SOUTH CAROLINA
EMPLOYMENT LAW LETTER
Part of your South Carolina Employment Law Service

June 2019

Who is my comparator? 4th Circuit clarifies standards in SC firing case

by Richard Morgan
Burr Forman McNair

An argument employers often have to address in discrimination cases is that the employee was treated more harshly than similarly situated coworkers. To resolve the issue, courts have set out some guidelines for employers. Read on to see how the U.S. 4th Circuit Court of Appeals (whose rulings apply to all South Carolina employers) applied the standards in a case that originated in our state.

'I'm going home; I'm leaving'

Waste Connections, Inc. (WCI) supervisor James Fountain, a white man, hired Jimmy A. Haynes, an African-American male, to work for the company in 2006. Fountain supervised Haynes for the duration of his employment. During that time, Haynes drove a large, multi-ton "front-end loader" truck in Duncan, South Carolina, to pick up trash from WCI's customers.

The following events led to the termination of Haynes' employment. On October 6, 2015, he arrived at work around midnight, which was two hours before his normal start time. In a later affidavit, he stated he went in early so he could finish work and have time to eat lunch with his wife and play basketball. When he arrived at work, company mechanics let him know his regular truck was down for repairs but that they could have a replacement vehicle ready in five minutes.

According to WCI, the mechanics heard Haynes respond, "I'm going home; I'm leaving." In his affidavit, Haynes explained he was ill with a stomach virus and had told another driver he was sick and unable to work. Haynes' wife also testified he was ill with a stomach virus on October 6 and 7.

As Haynes was leaving, approximately 45 minutes before the normal start of his shift, he sent the following text to Fountain: "Good morning, Jim. I came down with a stomach virus and I will not be working today. If u have any question let me know." Fountain did not see the text until 3:30 a.m. on October 7 and had to scramble to find someone to cover Haynes' route. Consequently, around a quarter of the customers along the route did not get their waste needs serviced. Haynes called Fountain at 3:00 p.m. on October 7 and reported he was feeling much better and would return to work the next day.

Before receiving Haynes' call, Fountain spoke with the company mechanics. According to WCI, they said Haynes seemed frustrated with the delay to repair his normal truck and stated, "Forget this" or "F*** this." After speaking with the mechanics, Fountain met with the district manager and human resources manager and decided to terminate Haynes. On October 8, Fountain and the district manager told the driver he was being let go for job abandonment.

List of reasons for termination grows

Though Fountain did not mention any reason aside from job abandonment as the basis for the termination, WCI later asserted that before the October 7 incident, Haynes committed three infractions:

Gas pump incident. According to Fountain's affidavit, on June 22, 2015, Haynes drove away from a gas station without removing a fuel pump

from his truck. The driver, however, states he doesn't remember whether he was involved in such an incident.

Stuck in a ditch. On August 11, 2015, Haynes undershot a driveway, and his truck became stuck. According to the driver, the weather was rainy and foggy, and Fountain stated the incident wasn't that bad when he arrived at the scene. Investigating officers didn't cite Haynes. As a result of the incident, Fountain and the district manager issued a written warning to the driver for "poor performance." According to Fountain, Haynes was "indignant, dismissive, and combatant" in response to the warning and refused to sign or acknowledge he had received it.

Hand on cell phone. On August 25, 2015, WCI's drive cam system, which records drivers' conduct when it's triggered by certain events, including hard braking and sudden stops, recorded Haynes with one hand on the steering wheel and the other hand touching his cell phone. Consequently, he received a second written warning and a one-day suspension. He testified he was stopped at a red light and looked at his phone to see the time and that he had been told he could use his phone while the truck was stopped. According to the driver, when he returned from the suspension, a clock had been installed in the assigned work truck.

Despite the infractions, Haynes asserts he met with Fountain to discuss his upcoming annual performance review on September 25, 2015, and that the supervisor told him "everything looks good" and there was "nothing to worry about."

District court sides with employer

While it's unclear from the record whether a discrimination charge was ever filed, Haynes filed a lawsuit *pro se* (or without a lawyer) against WCI under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981, which was enacted shortly after the Civil War to protect the right of all persons "to make and enforce contracts" regardless of race. The employer requested summary judgment (or dismissal without a trial), arguing:

- Haynes was unable to establish a *prima facie* (or basic) race discrimination case; and
- Even if he had done so, WCI had offered a legitimate, nondiscriminatory reason for the termination, i.e., "poor performance and walking off the job without valid reason or notice."

The district court agreed with WCI and dismissed Haynes' action. The court, adopting the magistrate judge's report and recommendation, found the driver had failed to establish a valid comparator and that even if he had done so, he had failed to show pretext. His post-judgment filing was denied by the district court, and he filed a timely appeal.

4th Circuit's analysis of comparators

When it comes to comparators, an employee must produce evidence that he and a coworker dealt with the same supervisor, were subject to the same standards, and engaged in the same conduct without differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. The 4th Circuit noted a comparison between similar employees will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances.

Haynes' evidence showed that Joe Hicks, a white employee also supervised by Fountain, had several workplace infractions, including twice using a cell phone while driving, driving while distracted, and responding late to a traffic situation. Haynes also pointed to evidence, which appears undisputed, that Hicks became angry and yelled at Fountain before quitting his job. Yet, Hicks was permitted to return to his job, and Haynes, who had fewer infractions and did not yell at his supervisor, was not permitted to return to his job and instead had his employment terminated.

Considering the evidence, the 4th Circuit found a reasonable factfinder could conclude Hicks and Haynes were appropriate comparators. They dealt with the same supervisor, were subject to the same standards, and engaged in similar conduct. Indeed, it appears Hicks—who had more infractions and was less respectful to his superiors—may have engaged in more egregious conduct than Haynes yet received more favorable treatment.

The 4th Circuit didn't buy WCI's argument that the nature of Haynes' previous infractions didn't render Hicks to be an inappropriate comparator. For example, the employer claimed Haynes' infractions caused damage while Hicks' did not. As an initial matter, factual disputes in the record call into question the company's assertion that Haynes' infractions caused damage:

- Haynes pointed to evidence the police officer didn't issue any citation as a result of his undershooting the driveway, because there was no damage, and Fountain himself said the incident wasn't that bad.
- The driver also asserted he doesn't believe he was involved in an incident involving a fuel pump.

Even assuming Haynes' infractions did cause damage, that fact alone wouldn't necessarily end the comparator analysis. Especially given the dangerous nature of Hicks' offenses, a factfinder could reasonably determine the two were proper comparators.

The 4th Circuit also found it wasn't appropriate for the district court to conclude Hicks and Haynes were improper comparators because the former notified WCI he was resigning from his job before leaving the premises, while the latter departed and abandoned his job without speaking with management. As an initial matter, the record indicates Haynes did in fact notify his supervisor via text before leaving the premises. While WCI claimed that was in violation of company policy, Haynes asserted in his affidavit that he always used that method to communicate with Fountain and that it had never caused a problem in the past.

It bears emphasizing, moreover, that Hicks didn't simply "notify" his employer he was resigning. Indeed, the record indicates he yelled at his supervisor over a customer service disagreement before quitting his job—behavior that to a jury might seem far more egregious than Haynes' text to his supervisor that he wasn't feeling well and would therefore not be able to work his normal shift. The evidence also undermines WCI's argument that Haynes had a more "dismissive" attitude than Hicks. Although the employer contends its own investigation suggested Haynes left work because he was frustrated that his truck wasn't ready while Hicks quit for a "seemingly honest" reason, the argument simply leads to another factual dispute, which must be read in the light most favorable to the non-moving party at this stage, which is Haynes.

According to the 4th Circuit, the evidence in the record could permit a reasonable factfinder to conclude Haynes and Hicks are proper comparators. Because Haynes is similar to Hicks, a white employee, in all relevant respects but was treated differently, the district court erred in holding Haynes had failed to establish a proper comparator.

Performance issues raised on appeal

Although the district court granted summary judgment to WCI solely on the basis of its comparator and pretext findings, the employer also argued on appeal that Haynes failed to show he was performing his job satisfactorily at the time of his termination. The 4th Circuit disagreed. Such a showing of satisfactory performance doesn't require Haynes to prove he was a perfect or model employee. Rather, he must show only that he was qualified for the job and was meeting his employer's legitimate expectations.

Haynes' evidence indicated Fountain told him in September 2015 (mere weeks before his termination) that "everything looks good" and there was "nothing to worry about" regarding his upcoming performance review. Haynes also received bonuses for the period in question. The evidence raises a reasonable inference—which again must be drawn in the driver's favor at this stage—that he was performing at a satisfactory level. WCI contended he could have received a larger bonus if he had performed better, but he doesn't have to prove he was a perfect employee, only that he was performing satisfactorily.

WCI argued Haynes failed to perform satisfactorily by sending a text to Fountain in violation of company policy, but a factual dispute would still exist over whether the driver met his employer's legitimate expectations at that time. After all, the evidence suggested Haynes routinely communicated with Fountain via text. Thus, Haynes successfully presented a prima facie (or initial) discrimination case, and the district court erred in holding otherwise.

4th Circuit reopens question about pretext

Finally, the 4th Circuit found the district court erred in determining that Haynes hadn't shown any evidence of pretext. To prove pretext, a fired employee may show that an employer's proffered nondiscriminatory reasons for the termination were inconsistent over time, false, or based on factual mistakes. Once the individual offers such circumstantial evidence, the case must be decided by a trier of fact and cannot be resolved via summary judgment.

Haynes showed WCI's reason for his termination has changed substantially over time, and therefore has presented sufficient evidence of pretext, according to the 4th Circuit. Perhaps most important, the company now asserts an entirely different reason for the termination than was offered initially: Haynes' poor attitude.

Additionally, when Haynes was terminated, Fountain said he had met with the human resources department, and the reason for the termination was "job abandonment." As the fired trucker points out, WCI's own policy defines job abandonment as "three days, no call and no show," which is inconsistent with his behavior on October 7. Haynes had in fact texted and called before returning to work after only one day.

The magistrate judge's recommendation, which the district court later adopted, discounted WCI's inconsistency, holding that Fountain didn't mean a job abandonment policy but was instead apparently referring to his own definition of the same, i.e., "coming in and leaving." Given that the supervisor had consulted with the HR department, a factual dispute exists over whether it was reasonable for Fountain to use that specific terminology without conforming to the company's own definition of "job abandonment" or whether it represents an inconsistency and evidence of pretext.

Haynes' final termination paperwork didn't include "job abandonment" as a reason and instead simply stated "violation of rules," though it is unclear which rules the paperwork was citing—rules created by Fountain or as defined in WCI's policy. While employers may certainly expand on their original reason for a termination, the evidence of substantial changes to WCI's proffered reason for the discharge permits an inference of pretext.

After analyzing the district court's opinion, the 4th Circuit reversed summary judgment and sent the case back to the lower court.

Lessons for employers

Several points jump out of the *Haynes* decision. While the 4th Circuit didn't adopt or change any standards or core elements about how to conduct or apply a "similarly situated employee" analysis, the case shows you should thoroughly vet your reasons for an adverse employment action on the front end. It is rarely a good idea to change or add to the original reason(s) for the adverse action later. Of course, you may come across "after-acquired evidence" (unknown at the time the original decision was made) that would further support a firing. In Haynes' case, however, the evidence of his record existed and was known to WCI. If the company was going to use the information as a basis for its decision, the appellate court believes it should have said so at the time of the firing.

Additionally, if WCI was going to use Haynes' previous write-ups as a basis for its adverse action, it should have asked the question: Are there any other "similarly situated employees" who haven't received the proposed penalty used in this case? That inquiry may have pushed the employer to make a different call. When the case was appealed and the *pro se* Haynes got some legal help, it appears the arguments got framed in a way that may give him a second chance to prove his discrimination case at the district court level.

Richard Morgan is a partner with Burr Forman McNair in Columbia and an editor of South Carolina Employment Law Letter. You can reach him at rmorgan@burr.com or 803-799-9800.