

Neil McPhie - Ask the Lawyer

By Neil A.G. McPhie

Q:

What do you do if you accuse an agency of racial discrimination and it responds with some bogus explanation?

A:

Agencies usually respond to allegations of discrimination made in Equal Employment Opportunity (EEO) complaints with some nondiscriminatory reason. The task for government employees then becomes proving that this explanation is “pretextual,” or untrue and cover for an actual discriminatory motive.

As the U.S. District Court for the District of Columbia noted in its 2008 decision in *Brady v. Office of the Sergeant of Arms*, the most popular strategy involves showing that the employer treated an employee in a protected class differently from employees of another race. The employee could also show the employer is lying. Just saying any employee of another race received more favorable treatment is not enough. As the U.S. 7th Circuit Court of Appeals noted earlier this year in *Coleman v. Donahoe*, the criteria for similarly situated co-workers usually includes the same supervisor, subjection to the same standards and engagement in similar conduct minus any differentiating mitigating or differentiating circumstances.

However, the court in *Coleman* added that the inquiry into similarly situated co-workers is “flexible” and it is not looking for “clone[s].” This case involved a U.S. Postal Service mail processing clerk who was removed after 32 years of service after she told her psychiatrist, among other things, that she thought about killing her supervisor. The psychiatrist informed the Postal Service about this threat, and *Coleman* was subsequently placed on off-duty status and terminated.

Coleman filed a lawsuit against the postmaster general claiming discrimination on the basis of her race, sex and disability and retaliation for prior discrimination complaints. *Coleman* noted that the same manager who fired her punished two white Postal Service employees with one-week suspensions after they threatened to kill another employee at knifepoint. A district court dismissed the suit, finding the two white employees – who had a different supervisor and worked different jobs – were not similarly situated to *Coleman*. The 7th Circuit reversed this decision, noting that the case of the two white employees was “close enough to *Coleman*'s to provide a „meaningful comparison