

PUBLICATION

Sixth Circuit Raises Obstacles to Defending Discrimination and Retaliation Claims

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The U.S. Court of Appeals for the Sixth Circuit provided a recent setback to employers in *McDole v. City of Saginaw*. McDole involved a former police officer for the City of Saginaw, Michigan. He was terminated after an internal investigation revealed that he physically assaulted and threatened a suspect. McDole filed a lawsuit, claiming that he was terminated due to his race, rather than the alleged assault. A jury awarded McDole \$1 million.

The City of Saginaw appealed, claiming that the trial court erred in two important respects. First, the city took issue with the trial court's refusal to give an "honest belief" instruction to the jury. Under the "honest belief" doctrine, an employer's disciplinary decision is not pretextual if the decision was based on an "honest belief" that the employee engaged in misconduct. Under the "honest belief" rule, if an employer terminates an employee based on particularized information, it will not be liable if the information in its possession later turns out to be incorrect. As long as the employer was acting on an "honest belief" that the employee engaged in misconduct, the employer's decision is valid. In *McDole*, the Sixth Circuit rejected the city's contention that the jury needed to be instructed on the "honest belief" rule. The Court reasoned that a jury finding intentional discrimination implicitly rejects the possibility that the employer was acting on an "honest belief." As a result of this decision, the viability of the "honest belief" doctrine (particularly at trial) is unclear.

In addition to weakening the "honest belief" doctrine, *McDole* also expands the notion of what constitutes a "similarly situated" comparator. Comparators are used to justify or undermine an employer's disciplinary decision in discrimination and retaliation cases. In order for the plaintiff to compare his discipline to the discipline of another employee, the comparator must be "similarly situated." Previous caselaw implied that in order to be "similarly situated" for comparison purposes, the two disciplinary actions must involve the same decisionmaker, applying the same standards, to the same conduct without differentiating or mitigating circumstances. The Sixth Circuit rejected that approach and found that the two decisions do not need to be made by the same decisionmaker, in order to be comparable. The Court also found that the two decisions being compared do not need to be "the same," they only have to be "similar," and an "exact correlation is not required." Finally, the Court noted that the question of what conduct was "similar" enough for comparison purposes was a question for the jury.

The Court upheld *McDole's* million dollar verdict. The bottom line for employers is that the Court is taking away some of the tools typically used to defend discrimination and retaliation claims. It did so by: (1) weakening the "honest belief" doctrine, and (2) expanding the universe of disciplinary decisions that an employee can claim are inconsistent with his own.