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SKILLED NURSING FACILITY EMPLOYEE LOSES APPEAL: A CLOSER LOOK AT THE FACT-SPECIFIC CONSIDERATIONS IN A PRETEXT ANALYSIS

On March 5, 2025, the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit" or "Court") in *Bashaw v. Majestic Care of Whitehall, LLC* affirmed the United States District Court for the Southern District of Ohio's (the "District Court") grant of summary judgment, finding the reasons for an employee's termination were not pretextual. The employee was terminated from her non-clinical position at a skilled nursing facility and claimed the reasons for her termination were "pretext" for her employer's discriminatory motives. However, the Sixth Circuit upheld the lower court's conclusion in favor of the employer, finding its four stated reasons for the employee's termination were based in fact and there were no adequate comparators. The opinion provides helpful examples and analysis of non-pretextual reasons for termination.

CASE BACKGROUND

Plaintiff Kirstyn Paige Bashaw ("Bashaw") was an employee of Defendant Majestic Care of Whitehall, LLC ("Majestic Care"), a skilled nursing facility in Ohio. Bashaw was terminated after: (1) Bashaw had surreptitiously recorded work conversations and meetings; (2) she was often tardy or missed work; (3) she told a coworker she did not want to return to work; and (4) she violated company policies regarding safe discharge of a resident.

Bashaw filed suit against her former employer in the District Court, alleging wrongful termination, retaliatory termination under Ohio law and Title VII retaliation. The District Court granted Majestic Care's motion for summary judgment, finding no pretextual reasons for Bashaw's dismissal. Bashaw appealed.

PRETEXTUAL TERMINATION

A plaintiff can show pretext in three ways: (1) showing the stated reasons for termination had no basis in fact; (2) showing that the stated reasons were not the true motivation for the termination; or (3) showing that the stated reasons were insufficient to motivate the employee's termination.

The issue in this case was whether the District Court correctly found that Bashaw's termination was non-pretextual. In other words, whether Majestic Care had legitimate, non-discriminatory reasons for Bashaw's termination.

FACT-SPECIFIC PRETEXT ANALYSIS RESULTS IN PRO-EMPLOYER RULING

The Sixth Circuit reviewed the issues de novo and ultimately affirmed the District Court's finding that the reasons for Bashaw's termination were not pretextual. The Court analyzed each stated reason for Bashaw's termination, in the context of Bashaw's allegations of pretext, finding support for each.

First, the Court rejected Bashaw's argument that because Majestic Care had no policy against surreptitious recording, her termination on this basis must have been pretextual. The Court reasoned that the lack of official policy does not alone establish pretext, and relied on details from the record indicating that the surreptitious recordings undermined Majestic Care's trust in Bashaw, raised concerns about potential legal liability and may have recorded protected health information. The Court relied on caselaw stating that an employer may terminate an employee for creating legal risk to the company and noted that the recordings could have exposed confidential or protected health information.

The Court was unconvinced by Bashaw's next argument: that her work attendance and tardiness were a pretextual reason for termination because similarly situated employees were not terminated. The Court reasoned that Bashaw only identified one comparator, and she did not provide enough information to show that the individual was similarly situated, and therefore could not disrupt a finding of summary judgment for dispute of fact.

The Court again rejected Bashaw's third argument that Majestic Care's belief Bashaw did not want to return to work was not based in fact and was therefore pretext. A defendant can defeat this argument by showing it "honestly believed" the proffered reason. Here, Bashaw's supervisor reasonably believed Bashaw no longer wanted to work at Majestic Care because Bashaw said she was looking for other jobs and

was uncomfortable working at Majestic Care. The Court determined that these facts in the record support an honest and reasonable belief that Bashaw did not want to return to work.

Finally, the Court declined to analyze a fourth reason for Bashaw's termination, indicating that it had already identified three non-pretextual reasons for her dismissal.

The resolution of this appeal in Majestic Care's favor demonstrates the fact-specific inquiry surrounding allegations of discrimination and pretextual termination. The Sixth Circuit's agreement with the District Court following its de novo review emphasizes the importance of collecting facts and ensuring the circumstances surrounding terminations are well documented.

PRACTICAL TAKEAWAYS

- The finding of pretext in an employment discrimination matter is always context-specific and will result in a fact-finding mission for the parties and the court, so entities should always maintain diligent records of reasons and circumstances leading up to an employee's termination.
- Companies should have in place policies and procedures specifically identifying reasons and behaviors that would result in an employee's termination.

If you have questions or would like more information about this topic, please contact:

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