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Sixth Circuit Rejects Plaintiff's Claim of "Hyper-Scrutiny" as Evidence of Discrimination

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In *Boshaw v. Midland Brewing Company*, Midland Brewing's former restaurant operations manager, Boshaw, claimed he was terminated because of his "sexuality" in violation of Title VII and Michigan's Elliott Larsen Civil Rights Act ("ELCRA"). Boshaw alleged that the restaurant manager told him that he would not be promoted unless he appeared more masculine and hid his sexual orientation. Subsequently, Boshaw complained about this comment to Midland Brewing's owner, Kepler. Among Boshaw's many allegations, he claimed that he was retaliated against for engaging in the protected activity of raising a civil rights complaint. Midland Brewing stated that its non-discriminatory reason for terminating Boshaw was that he violated work rules and instructions on multiple occasions. In an attempt to avoid a dismissal, Boshaw claimed that he was subjected to "hyper-scrutiny" after his complaint, which showed Midland Brewing's reasons for discharge were false and pretext for discrimination.

The Court of Appeals upheld the dismissal of Plaintiff's claims because his allegation of "hyper-scrutiny" was too vague and not supported by the undisputed facts. For example, Boshaw claimed that he "could not do anything right," that the owner "expressed anger," and that he was terminated for missing a single meeting, whereas a bartender who was a "no-call, no-show" on multiple occasions was not terminated. However, the evidence showed Boshaw did more than simply miss a meeting. He attempted to expand his job duties without permission; brought the wrong resume to an interview; attempted to offer a beer promotion without authorization; and missed a mandatory meeting and shift without prior notification. Specifically addressing the "no-call, no-show" bartender, the Court recognized Boshaw held the second highest position at the restaurant and, therefore, he was not treated differently than any other similarly situated employee.

This case demonstrates the importance of good documentation and record keeping. The employer was able to rebut the Plaintiff's vague "hyper-scrutiny" allegation and sustain a dismissal of the retaliation claim because it had evidence that supported its reasons for termination. This case also illustrates that an employer must treat similarly-situated employees similarly. Having good documentation as to how jobs, behavior, or circumstances differ can be powerful evidence in rebutting claims of dissimilar treatment.

Although the Plaintiff was not successful, the issue of “hyper-scrutiny” is real – simply peppering a file to support a termination when other employees are not held to the same standard can be evidence of pretext for discrimination, which would preclude a dismissal at the summary judgment stage.

Employers who desire guidance on disciplining and terminating employees in a way that minimizes the potential for a discrimination or retaliation claim should contact any member of **Bodman’s Workplace Law Group**. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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