SIXTH CIRCUIT REVIEW

Johnson v. Ohio Department of Public Safety: Last Chance Agreements May Make Claims of Racial Discrimination More Difficult to Prove

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A recent Sixth Circuit ruling may make it more difficult for plaintiffs to meet their factual burden in employment discrimination cases if they have signed a Last Chance Agreement with their employer. A Last Chance Agreement (LCA) puts an employee on notice that if prohibited conduct continues, or if performance does not improve, they will be terminated.

LCAs do not give employers free rein to terminate employees; employers must still comply with applicable federal employment laws, such as the prohibition of discrimination contained in Title VII of the Civil Rights Act of 1991. Similarly, "an employee may not prospectively waive his or her rights under … Title VII." *Hamilton v. General Elec. Co.*, 556 F.3d 428, 434 (6th Cir. 2009) (the case remanded and tried, and in a separate ruling, the Sixth Circuit affirmed a jury verdict in favor of the employer. *Hamilton v. General Elec. Co.*, 487 Fed. App'x. 280 (6th Cir. 2012)). But even though an LCA does not change a plaintiff's rights under Title VII, it may make it more difficult for a plaintiff to meet their factual burden of discrimination under the recent ruling in *Johnson v. Ohio Dept. of Public Safety*, 942 F.3d 329 (6th Cir. 2019).

In the Sixth Circuit, the court uses the *McDonnell Douglas* burden-shifting framework when analyzing Title VII racial discrimination claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This analysis has three parts—first, the plaintiff has the burden of proving a prima facie case of discrimination; second, if the plaintiff is successful in proving the prima facie case, the burden shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for the action; and third, should the defendant carry their burden, the plaintiff must then have the opportunity to prove that the proffered reasons were a mere pretext for discrimination. *Id* at 802–804. However, when an LCA is part of an allegation of impermissible discrimination, at what point in the legal analysis should a court consider its terms? At the outset, in the prima facie stage as evidence that claimant and their comparators are not "similarly situated," or later, in the final burden-shifting stage to demonstrate that the "legitimate, nondiscriminatory reason" for the

adverse employment action was mere pretext?

This was the question in front of the Sixth Circuit in *Johnson*, 942 F.3d 329. The majority considered the LCA at the outset, affirming that the plaintiff and the comparator he used were not "similarly situated." *Id.* at 331. However, the dissent argued that the LCA should only be considered after the plaintiff has met the lower burden of showing a prima facie case of discrimination. *Id.* at 333–34 (Moore, J. dissenting).

Johnson involves Ohio State Highway Patrol trooper Morris Johnson, who was fired for breaching an LCA after he engaged in "conduct unbecoming an officer." Johnson pulled over and arrested a female driver for a DUI and told her that he would take her to a nearby Waffle House, where "[t]hey make some fantastic waffles." A month later, Johnson again pulled over the same woman, undisputedly without probable cause. Johnson admitted that he wished to be friends with her. At that stop, Johnson told her he liked her and apologized for not taking her to Waffle House after the first stop. After a citizen's report and subsequent investigation, Johnson was found in violation of Ohio Admin. Code 4501:2-6-02(I), Conduct Unbecoming an Officer, and was recommended for termination.

To avoid immediate termination, Johnson accepted the conditions of the LCA, which stated that if he engaged in similar behavior within the next two years, he would be terminated. But Johnson was unable to maintain appropriate behavior for the full term of the LCA. Instead, less than two years later, Johnson chose to take another DUI arrestee home, despite the fact that she had already contacted someone for a ride. He stayed at her home for a half-hour in the wee hours of the morning and later texted her from his personal cell phone. After another citizen report and investigation, Johnson was again charged with violation of Ohio Admin. Code 4501:2-6-02(I), Conduct Unbecoming an Officer, and was terminated for violating his LCA.

To demonstrate a prima facie case for racial discrimination, a plaintiff must show, among other things, that they were "similarly situated" "in all of the relevant respects" to an employee treated differently outside of the protected class. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). In alleging that he was discriminated against because of his race, Morris Johnson pointed to David Johnson, a white trooper who also engaged in harassment of female arrestees. David Johnson had, in two incidences three years apart, sent Facebook friend requests while off-duty to female arrestees (the first incident was unsubstantiated after investigation). After the second incident was substantiated, David Johnson was placed on a one-day

suspension but was not subject to an LCA.

Comparing the incidents, the court had to decide whether Morris Johnson was similarly situated to David Johnson in all relevant respects, including whether placing Morris Johnson on an LCA constituted differential treatment. The majority opinion found that the Ohio Department of Public Safety disciplined both troopers differently simply because both situations were different. The two troopers' actions were not of "comparable seriousness" and therefore were not similarly situated for the purpose of demonstrating that the Department discriminated against Morris Johnson when it fired him for breach of his LCA. *Johnson*, 942 F.3d at 331.

But Judge Moore reached a different conclusion in her dissent. Judge Moore focused on the low bar plaintiffs must meet in demonstrating a prima facie case, noting that it is not the duty of the Court on summary judgment to determine whether two parties are "similarly situated," but to determine whether a reasonable jury could find, based on the facts viewed in the light most favorable to the plaintiff, that they are similarly situated. *Id.* at 335 (Moore, J. dissenting). She found that this burden was met because both troopers were disciplined under the same provision for the same general conduct: Conduct Unbecoming an Officer. *Id.* Even though each officer was charged with a different sub-provision ("attempting to cultivate a personal relationship with an arrestee" and "attempting to establish a relationship with a female to whom he had issued a citation," respectively) there was no evidence that either offense was qualitatively different from the other. *Id.*

Generally, Judge Moore noted that the LCA "speaks to the sanction for the conduct, not the standard for evaluating the conduct." *Id.* at 333. Therefore, she found that the LCA was only relevant to the prima facie demonstration to the extent that it was a sanction for one officer, and not another. Her dissent argued that the context that triggered the LCA and its terms should be independently analyzed after the burden shifts back to the employer as a legitimate nondiscriminatory reason for the discipline and subsequent termination. *Id.* at 333–34. In other words, both officers were sanctioned for the same infraction—Conduct Unbecoming an Officer—but only Morris Johnson was placed on an LCA and at risk of immediate termination. Because both violated the same standard of conduct but only one was subject to an LCA and later terminated, Judge Moore found that both officers were similarly situated and that Morris Johnson "satisfied the first stage of the burden-shifting framework." *Johnson*, 942 F.3d 335 (Moore, J. dissenting).

In response, the majority found that the standard of "more severe

treatment [for] more egregious circumstances" applied to Morris Johnson's conduct. *Clayton v. Meijer, Inc.*, 281 F.3d 605, 612 (6th Cir. 2002). Under this approach, plaintiffs may have a higher factual burden and need to demonstrate more than just an inequal application of sanctions burden to show a prima facie case of racial discrimination. Even so, Judge Moore's dissent serves as a reminder that the plaintiff's burden is intended to be easily met. Employers should take care to evenhandedly and rationally apply sanctions when employees violate conduct standards.