Employment Law Lunch

Fassbender

Alena FASSBENDER, Plaintiff-Appellant

v.

CORRECT CARE SOLUTIONS, LLC, Defendant-Appellee

10th Circuit - May 15, 2018

Female former employee brought action against her former employer, asserting claims for **pregnancy discrimination and retaliation under Title VII**. The United States District Court for the District of Kansas, John W. Lungstrum, granted employer's motion for summary judgment. Employee appealed.

Fassbender Facts

- Correct Care contracts with jails and prisons to provide healthcare services to inmates
- Fraternization policy – broadly forbids “undue familiarity” with inmates, including “sharing personal information” and “taking out of the facility any correspondence from an inmate”
- “Any violations of the ... policy are to be reported to a member of CCS management or Human Resources.”
- In late March-April 2015, Correct Care supervisor, Carrie Thompson, made 3 remarks heard either by Fassbender or another medication aide. Indicated concern about how she would manage “too many pregnant workers”

Supervisor's Remarks

You're pregnant too?

March or early April 2015, Carrie Thompson—CCS' health-services administrator at the Detention Center—overheard Fassbender discussing her pregnancy and remarked, "What, you're pregnant too?"

Are you kidding me?

A few days later, Thompson learned that yet another member of her staff was pregnant. Fassbender testified that she heard Thompson respond to this news, "[A]re you kidding me? Who is it? I don't know how I'm going to be able to handle all of these people being pregnant at once."

Too many pregnant workers

Lori Lentz-Theis—another certified medication aid—overheard Thompson telling an administrative assistant, "I have too many pregnant workers[.] I don't know what I am going to do with all of them." Lentz-Theis said that Thompson sounded "very angry and frustrated compared to how she usually sounds" when she said this.

Inmate Note – Slipped in Med Cart

"What up sexy lady how was your night at work, good I hope not tir[ ]ing cause you had 3 days off and I wasn't able to see your beautiful face, [expletive] I thought you quit on us but I knew you wouldn't let that happen. Anyway you know I have told you in many ways that I like you, sometime[ ]s I just get caught up on what to say cause I don't want us to get in trouble so I just kept it on small talk so it would be cool if we were good friends, I know you have a beautiful son and one on the way (Girl) but most of all you have a great sense of humor and a nice personality you are down to earth, sweet, honest that's why I like you. I know you said we could be friends but what kind of friend just hi see you later or what if you are serious about this let me know. [A]nd [h]ow old are you? I'm 31. [I]f you write back write as (La La) that is your nick name from me to you!"

Fassbender Facts - Continued

- Next afternoon, Fassbender reported note to officials at the detention center, but not to Correct Care
- A detention center official reported the incident to Correct Care supervisor Thompson, who in turn brought the issue to HR
- Fassbender was issued a written warning, but not suspended
- On May 3, another inmate gave a note to Fassbender
- This time Fassbender complied with policy
- Fassbender was terminated May 6

Fassbender – Termination Explanations

Initial Statements

Supervisor statement on termination - "Severity of findings" – No details

Fassbender requested explanation

By phone - "Not reporting note sooner."

Response to EEOC

Correct Care said it terminated Fassbender "because she violated the Fraternization Policy." (1) she failed to report the inmate's note to Thompson, (2) she didn't report the incident the same day, and (3) she discussed personal matters either with the inmate or within earshot of the inmate.

Correct Care did not mention that she took the note home.

Summary Judgment

Terminated Fassbender because she took "correspondence from an inmate home in violation of" the fraternization policy

Fassbender Lawsuit Claims

Fassbender filed suit, claiming CCS terminated her based on her pregnancy and retaliated against her in violation of Title VII.

The district court granted CCS' motion for summary judgment, finding that Fassbender failed to present sufficient evidence showing discrimination or that CCS' proffered reason for her terminated was pretextual.

The district court further found that she failed to show she reasonably believed the inmate's note was sexual harassment so as to support her retaliation claim.

Fassbender - 10th Circuit Rulings

Pregnancy Discrimination – Direct or Circumstantial?

The Tenth Circuit affirmed the district court's grant of summary judgment as to the finding that Fassbender did not present adequate direct evidence of pregnancy discrimination. Direct evidence that shows on its face that an employment decision was reached for discriminatory reasons. Fassbender relied on the three comments from Thompson expressing displeasure with her employees' pregnancies. The court found that **while these comments arguably expressed animosity toward a protected group, and potentially a desire to employ fewer pregnant individuals, Fassbender did not present evidence to show action based on discriminatory beliefs.**

Fassbender – 10th Circuit Rulings

Pregnancy Discrimination – Circumstantial Evidence – McDonnell-Douglas Framework

The Tenth Circuit reversed the district court on the issue of circumstantial evidence, finding that a reasonable jury could conclude that CCS' proffered reason for terminating Fassbender was pretextual. The *McDonnell-Douglas* burden-shifting framework applies where a plaintiff relies on circumstantial evidence.

Fassbender – 10th Circuit Rulings

Circumstantial Evidence – McDonnell-Douglas Framework – Pretext

The court found that the totality of the circumstances surrounding her termination were "sufficiently suspicious" for a jury to find **pretext**. Specifically, it pointed to:

- Thompson's three comments about "too many pregnant workers" in the weeks before her termination;
- CCS' inconsistent explanations of its reasons for terminating Fassbender;
- The fact that Fassbender followed policy in reporting the second note; and
- Thompson's failure to attach a narrative to Fassbender's termination request

Fassbender – 10th Circuit Rulings

Note was not unlawful sexual harassment – She was not opposing unlawful activity – Termination was not retaliation

The Tenth Circuit affirmed the district court's conclusion on Fassbender's retaliation claim that she could not reasonably believe that the inmate's note constituted unlawful sexual harassment. A Title VII retaliation claim requires a plaintiff to show retaliation based on an employee's opposition of activity that is unlawful under Title VII. **Because Fassbender could not show any unlawful activity she opposed, her retaliation claim failed.**

Litzinger

Tiffany LITZSINGER, Plaintiff – Appellant
v.
ADAMS COUNTY CORONER'S OFFICE, Defendant – Appellee
10th Circuit - February 15, 2022

Discharged employee of county coroner's office, who had **anxiety and depression**, brought action against her former employer alleging retaliation under **Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA)**. The U.S. District Court for the District of Colorado, Michael E. Hegarty, United States Magistrate Judge, granted employer's motion for summary judgment. Employee appealed.

Litzginer Fact Summary

- Litzinger was medicolegal death investigator, employed 2013-2018.
- Litzinger had anxiety and depression. Coroner and Deputy Coroner were aware and solicitious.
- Litzinger had anxiety episode, took FMLA.
- Back from FMLA leave, Coroner placed Litzsinger on probation for multiple violations of workplace policies.
- Shortly after her probation began, Coroner terminated Litzsinger for violating the terms of her probation.

Litzinger Lawsuit Claims

Litzsinger sued under FMLA and ADA, alleging that Coroner terminated her in retaliation for exercising her rights under both statutes.

Mag. J. Hegarty – Consent Jurisdiction – Granted Summary Judgment

The district court granted summary judgment for the Coroner's Office because **Litzsinger failed to demonstrate that the Coroner's reason for terminating her was pretextual**

Litzinger – Fact Details

Litzsinger regularly visited a counselor for mental health assistance.

Litzsinger's supervisors were aware that Litzsinger struggled with anxiety and asked her on several occasions whether she needed any help. Litzsinger declined each offer.

Spring of 2018, the Coroner retained Nicoletti-Flater Associates, a psychology firm, to provide stress-relief therapy and resiliency training for staff.

Litzinger – Fact Details

Litzsinger met with Dr. Dvoskina, a Nicoletti-Flater psychologist, for mental health assistance.

In June 2018, Litzsinger's primary physician diagnosed her with anxiety and panic attacks. PA encouraged Litzsinger to take medical leave, but Litzsinger said she did not want to take leave **"for fear of retaliation because the Coroner's Office would consider me to be a problem if I took time off for a mental condition."**

The next month, Litzsinger met with Dr. Dvoskina again. During this meeting, Litzsinger "broke down" and Dr. Dvoskina advised her to take FMLA leave to treat her stress and anxiety. **Litzsinger again refused to take leave because she feared retaliation from the Coroner.**

Litzinger – Fact Details

Towards the end of July 2018, the Coroner and Chief Deputy Coroner **drafted a written reprimand** to give to Litzsinger. The draft detailed several performance issues that had occurred in recent months, including Litzsinger's failure to comply with the Coroner's secondary employment policy, struggles to stay awake on shift, and problems with completing tasks on time.

On August 3, 2018, Litzsinger had to perform an external exam on a decomposed body during a night shift. While on duty, Litzsinger called the Coroner and told her that **she could not perform the exam**. When the Coroner asked Litzsinger why she could not do the exam, Litzsinger refused to answer, saying only that she was "burnt out" and that someone at Nicoletti-Flater was going to call the Coroner to explain.

Following Litzsinger's refusal to perform the exam, the Coroner told Litzsinger that they would meet the following week to "discuss this incident, [your] overall performance, and whether or not [you] can do this job." **The Coroner decided not to give Litzsinger the written reprimand that had already been drafted because she believed stricter punishment was warranted.**

Litzinger – Fact Details

On August 9, 2018, during the week in which the Coroner planned to meet with Litzsinger to discuss the disciplinary issues, Litzsinger suffered **chest pain at work** and was **transported to the emergency room via ambulance**. The next day, Litzsinger met with her physician's assistant, who told Litzsinger that her chest pain was likely a manifestation of her anxiety and depression.

PA encouraged Litzsinger to take medical leave.

Litzsinger requested leave from August 9 to August 21 to address her mental health needs. The Coroner told Litzsinger via email that **she would need to utilize FMLA leave because the requested leave time exceeded the standard sick leave** timeframe. The Coroner provided Litzsinger with the necessary FMLA paperwork. She also told Litzsinger the following:

"As previously discussed following the incident on 08/03, I was planning to meet with you on your workweek of 08/08 to discuss your job. However, now that you are on leave, we will have to move this meeting to a later date when you return."

Litzinger – Fact Details

The day after Litzsinger began FMLA leave, Coroner emailed Dr. Shawn Knadler, a clinical associate at Nicoletti-Flater, to explain the circumstances of Litzsinger's hospital visit and FMLA leave. Coroner informed Dr. Knadler about Litzsinger's refusal to perform an external exam and how Litzsinger had told Coroner that someone from Nicoletti-Flater would call to explain why Litzsinger could not execute her assigned tasks. Coroner also told Dr. Knadler that Litzsinger went to the ER for "chest pain" and that it "now appears that she is going on FMLA via that route." In closing, the Coroner told Dr. Knadler,

> "I implemented this mental health program through your organization to promote employee resiliency. It is obviously **highly suspect that this employee was going to try to abuse this**. **She may still seek to be seen at your organization during her leave of absence** (which I promote). However, **it would not surprise me if she still seeks FMLA or an extension of the FMLA approved by her physician**. I am requesting that your organization refer any of my employees, that may be seeking psychological FMLA leave, to their own private psychologist. Please let me know your thoughts and if you see a problem with this approach."

Litzinger – Fact Details

In his response to the Coroner, Dr. Knadler acknowledged that Nicoletti-Flater's wellness sessions are limited in scope and that requests for FMLA should be "completed through [employees'] primary therapists."

Litzinger – Fact Details

Litzsinger returned from FMLA leave on August 21. **On August 30**, the Coroner and Chief Deputy Coroner met with Litzsinger to **discuss her performance issues**. The conversation covered many of the same topics that were included in the written reprimand drafted prior to Litzsinger taking leave, such as **Litzsinger's secondary employment**, **sleeping during graveyard** shifts, and **failure to meet deadlines**.

The Coroner was particularly troubled by Litzsinger's e**xcessive use of the Internet for personal reasons at work**. During a review of Litzsinger's Internet history, the Coroner discovered that **Litzsinger spent an average of 90 to 120 minutes per shift using the Internet for reasons other than work, such as social media and online shopping**. The **Coroner also identified several timesheets where Litzsinger recorded her time as working on reports, but where Litzsinger's Internet history showed that she was instead visiting personal Internet websites**. The Coroner also noted that **Litzsinger was chronically behind on her work, which made the personal Internet use more egregious.**

Litzinger – Fact Details

The Coroner ultimately decided to place Litzsinger on **probation** instead of terminating her. But the Coroner remarked that she could terminate Litzsinger for many reasons, including dereliction of duty, fraudulent timesheets, using the Internet for personal reasons, and consistently being behind on her work. Litzsinger did not deny that she had committed the alleged violations of workplace policies. Instead, **Litzinger agreed with the Coroner, telling her, "You have every right to terminate me right now."**

The terms of Litzsinger's probation included the following:

- Refrain from using the Internet for personal reasons while at work
- Complete all work tasks within assigned timeframes
- Follow every policy and procedure and ask if any policy or procedure seems unclear

Litzinger – Fact Details

At the end of the disciplinary meeting, the Coroner told Litzsinger that she would not be given any more chances and that if there were further issues, Litzsinger would be terminated. Litzsinger acknowledged the terms of her probation and the consequences of noncompliance. Litzsinger then thanked the Coroner for being fair and for giving her an opportunity to keep her job in a probationary status.

Litzinger – Fact Details

In the two weeks after she was put on probation, Litzsinger continued to use the Internet for personal reasons. The Coroner identified **ten websites that Litzsinger visited while on probation that were unrelated to her work**. Litzsinger **admits** that she **accessed a utility company website for her son on one occasion and that she showed her co-workers her personal photography website on another occasion**. Litzsinger claims that the other websites in her Internet history were all for work purposes.

Litzinger – Fact Details

The Coroner's Office **terminated** Litzsinger on September 16, 2018 **for violating the terms of her probation**.

Litzinger – McDonnell-Douglas Framework

First

"Plaintiff must establish a prima facie case of discrimination or retaliation."

Second

Burden then shifts to the defendant, who must proffer "a legitimate non-discriminatory reason for the adverse employment action."

Third

Burden shifts back to the plaintiff to "show there is at least a genuine issue of material fact as to whether the employer's proffered legitimate reason is genuine or pretextual."

Litzinger – McDonnell-Douglas Analysis

The parties do not dispute that the first two prongs of the *McDonnell-Douglas* framework are met. Our **analysis thus focuses only on the third prong** of the framework, which is **whether a reasonable juror could find that the Coroner's proffered reason for terminating Litzsinger was pretextual**.

Litzinger – Law on Pretext

"A plaintiff demonstrates pretext by showing **either** that a **discriminatory reason more likely motivated** the employer **or** that the **employer's proffered explanation is unworthy of credence**." *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1166 (10th Cir. 2007) (citation omitted). Pretext may be established by revealing "weaknesses, implausibilities, inconsistencies, incoherence, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1267 (10th Cir. 2007) (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)

To support an inference of pretext, the plaintiff "must produce evidence that the employer did more than get it wrong." *Johnson v. Weld Cty.*, Colo., 594 F.3d 1202, 1211 (10th Cir. 2010). The plaintiff "must come forward with evidence that the employer didn't really believe its proffered reasons for action and thus may have been pursuing a hidden discriminatory agenda."

Litzinger – No pretext evidence

We agree with the district court that Litzsinger failed to show a genuine issue of material fact regarding pretext. Analyzing the evidence in the light most favorable to Litzsinger, we conclude no reasonable juror could find the Coroner's reason for terminating Litzsinger was pretextual. Other than the **temporal proximity between Litzsinger's FMLA leave and her termination**—which, **absent more, does not establish pretext**—Litzsinger presents no circumstantial evidence to show that the Coroner's proffered reason for terminating her was false or unworthy of belief.

Litzinger – Arguments on Pretext

The Coroner's Office says it fired Litzsinger for violating the terms of her probation by using the Internet for personal reasons. Litzsinger claims this reason is pretextual and that the Coroner's Office terminated her because she has a disability and in retaliation for taking FMLA leave. **To support her pretext argument, Litzsinger presents the following evidence: (1) the Coroner expressed frustration and skepticism about Litzsinger taking FMLA leave; (2) an employee normally would not be terminated for personal Internet use at work; and (3) the Coroner's reasons for terminating Litzsinger changed over time.**

Litzinger – The Coroner's Statements

While Litzsinger concedes these statements are not direct evidence of retaliation, she argues the email shows the Coroner thought Litzsinger was abusing the FMLA process, faking her disability, and that a "natural human reaction is to retaliate against the person for such abuse."

The district court acknowledged that the email shows skepticism but concluded that it cannot reasonably be read as showing an intention to retaliate. The court concluded that the email "suggests that the Coroner believed that Plaintiff chose to use FMLA leave to avoid a discussion with her regarding employment performance issues."

Litzinger – Coroner's Statements

We agree with the district court that a reasonable jury could <u>not</u> conclude that the Coroner's email casts doubt on the Coroner's proffered reason for terminating Litzsinger. The **broader context** shows that the **Coroner was frustrated with the way that Litzsinger sought FMLA leave, not with the fact that she used leave.** Specifically, the Coroner was concerned that instead of seeking FMLA leave through her primary psychiatrist Litzsinger had improperly used Nicoletti-Flater.

The response email from Dr. Knadler reinforces this interpretation. After discussing a few options for how the Coroner could respond to Litzsinger's situation, including disciplinary action, Dr. Knadler told the Coroner,

"We will ensure that ... all of your employees are aware of the objectives and limitations of the wellness sessions. This includes that requests for FMLA would be completed through their primary therapists and that they are encouraged to discuss any concerns/problems they are experiencing directly with their supervisor/management."

Litzinger – Coroner's Statements

Litzsinger also **claims the Coroner thought Litzsinger was faking her disability because she put "chest pain" in quotation marks** in her email to Dr. Knadler. **But** the record shows that the **Coroner understood many of her employees suffered from mental health problems due to the nature of the work**. That is the precise reason she **hired Nicoletti-Flater—to provide resiliency training for staff.** Other evidence in the record shows that the **Coroner and Chief Deputy Coroner knew about Litzsinger's mental health struggles and asked her on multiple occasions whether she needed any help or accommodations**. Given this evidence, a reasonable jury could not conclude the Coroner retaliated against Litzsinger for faking her disability.

Litzsinger analogizes her situation to that of the plaintiff in ***Fassbender v. Correct Care Sols., LLC*,** 890 F.3d 875 (10th Cir. 2018). In *Fassbender*, **we found evidence of pretext where a prison contractor terminated a pregnant employee** for taking an inmate's handwritten note home in violation of the contractor's fraternization policy. **We concluded a reasonable jury could find pretext because the employee's supervisor had made several hostile statements about pregnant workers and the employer's proffered reasons for termination changed over time.**

Litzsinger compares the comments made by the supervisor in *Fassbender* to those made by the Coroner to Dr. Knadler. But the Coroner's comments do not come close to the level of hostility and discrimination exhibited by the supervisor in *Fassbender*. As explained above, **the Coroner's comments reflect frustration with the way Litzsinger utilized Nicoletti-Flater, not with her disability or the fact that she took FMLA leave. The Coroner's email also does not indicate a desire to terminate or otherwise discipline Litzsinger in retaliation for taking FMLA leave, which is distinguishable from *Fassbender*.**

In sum, the Coroner's statements do not show that the Coroner's Office "didn't really believe its proffered reasons for action and thus may have been pursuing a hidden discriminatory agenda."

Litzinger – Changing Justifications - Law

Contradictions or inconsistencies in an employer's proffered reason for termination can be evidence of pretext. *Whittington v. Nordam Group Inc.*, 429 F.3d 986, 994 (10th Cir. 2005). For instance, a jury can reasonably infer pretext when an employer provides one explanation for an adverse action but later affirmatively disclaims or otherwise abandons the rationale. **But pretext cannot be established by "the mere fact that the [employer] has offered different explanations for its decision."** *Jaramillo v. Colo. Jud. Dep't*, 427 F.3d 1303, 1311 (10th Cir. 2005**). Rather, "inconsistency evidence is only helpful to a plaintiff if 'the employer has changed its explanation under circumstances that suggest dishonesty or bad faith.'** " *Twigg v. Hawker Beechcraft Corp*., 659 F.3d 987, 1002 (10th Cir. 2011) (quoting *Jaramillo*, 427 F.3d at 1310).

Litzinger – Changing Justifications - Analysis

During the probation meeting on August 30, the Coroner listed the many policy violations committed by Litzsinger and told her, “There are a million reasons to terminate you.” The Coroner explained that Litzsinger could be fired for, among other things, “**dereliction of duty**, **fraudulent records**, [and] **spending extensive worktime doing email/internet searches**.” Litzsinger agreed with the Coroner’s assessment and **admitted to her that “you have every right to terminate me right now.”** Instead of terminating Litzsinger, the Coroner placed her on probation and made it clear that while on probation, Litzsinger would only be allowed to use the Internet for work-related reasons.

Litzinger – Changing Justifications - Analysis

Less than two weeks after she was placed on probation, several co-workers reported that Litzsinger had visited personal websites during work hours. Litzsinger's supervisors **checked her internet history and confirmed the report.** Litzsinger admits that she briefly visited a utilities website to help her son with a power outage. She also admits that she visited a photography website to show co-workers photos from her photography business.

The Coroner terminated Litzsinger on September 16, 2018. The parties agree that on that day, the Coroner told Litzsinger that she was being fired for visiting personal websites at work in violation of her probation. Litzsinger says the Coroner "gave me no other reason for termination."

Litzinger – Changing Justifications - Analysis

Litzsinger concedes that the Coroner has never abandoned personal internet use as the reason for termination. Instead, she argues that once litigation commenced, the Coroner gave additional reasons for termination, which raises the question of whether the Coroner's initial proffered reason is legitimate or pretextual.

Litzinger – Changing Justifications - Analysis

Litzsinger first directs us to the deposition testimony of Chief Deputy Coroner Appleberry. During her deposition, Appleberry said that the Coroner terminated Litzsinger for violating the terms of her probation. Appleberry then explained that Litzsinger violated her probation by **"using her computer for personal use," "not working,"** and **"retaliating against her coworkers"** for reporting her behavior. Litzsinger contends that these additional reasons for termination conflict with what the Coroner told Litzsinger on the day she was terminated, which is that she was being terminated for her personal Internet use.

We disagree. **The additional justifications are not inconsistent with the Coroner's proffered reason for termination—rather, they are part of the same violation.** Litzsinger was "not working" because she was on the Internet for personal reasons. And Litzsinger retaliated against her co-workers because they reported her for using the Internet instead of working. **The fact that the Coroner provided additional reasons for termination resulting from the underlying cause for termination does not show pretext.** *See Matthews v. Euronet Worldwide, Inc.*, 271 F. Appx 770, 774 (10th Cir. 2008) (unpublished) ("[T]here is no support for a finding of pretext if the employer does not give inconsistent reasons, but instead merely elaborates on the initial justification for termination.").

Litzinger – Changing Justifications - Analysis

Litzsinger next points us to the Coroner's Motion for Summary Judgment, where the Coroner explained that it **"had several legitimate non-retaliatory reasons for the termination,"** including Litzsinger "falsifying her timecards," being "chronically behind on her work," "creat[ing] extra work for her coworkers," and "caus[ing] delays for funeral homes and the families of the deceased."

We are not persuaded that these additional reasons show pretext. Reading the motion as a whole, it is apparent that these reasons were simply bolstering the Coroner's claim that Litzsinger's termination was justified. The motion does not say that Litzsinger was terminated for the additional reasons, only that Litzsinger could have been justifiably terminated for any number of reasons.

Litzinger – Changing Justifications - Analysis

Litzsinger analogizes the Coroner's shifting explanations to those of the employer in *Fassbender*. But the employer's conduct in *Fassbender* is distinguishable. [In *Fassbender,* Correct Care was not consistent in always including the fact that Fassbender took the inmate note home.] Here, the Coroner told Litzsinger that she was being terminated for her **personal use of the Internet while on probation** and the **Coroner has never abandoned that initial explanation for termination**. The Coroner has always maintained that it fired Litzsinger for improper use of the Internet. **Although the Coroner offered additional explanations for why probation and termination were justified, Litzsinger has not shown why these additional reasons undermine the Coroner's proffered legitimate reason for termination.**

Litzinger – Changing Justifications - Analysis

Litzsinger is correct that different reasons for termination do not have to be contradictory to show pretext—they only need to undermine the credibility of the employer's proffered reason for termination. But this point of law provides no help to Litzsinger because she fails to demonstrate how any of the Coroner's reasons for termination show a lack of credibility. Providing additional justifications for termination without abandoning the primary reason for termination does not, without more, establish pretext. To support an inference of pretext, the additional justifications must "suggest dishonesty or bad faith." *Twigg*, 659 F.3d at 1002 (citation omitted). **While it is true that the Chief Deputy Coroner noted additional probation violations in her deposition and the motion for summary judgment included a list of other policy violations that could have supported termination, the Coroner's Office never deviated from its initial justification for terminating Litzsinger—her Internet use.**

Eisenhour -

Marcia EISENHOUR
v.
Weber COUNTY (also Craig D. Storey, former Judge)

10th Circuit - July 27, 2018

Former county court administrator filed § 1983 action alleging that judge had sexually harassed her, in violation of her equal protection rights, and that county and county commissioners retaliated against her for complaining about harassment. After jury rendered verdicts for plaintiff on equal-protection harassment claim against judge and whistleblower claim against county but found against her on First Amendment retaliation claims, new trial was ordered on whistleblower and retaliation claims. After retrial, the United States District Court for the District of Utah, **granted commissioners' motion for judgment as matter of law on retaliation claim against them** and jury found for county on whistleblower and retaliation claims against it. Plaintiff and judge appealed, and appeals were consolidated.

EISENHOUR – Background and Suit

Plaintiff Marcia Eisenhour worked as a **court administrator** for the Weber County Justice Court in Utah for **24 years**. In 2008, she complained the county attorney about sexual harassment by Judge Craig Storey, her supervisor at the time. The matter was referred to **Utah's Judicial Conduct Commission, which found no misconduct**. Eisenhour went public with her allegations in 2009, which the press reported. **Several months later, three county commissioners voted to close the Justice Court and merge it with a court in another county, ultimately putting Eisenhour out of a job.**

Eisenhour sued Judge Storey, Weber County, and the three county commissioners.

EISENHOUR – Procedural History

The district court granted summary judgment against Eisenhour on all claims. On appeal, the **Tenth Circuit reversed in part**, finding she had presented enough evidence to support:

1. **Her §1983 equal protection claim against Judge Storey for sexual harassment**
2. **Her § 1983 First Amendment retaliation claim against the county and commissioners**

EISENHOUR – Procedural History

At trial on remand, the jury found for Eishenour on her equal protection claim, but against her on her First Amendment claim. The district court ultimately held a new trial on the retaliation claim against the county and commissioners. The court granted the commissioners' motion for judgment as a matter of law, and the jury found for the county. Both Eisenhour and Storey appealed.

EISENHOUR – Rulings

The court affirmed the denial of Storey's motion for judgment as a matter of law on Eisenhour's equal protection claim. The court pointed to Eisenhour's testimony of harassment:

> Storey's harassment began when he **handed her**, albeit for the purported purpose of filing, the **erotic poem that he wrote about her**. His misconduct escalated after that point and he **began making physical contact** with her. He would either come up behind her when she was sitting at her desk and press his **groin into the back of her head** or come up to her at **the front counter and stand close enough that his groin touched her thighs**. On one occasion Storey had her come into his office and he proceeded to tell her about a **dream of his in which she was at work naked from the waist up**. In addition, **Storey**, who served as her direct supervisor, **became possessive of her after learning that she and her husband had separated.** He began asking her co-employees about her activities and began placing restrictions on when she could use leave time (that is, only after informing him where she intended to go, whom she intended to go with, and what she intended to do).

EISENHOUR – Rulings

Judge Lost - Based on this evidence, the court found that a **jury could have reasonably found that Storey's actions created an objectively hostile or abusive working environment.**

Commissioners Won - The court further affirmed the judgment as a matter of law in favor of the commissioners on the First Amendment retaliation claim. Because the jury at the second trial found that the county had taken no adverse employment action against Eisenhour, there was likewise no basis for liability against the individual commissioners, rendering any error harmless.