. There was no evidence presented to suggest that the supervisor actually knew or believed that the white employee was also behaving erratically. The court was not willing to simply assume that race was on the mind of the supervisor in requiring one employee but not the other to be drug tested.

LESSON FOR EMPLOYERS

This is a good example that management's honest belief in making employment decisions – even if wrong – will often overcome claims of unlawful discrimination. It should always be remembered that in almost all cases it is the plaintiff's burden to show that an unlawful discriminatory motive was at least a factor in the decision to take adverse action. In this case, there was no evidence of an unlawful motive based on race, and there was no evidence to even support a claim that sending this employee for a drug test was adverse action. Nevertheless, in order to avoid later arguments and litigation, employers still should consider treating employees equally in similar circumstances.

Reference: [BerryArcelormittal](#) (N.D. Ind., No. 2:10 cv 124 April 10, 2013).

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