

Court's Reminder to Employers: Be Consistent with Similarly-Situated Employees

By: Melissa M. Tetreau, Senior Associate, Workplace Law Group

When evaluating employee discipline or termination, there are a number of factors to consider:

- Did the employee have notice of the policy or rule he allegedly violated?
- Is there evidence or sufficient documentation that the employee violated that policy or rule?
- What level of discipline is appropriate for the offense?

When answering the third question, employers should ensure that discipline is proportionate to the violation (i.e. it probably does not make sense to terminate a twenty-year employee with a good record for being tardy one day). You should also confirm that discipline is being given fairly and consistently. This means that employers must treat similarly-situated employees in a similar manner. Although employees do not have to have identical records to be similarly situated, they should be similar "in all relevant respects." Generally they should, at a minimum:

- Have the same supervisor,
- Be bound by the same rules and policies,
- Have the same job tasks and responsibilities, and
- Have similar disciplinary histories.

The recent case of *Bowes v. Burroughs Corp.* (U.S. Dist Ct. W. D. Mich, Docket No., 1:20-cv-00964 (5/13/21)) illustrates how important it is to treat similarly situated employees similarly. Burroughs Corp. terminated Bowes, an African American employee, from its Kalamazoo, Michigan facility after he tested positive for marijuana. Under the applicable collective bargaining agreement, Burroughs could either terminate the employee or require him, as a condition of continued employment, to undergo treatment for substance abuse. If the employee refused to complete the program or had a second positive drug test, the employee would be terminated.

After Bowes' positive drug test, the company did not offer him the chance to participate in a treatment program and terminated his employment. Bowes filed a lawsuit in federal court alleging that his termination was race discrimination.

Where did Burroughs go wrong? Bowes was aware of the drug-free workplace rule and violated it by testing positive. Termination may have been the proportionate response because the employer claims it had a zero-tolerance policy. But, termination may not have been the most fair and consistent outcome if similarly-situated employees were treated differently. Bowes claims that the company allowed similarly-situated white employees who failed a drug test to go to treatment and continue working.

While the company filed a motion to dismiss the lawsuit, the court denied the motion because Bowes pointed to six white employees who failed their drug tests and were not terminated. The court found that this fact was sufficient at this stage to allow the case to move forward.

This case is a good reminder that consistent and fair application of employer policies includes handling the discipline of similarly-situated employees in a similar manner.

If you have any questions, please reach out to any member of **Bodman's Workplace Law Practice Group**. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

WORKPLACE LAW PRACTICE GROUP	AARON D. GRAVES <i>Chair</i> 313.392.1075 agraves@bodmanlaw.com	JOHN T. BELOW 248-743-6035 jbelow@bodmanlaw.com	JOHN C. CASHEN 248.743.6077 jcashen@bodmanlaw.com
	GARY S. FEALK 248-743-6060 gfealk@bodmanlaw.com	JOHN DAVID GARDINER 616.205.3123 jgardiner@bodmanlaw.com	MELISSA M. TETREAU 248.743.6078 mtetreau@bodmanlaw.com
	REBECCA C. SEGUIN-SKRABUCHA 313.393.7594 rseguin-skrabucha@bodmanlaw.com	MICHELLE L. KOLKMEYER 248.743.6031 mkolkmeier@bodmanlaw.com	ALEXANDER J. BURRIDGE 313.393.7560 aburridge@bodmanlaw.com
	DAVID B. WALTERS 248.743.6052 dwalters@bodmanlaw.com	KAREN L. PIPER <i>Of Counsel</i> 248.743.6025 kpiper@bodmanlaw.com	