

LABOR AND EMPLOYMENT

MICHIGAN COURT OF APPEALS HOLDS THAT VIOLATING CODE OF ETHICS A LEGITIMATE, NON-DISCRIMINATORY REASON FOR TERMINATION

by Aaron V. Burrell

On July 23, 2019, the Michigan Court of Appeals affirmed dismissal of an age-discrimination complaint against a bank where the bank's internal investigation revealed that the plaintiff violated its code-of-ethics policy. In *Decatur v. PNC Bank, NA*, unpublished opinion per curiam of the Court of Appeals, issued Jul. 23, 2019; 2019 WL 3312511 (Docket o. 342084), the plaintiff worked in the banking industry for approximately 35 years and was a lead vault teller for a bank branch. The plaintiff's husband suffered a stroke, and the plaintiff alleged she provided two of her co-workers with "two halves to the combination of the main reserve cash vault"—which is an accepted practice under the bank's Code of Ethics and Fidelity Bonding policy ("the Ethics Policy"). But while the plaintiff was absent, a regional manager discovered that one of the plaintiff's co-workers "opened the main reserve coin vault by herself—not under dual control." *Id.* at * 1. The regional manager further learned that a co-worker had accessed the plaintiff's personal coin vault—also a violation of the Ethics Policy.

The bank conducted a thorough investigation into the incidents and concluded that the plaintiff provided "combinations to a co-worker providing her access to her coin vault and was dishonest about the matter when questioned in the investigative interview." *Id.* at *2. From this conclusion, the bank terminated the plaintiff and a similarly situated co-worker. The bank, however, did not terminate an individual its investigation revealed was "truthful"—but this "truthful" employee was also in her "twenties."

The plaintiff filed an action against the bank alleging that it retained a co-worker who was equally culpable in this incident because she was "in her twenties." The plaintiff further "alleged that a person 16 years younger than [the plaintiff] filled the teller position." *Id.*

The bank moved for summary disposition, arguing that it terminated the plaintiff for legitimate, non-discriminatory reasons: that she was dishonest during the investigation into the incident and directed another employee to be dishonest. Each infraction constituted a violation of the bank's Ethics Policy.

The court agreed with the bank. Beginning its analysis, the court outlined the ways an employee may demonstrate that the employer's stated reason for a termination constituted mere pretext:

1. showing the reasons had no basis in fact,
2. if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or
3. if they were factors, by showing that they were jointly insufficient to justify the decision. [(citations omitted) *Id.* at *3].

Applying these factors here, the court concluded that the plaintiff failed to demonstrate that the bank's stated reason for termination—that the plaintiff lied about giving the full combinations to the pertinent vaults and instructed her co-workers to lie about it—were mere pretext. The court cited the bank's lead investigator and her "full investigation concerning the acts of dishonesty, which entitled interviewing" all of the pertinent parties, in coming to its decision. *Id.* at *5. From this investigation, the court found no evidence which demonstrated that the termination occurred as a result of the plaintiff's age; instead, the "record evidence tend[ed] to show that [the bank] was not regularly terminating older employees . . . but was rather simply terminating dishonest employees of all ages." *Id.* Accordingly, the bank appropriately terminated the plaintiff as a result of her violation of the ethics policy—and not as a result of her age.

Takeaways

1. An employee may prove that a stated reason for termination was pretext by demonstrating that the reasons had no basis in fact, were not the actual factors motivating the decision, or were insufficient to justify the decision.
2. Courts give a great deal of credence to companies who conduct substantial investigations into incidents of impropriety. The more thorough the investigation, the more likely the Court will affirm the company's conclusions.
3. A violation of the company's ethics policy is likely sufficient to justify a termination. A company should work diligently to ensure that it exhaustively and fully investigated the incident, corroborated its findings with documentary and testimonial evidence, and is consistent in issuing discipline—irrespective of any particular protected class.

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Aaron V. Burrell is a Member in Dickinson Wright's Detroit office. He can be reached at 313-223-3118 or aburrell@dickinsonwright.com.