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## Alternate Theory for Motive Does Not Establish Pretext

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*Special to the Legal*

Most employers would likely agree that an employee who openly discusses looking for another job places his or her current employment in grave jeopardy. When Shirley Fichter asked a senior manager at her employer, AMG Resources, to be a reference in a job search, she was presented with a severance package shortly thereafter. Rather than sign the agreement, Fichter resigned and then brought suit for a hostile work environment and gender discrimination under Title VII of the Civil Rights Act of 1964. The U.S. Court of Appeals for the Third Circuit recently affirmed summary judgment in favor of AMG in *Fichter v. AMG Resources*, No. 12-3302 (3d Cir. June 12, 2013).

### ASSISTANT HIRED

Fichter was a long-term employee of AMG, a scrap metal processor and seller, working first in accounts receivable and then in accounts payable. In the latter



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position, she had an assistant, who was reassigned, leaving Fichter with "twice as much work," according to the opinion. However, when the company started looking for an assistant to work with Fichter, she objected. Nevertheless, Fichter assisted in the interview process and ultimately took part in selecting Gregory Cercone as her new assistant in June 2008, the opinion said. Cercone reported to Fichter in his new role.

When Fichter took a medical leave in the spring of 2009, Cercone assumed her duties and, when she returned to work, she

was reassigned to a position assisting one of the company's scrap metal brokers with both accounts receivable and payable. Cercone remained in Fichter's former position. Fichter understood that her new position was "very important" to AMG and that she was the best-qualified person for the role, the opinion said. Furthermore, Fichter testified that assisting the broker required her to work only one hour a week, while other clerks worked full-time and occasional overtime.

### JOB TAKES ONE HOUR PER WEEK

Fichter worked in her new position for three months and then told a senior manager that she disliked her new job and would be looking for new employment if she could not be laid off or work from home. One week later, Fichter's supervisor presented her with a severance agreement, but did not explicitly terminate her employment. Fichter refused to sign the agreement, but said that she would be leaving the company in a few weeks, according to the opinion. She did, and subsequently brought

suit under both Title VII and the Pennsylvania Human Relations Act. At the close of discovery, AMG moved for summary judgment, which was granted. Fichter then appealed to the Third Circuit.

## **ALTERNATIVE THEORY REJECTED**

Fichter's overarching claim was that a series of decisions by the company marginalized her in an effort to "[push] her out" of her job, the opinion said. The court observed that in responding to the company's (legitimate nondiscriminatory) reasons for the decisions made, Fichter did not attempt to rebut the explanations, but, instead, advanced an alternate theory as to why the decisions were made. The court cited one of its bedrock employment discrimination decisions, *Kautz v. Met-Pro*, 412 F.3d 463 (3d Cir. 2005), in rejecting this approach, finding that "we are obliged to consider whether the employer's proffered reasons are pretextual and not alternative theories advanced by the plaintiff."

Specifically, inasmuch as Fichter admitted that her reassignment to assisting the broker was an important job and that she was the best-qualified candidate, she was left to argue that AMG's explanation was pretextual because the position was a "waste of time" because no one else had made the position effective. This was rejected.

Fichter's claim that the company knew that she was underutilized, and was not allowed to assist others to make herself more useful, was also rejected — first, because

there was no evidence that she had informed anyone as to her idleness and secondly, because Fichter's claim that she should have been allowed to help others was nothing more than a disagreement with "allocating resources [which] is a common business decision," the opinion said.

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Similarly, Fichter admitted that the company had the managerial right to hire Cercone and to assign her duties to him when she went on medical leave. She presented no evidence of discrimination.

## **HOSTILE ENVIRONMENT CLAIM**

Fichter's hostile work environment claim was also dismissed. While she presented a laundry list of events that allegedly created a hostile environment, there was no evidence of severe or pervasive discriminatory environment "due to her gender to the extent that it would alter the conditions of her employment." Fichter argued that the district court incorrectly considered each of the alleged behaviors in isolation and that it

had failed to consider the "totality of the circumstances." The Third Circuit found that, while its precedent requires a court to "evaluate the sum total of abuse over time," a court is not required to "cobble together unsubstantiated theories from otherwise innocuous facts."

The importance of the decision is in its emphasis on the need for employees to rebut the employer's reasons for its action, rather than asking the court to accept alternate theories of motivation as a basis for pretext. While the employee certainly feels wronged and has likely stewed over why certain actions were taken, courts will be looking for evidence of disparate treatment or severe behavior in order to defeat summary judgment. •