

BLOGS

Archives;Class Action & Litigation;Discipline;Discrimination;Hiring & Firing

In the Employment Discrimination Context, Can Two Wrongs Make a Right?

I remember being told as a child that two wrongs do not make a right. This was the common response I got if I tried to justify bad behavior by saying that I'd been provoked or that others had done the same thing. I imagine that, like me, parents all over the world still commonly use the phrase two wrongs don't make a right in encouraging children to do the right thing. The lawsuit filed earlier this week by former Minnesota Senate aide Michael Brodkorb should, however, serve as a reminder to employers that this childhood lesson doesn't always apply in the employment discrimination context.

In the discrimination context, an employer cannot assume that an employee's misconduct will always legally justify discipline or termination. Liability for discrimination turns on proof that an employer treated someone differently based on race, gender, religion, or some other legally protected class status. As a result, courts have held that an employee can establish discrimination—even when he or she admittedly engaged in wrongdoing—if others who are similarly situated engaged in the same behavior but were treated less harshly based on a protected class status.

Consistent with this line of authority, Michael Brodkorb's lawsuit against the state of Minnesota asserts a gender discrimination claim. Mr. Brodkorb's lawsuit stems from his termination last December from his Senate aide position after having an affair with then-Senate Majority Leader Amy Koch. In his lawsuit, Mr. Brodkorb claims that his firing constitutes discrimination against him because of his gender, because similarly situated female legislative employees have not been fired despite having intimate relationships with male legislators. The Minnesota legislature has denied Mr. Brodkorb's allegations, maintaining he was an at-will employee and was lawfully fired.

It remains to be seen whether Mr. Brodkorb will be able to establish that female legislative employees were, in fact, similarly situated to him in all relevant respects, or that he was subject to gender discrimination. Whatever the outcome of the lawsuit, however, it is sure to be an expensive and public battle for the state of Minnesota. To minimize the risk, distraction, and potential expense of this kind of a discrimination claim, employers should do the following before disciplining or terminating an employee for misconduct or poor performance:

Related People

Megan Anderson

Partner

Minneapolis

612.632.3004

megan.anderson@lathropgpm.com

- Thoroughly investigate the situation and ensure the misconduct or poor performance, in fact, occurred and can be proved.
- Assess whether individuals who might be seen as similarly situated have engaged in the same or similar conduct but faced different employment consequences. Of course, circumstances may differ and may justify different courses of action for different employees. Before acting, however, an employer should carefully consider whether, if faced with a discrimination claim, it will be able to sufficiently articulate and prove its reasons for treating similarly situated employees differently.
- Consider how to handle any future instances of similar misconduct or poor performance. If the employer is not prepared to discipline or terminate employees consistently in the future, it could face a discrimination claim if the disciplined or terminated employee learns of future inconsistencies in the employers actions.