FILED
United States Court of Appeals
Tenth Circuit

June 13, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SARAH J. OLDRIDGE,

Plaintiff - Appellant,

v.

CITY OF WICHITA, KANSAS,

Defendant - Appellee.

No. 22-3104
(D.C. No. 6:18-CV-01243-JWB)
(D. Kan.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **BALDOCK**, and **EID**, Circuit Judges.

Sarah J. Oldridge appeals the district court's grant of summary judgment to the City of Wichita, Kansas, on her claim of employment retaliation. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Oldridge began working as a police officer for the Wichita Police Department (WPD) in 1996. By 2015, she had been promoted to lieutenant. In March 2018, she

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

applied for promotion to captain. At the time, Oldridge was the only female lieutenant. She is white.

On March 8, Chief Gordon Ramsay invited WPD employees via email to provide information about the applicants for the captain position through an anonymous web-based survey. On March 12, Oldridge forwarded Ramsay's email to Triniece Robertson, who was the City's Human Resources (HR) Specialist, asking how the survey would "filter personal or other bias from the respondents." App., Vol. III at 65. Oldridge also asked about the survey's basis for ranking candidates; how employees with no knowledge of the candidates would be able to rank them; what response rate would be considered meaningful, valid, and reliable; how the survey results would be used in factoring the overall scoring and assessment of candidates; and whether the results would be confidential or shared with others, including HR. Robertson replied that because Ramsay had sent the information about the survey, it was better if Oldridge directed her questions or concerns to him. Oldridge then forwarded the March 12 email to Ramsay and copied Robertson, Deputy Chief Troy Livingston, HR Director Chris Bezruki, and her immediate supervisor, Captain Clay Germany. Concerned that Ramsay had not received that email, Oldridge resent it to him on April 4.

On April 4, Captain Chester Pinkston provided Ramsay a draft response to Oldridge's email. On April 5, Ramsay emailed the following response to Germany and asked him to discuss it with Oldridge:

> One of the issues that has been brought to my attention from members of the Department is the lack of input that many of them perceive that they have. I have always felt that providing each member with an opportunity to provide input and feedback benefits the organization as a whole. I have successfully used this method prior to this process. Due to the magnitude of making both a Deputy Chief and Captain promotion, I wanted to ensure that all members of the Department could have an opportunity to be heard regarding the candidates. My historical knowledge of the candidates is comparatively brief and I therefore value additional input.

Id. at 67.[1] Germany discussed Ramsay's response with Oldridge on April 11.

On April 12, Ramsay informed Oldridge that she had not scored high enough on the panel interview to proceed to the next phase of the promotion process. Oldridge scored eighth out of the eleven applicants. The top four moved on in the process.

On May 5, Ramsay promoted two men to captain. One was white and the other black. The black man was Wendell Nicholson. Among other things, candidates for the captain position were required to have at least one year of experience as a WPD lieutenant. Nicholson did not have one year of experience as a lieutenant at the time he submitted his application in March, but he did have a year in rank at the time the promotion occurred. Nicholson also had more seniority than Oldridge, scored higher than her on the panel interview, and had additional higher education.

[1] The record suggests Ramsay's email to Germany contained two more paragraphs. *See* App., Vol. III at 155:7–10; *id.*, Vol. V at 13. However, the parties do not discuss those.

On May 9, Oldridge sent an email to HR Director Bezruki and copied many others: Ramsay, Deputy Chief Livingston, Captain Pinkston, Captain Germany, HR Specialist Robertson, the HR Equal Employment Opportunity Investigator, the City Attorney, the Deputy City Attorney, the City Manager, Oldridge's personal attorney, and all of the other twenty-eight WPD lieutenants. Oldridge wrote that she had not received a response to all the questions in her March 12 email, which she claims was appended to the May 9 email,[2] and she posed five additional questions concerning the role resumes played in the selection process and whether a combination of experience and training could supplement or be used in lieu of the minimum job requirements. Although she did not identify Nicholson by name, Oldridge claimed a lieutenant who received the promotion "did not meet the minimum requirement of time in rank." *Id.*, Vol. IV at 110. She also questioned why another lieutenant (also not identified by name) who met the time-in-rank requirement but not an education requirement was not allowed to apply. Oldridge asked what information about the applicants the interviewers had received before the interview, and she questioned why Pinkston had managed the process instead of the Training Bureau, which had historically done so. Oldridge stated her inquiry was "not intended to disparage anyone but to clarify expectations and advocate for improvement of disparities, transparency in the

[2] In her response to the City's motion for summary judgment, Oldridge asserted that her May 9 email specifically asked how the survey would "filter out bias." App., Vol. III at 25, ¶ 25. The district court could not reach that conclusion because the email itself did not ask that question and the relevant exhibit contained only the header of an April 4 email sent to Ramsay. *See id.*, Vol. IV at 110 (exhibit); *id.*, Vol. VI at 11 n.3.

process, equal opportunity, [and] consistency and fairness for all current and [sic] applicants who participate in the promotional process." *Id.*

The City Manager informed the City Attorney that he thought Oldridge's questions were fair and should be answered. Ramsay, Pinkston, and then-Captain Wanda Givens agreed Oldridge could ask questions about the promotion process, but Ramsay and Givens thought Oldridge had deviated from the chain of command by sending the May 9 email to all twenty-eight lieutenants and others outside the chain (Pinkston provided no testimony on this point).

Based on the May 9 email, Deputy Chief Livingston initiated a complaint against Oldridge for conduct unbecoming an officer in violation of WPD policy 3.204, which provides: "Each member of the Department shall contribute his/her part in maintaining Departmental integrity, order, and discipline," *id.*, Vol. II at 274. WPD's Professional Standards Bureau (PSB) launched an internal investigation led by Detective Tammy Doshier. Doshier interviewed forty-seven witnesses, including all the lieutenants copied on the May 9 email, and generated a 191-page report. In fashioning her investigation, Doshier relied in part on a statement in a manual on law-enforcement administrative investigations that it is important to ask whether a reasonable officer would anticipate that the conduct being investigated would be subject to discipline. *See id.* at 269 (manual); *see also id.*, Vol. IV at 46, 51–53 (Doshier's testimony). Thus, Doshier asked thirty-eight[3] of the witnesses if they

[3] The report states that not all questions were applicable to all forty-seven witnesses. *See* App., Vol. V at 192.

would have sent the May 9 email. One respondent was unsure, three said they probably would have sent it, and thirty-four responded they would not have sent it.

Doshier's report identified several areas of concern, including that Oldridge failed to follow the chain of command despite coaching Germany had provided her in April. Based on Doshier's report, Ramsay sustained the charge of conduct unbecoming an officer and suspended Oldridge for one day without pay.

Shortly after the investigation began, Oldridge filed this action against the City under Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. §§ 2000e-2 & 2000e-3, asserting claims of discrimination and retaliation.[4] In the pretrial order (and as relevant to this appeal), Oldridge contended that she was denied the promotion because of her sex and that the manner and scope of the PSB investigation and the resulting suspension were in retaliation for questioning the promotion process in her March 12 and May 9 emails. The City filed a motion for summary judgment on both claims, which the district court granted. On appeal, Oldridge does not challenge the district court's ruling on her discrimination claim. As for the other claim, the district court concluded Oldridge could not establish an element of a prima facie case of retaliation—that she had engaged in protected opposition to unlawful discrimination. The court concluded that the reference to "personal or other bias" in the March 12

[4] Oldridge also invoked the Kansas Act Against Discrimination (KAAD), *see* Kan. Stat. Ann. § 44-1009, but the parties' briefs on appeal refer only to Title VII. We therefore treat this appeal as involving only Title VII. But we would apply the same analysis to Oldridge's KAAD claims. *See Singh v. Cordle*, 936 F.3d 1022, 1037, 1042 (10th Cir. 2019).

email was too vague to amount to a complaint that the survey discriminated on the basis of sex. The court determined the May 9 email also did not refer to sexual discrimination but complained only that Nicholson was promoted despite not meeting the minimum one year as a lieutenant. Otherwise, the court observed, the May 9 email set out general complaints about the promotion process and Ramsay's lack of a complete response to the March 12 email without any indication that those complaints involved sexual discrimination.

II. DISCUSSION

A. Standard of review

We review de novo a district court's decision to grant summary judgment, applying the same standard governing the district court. *Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 758 (10th Cir. 2020). Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We view all facts and evidence in the light most favorable to the party opposing summary judgment." *Craft Smith, LLC v. EC Design, LLC*, 969 F.3d 1092, 1099 (10th Cir. 2020) (internal quotation marks omitted).

B. General principles of Title VII retaliation law

In relevant part, Title VII's anti-retaliation provision makes it unlawful for "an employer to discriminate against" an employee "because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, an employee must demonstrate "(1) that

she engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse[,] . . . and (3) that a causal connection exists between the protected activity and the materially adverse action." *EEOC v. PVNF, L.L.C.*, 487 F.3d 790, 803 (10th Cir. 2007). In this appeal, our focus is on whether Oldridge met the first of these requirements—that she had engaged in protected opposition to discrimination.

"Protected opposition can range from filing formal charges to voicing informal complaints to superiors." *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1015 (10th Cir. 2004). "Although no magic words are required, to qualify as protected opposition the employee must convey to the employer his or her concern that the employer has engaged in a practice made unlawful by [Title VII]." *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1203 (10th Cir. 2008).[5] Thus, "[g]eneral complaints about company management . . . will not suffice." *Id.* Nor will a "vague

[5] Although *Hinds* involved the Age Discrimination in Employment Act (ADEA), the ADEA's "substantive anti-discrimination provisions . . . are patterned on Title VII," *Villescas v. Abraham*, 311 F.3d 1253, 1257 (10th Cir. 2002). Moreover, the Title VII and ADEA anti-retaliation provisions are substantially identical, *compare* 42 U.S.C. § 2000e-3(a) (Title VII) *with* 29 U.S.C. § 623(d) (ADEA), and the elements of a prima facie case are the same under both statutory schemes, *see Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 533 (10th Cir. 1998). Because of these similarities, we may consult cases involving the ADEA for guidance when considering whether a plaintiff has shown protected opposition to discrimination in a Title VII case. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173–74 (2009) (explaining that "[w]hen conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination," and declining to apply Title VII case law to analysis of the burden of persuasion in an ADEA case because of textual differences in the respective statutes regarding that burden). *Hinds* itself relied on Title VII cases in support of the statement we quote. *See Hinds*, 523 F.3d at 1203 n.13.

reference to discrimination . . . without any indication that [the alleged misconduct] was motivated by" a category that Title VII protects. *Id.* at 1203 n.13 (internal quotation marks omitted).

C. The March 12 email

In her March 12 email, Oldridge's use of the phrase "personal or other bias" did not refer to unlawful discrimination or indicate she was concerned that the survey violated Title VII. Instead, the email expressed no more than a concern that the survey might be unfairly biased in some respect. Thus, the reference to "personal or other bias" is too vague to qualify the March 12 email as protected activity.

But even assuming, as Oldridge argues, that "personal or other bias" was not ambiguous but specific enough to encompass Title VII discrimination, the March 12 email still does not amount to opposition to discrimination. To demonstrate protected opposition to discrimination, an employee "need not [establish] that his employer had actually discriminated against him; he need only show that when he engaged in protected opposition, he had a reasonable good-faith belief that the opposed behavior was discriminatory." *Hertz*, 370 F.3d at 1015–16. This standard has subjective and objective components. *Little v. United Techs.*, *Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997); *see also Crumpacker v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1171 (10th Cir. 2003) (holding that a plaintiff cannot "maintain a retaliation claim based on an *unreasonable* good-faith belief that the opposed conduct violated Title VII"). "A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in

unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented." *Little*, 103 F.3d at 960; *accord Crumpacker*, 338 F.3d at 1171.

Oldridge has pointed to no facts or record evidence that the survey or its use (if any) in the promotion process unlawfully discriminated on account of sex or any other category Title VII protects, or that when she wrote the March 12 email she held a good-faith belief that the survey did so. In fact, the record is devoid of any evidence regarding the substance of the survey or Oldridge's beliefs about the survey on March 12.[6] In late May or early June, Pinkston prepared written responses to all the questions Oldridge raised in the March 12 and May 9 emails, and those responses were provided to Oldridge during discovery.[7] Those responses include statements that "[t]he survey did not impact [the promotion] process" and "[t]his survey was not designed to include or filter out an individual's bias" but instead "provide[d] members of the Department an opportunity for input that many perceive that they do not have." App., Vol. III at 120. These statements are insufficient to meet the objective component of the good-faith-belief standard. We therefore conclude that, even assuming that "personal or other bias" could have encompassed Title VII

[6] In her response to interrogatories, Oldridge did not even list the survey among the "key documents" in this case. App., Vol. II at 301.

[7] Doshier asked Pinkston to wait until after the PSB investigation to provide the answers to Oldridge. When he tried to do that, Oldridge declined to meet because she had filed this action.

discrimination, the March 12 email does not qualify as protected opposition to discrimination.

D. The May 9 email

The May 9 email is even further removed from qualifying as protected opposition to discrimination than the March 12 email. Despite referring to "transparency," "equal opportunity," and "fairness," *id.*, Vol. IV at 110, the May 9 email expressed concerns only about Ramsay's response to the March 12 email and the promotion process generally. As for her inquiry regarding the other unnamed lieutenant (Jason Stephens, as it turns out) who was not allowed to apply for the promotion because he did not meet an educational requirement, Oldridge told Doshier during the PSB investigation that she viewed it as discrimination against Stephens even though it did not "have to do with whether they're a protected class or not." *Id.*, Vol. V at 152. And at her deposition, Oldridge testified that the questions in her May 9 email were "not about anybody else but . . . about the process." *Id.*, Vol. III at 97:5–6. Oldridge's own statements, therefore, lend additional support for our view that the concerns she expressed in the May 9 email amount to "[g]eneral complaints about [WPD] management," *Hinds*, 523 F.3d at 1203, not opposition to Title VII discrimination, and are therefore insufficient to constitute protected activity.

E. Oldridge's arguments

1. Broad construction of anti-retaliation provision

Oldridge's arguments do not persuade us otherwise with respect to either email. She first contends the district court disregarded the Supreme Court's

instruction that Title VII's anti-retaliation provision must be read broadly to further Title VII's purposes. We have no quarrel with that principle as a general proposition. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 173–74 (2011) ("Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct" and "prohibits any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (internal quotation marks omitted)); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (interpretation of Title VII should not "provide a perverse incentive for employers to fire employees who might bring Title VII claims"). But a broad construction does not mean one without boundaries. And as made clear above, our precedents require more than the vague suggestions of discriminatory conduct set out in Oldridge's emails.

2. Anticipatory retaliation

Shifting gears, Oldridge next argues that the City retaliated against her in anticipation of her opposing discrimination. She contends the focus should be on the employer's motivation, and circumstantial evidence in this case—that several recipients of her May 9 email interpreted it as complaining of illegal discrimination—is sufficient for a jury to find that the PSB investigation and resulting suspension were motivated by a desire to prevent her from filing a claim that the promotion process was discriminatory. The district court rejected this theory for two reasons: (1) Oldridge cited no authority supporting the proposition that such circumstantial evidence is sufficient to show protected activity where her underlying

email does not constitute such activity, and (2) she failed to identify any recipients of the email, in particular any decisionmakers regarding the PSB investigation, who interpreted it as a complaint of unlawful discrimination under Title VII.

Now, on appeal, Oldridge founds this theory on *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993), where we held that actions taken against an employee in anticipation of the employee engaging in protected opposition to discrimination fall within the scope of Title VII's anti-retaliation provision. The City argues Oldridge waived a theory of anticipatory retaliation because she did not present it to the district court or cite *Sauers*. Oldridge replies that she did raise it in the district court when she distinguished a case the City relied on by stating that "unlike the employer [in that case], here recipients of Oldridge's email interpreted it to be a complaint of illegal discrimination, including at least two[] members of command staff," App., Vol. III at 33–34.

We agree with Oldridge that she adequately presented this theory to the district court because she went on to discuss the views those recipients expressed to Doshier during the investigation, and, notwithstanding her failure to cite any supporting case law, the district court rejected her theory on the merits. However, *Sauers* is distinguishable in a significant respect. The plaintiff in *Sauers* had not yet engaged in protected opposition to discrimination before she was reassigned against her wishes, but she introduced evidence of a tape-recorded conversation between her supervisor and another employee in which the supervisor appeared "to be concerned about someone filing sexual harassment charges against him." 1 F.3d at 1128. This

court concluded that the recorded conversation indicated the supervisor feared the plaintiff might soon file a sexual harassment complaint against him, and that reassigning plaintiff "in anticipation" of her "engaging in protected opposition to discrimination" was "no less retaliatory than action taken after the fact." *Id.*

There is no similar direct evidence in this case of any of the decisionmakers' motivation.[8] Moreover, we have never extended *Sauers* beyond its facts, and we decline to do so here because the circumstantial evidence on which Oldridge relies—statements made by four recipients of the May 9 email—is insufficient to support a determination that the decisionmakers acted in anticipation of Oldridge filing a discrimination claim given that none of them characterized the email as complaining of Title VII discrimination.

As Oldridge observes, Stephens told Doshier he thought the email "'look[ed] like somebody's building a lawsuit against the City.'" App., Vol. V at 124. But taking Stephens's PSB interview as a whole, his opinion clearly was grounded on discussions Stephens had with Oldridge concerning Nicholson's time in rank and whether Stephens was told he could not apply for the promotion because he did not meet an educational requirement. There is no indication that any lawsuit Stephens

[8] Although the parties have never made clear who the decisionmakers were in this case with respect to the PSB investigation and resulting suspension, we view them to include at least Ramsay (because he was Chief and suspended Oldridge), Livingston (because he initiated the complaint), and Doshier (because she was in charge of the investigation).

believed Oldridge might have been building against the City involved Title VII discrimination.

Lieutenant Jeffrey Allen thought Oldridge was "'trying to make a complaint'" and the PSB investigation looked "'retaliatory.'" *Id.* at 61. But this begs two questions: "A complaint about what?" and "Retaliation for what?"

Captain Brian White viewed the May 9 email as reporting "'suspected wrong doing,'" *id.* at 53, and indicating "'potentially a civil action,'" *id.* at 52. But White also told Doshier that when he spoke with Oldridge after she sent the May 9 email, Oldridge indicated she had concerns about the promotion process, how the survey would be used, how the interview boards were set up, the "'process as a whole,'" and the response to her concerns. *Id.* at 50. White also said it was likely he had spoken with Oldridge about time-in-rank requirements and general fairness of the process, but he mentioned nothing to Doshier about concerns of Title VII discrimination.

Deputy Chief Jose Salcido, who was "the human relations officer [EEO for the department]," said that employees usually "'come . . . with an EEO complaint'" and he "'hear[s] 'em out'" before "'refer[ring] to HR,'" but he "'never heard from [Oldridge] in that capacity,'" and instead she did it in the email. *Id.* at 57 (first set of brackets in original). As the district court observed, however, although the parties never defined an EEO complaint, "it appears to be an internal complaint with the City," *id.*, Vol. VI at 13; *see also id.* at 27 n.11, and the relevant WPD policy defines discrimination as "[a] failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored," *id.*, Vol. V

at 193. Because discrimination under the policy is more expansive than Title VII's protected categories, Salcido's reference to an EEO complaint is too imprecise to be probative circumstantial evidence of the decisionmakers' motive regarding the PSB investigation and Oldridge's suspension.

3. "Perception theory"

In a gloss on her *Sauers* theory, Oldridge points to other circumstantial evidence she says is sufficient to show that the investigation was a pretext for unlawful retaliation. From that evidence, she concludes, a reasonable jury could find the decisionmakers perceived she was raising discrimination, thus satisfying the requirement that she show she engaged in protected opposition to Title VII discrimination. She argues that even if we "abandon" *Sauers*'s "idea of anticipatory retaliation," Aplt. Reply Br. at 8 (internal quotation marks omitted), we should reverse based on the "perception theory of retaliatory discrimination," Aplt. Opening Br. at 31 (internal quotation marks omitted).

First, we have not abandoned *Sauers*'s anticipatory-retaliation theory; we have only declined to apply it on the facts of this case. Second, unlike her *Sauers* theory, we fail to see where Oldridge adequately raised a "perception theory" of retaliation in the district court. In opposing summary judgment on her retaliation claim, Oldridge did point to some of the evidence to show pretext on her *discrimination* claim,[9] but

[9] Evidence she pointed to in the district court was that (1) Nicholson did not meet the time-in-rank requirement and therefore was less qualified than Oldridge; (2) Nicholson was not disciplined after representing he met the time-in-rank requirement; (3) Nicholson forwarded the May 9 email outside his chain of command

she invoked none of it in connection with her retaliation claim, and she did not rely on the additional evidence she now points to.[10] Because Oldridge did not raise her "perception theory" in the district court and has not asked for plain-error review on appeal, we deem that theory waived and decline to review it. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019).

III. CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Bobby R. Baldock
Circuit Judge

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but was only coached, not disciplined; and (4) the PSB investigation concerning Oldridge's May 9 email was unfair when compared with an investigation of a male sergeant for sending an email outside his chain of command that was much smaller in scope and resulted in a written reprimand.

[10] Additional evidence Oldridge cites on appeal includes (1) Oldridge's complaint in the May 9 email about the qualifications of a black man (Nicholson) who was promoted instead of her and her reference to a white lieutenant (Stephens) who did not apply because of the educational requirement and (2) one member of command staff (apparently then-Captain Givens, who later became a Deputy Chief) believed Oldridge's March 12 and May 9 emails were racially motivated because Nicholson is black. She also argues that based on Nicholson's inability to explain his opinion that sending the May 9 email was unprofessional, a factfinder could conclude Doshier conducted her investigation not "as a search for the truth about [Oldridge's] allegations" but to deter Oldridge and others from raising complaints of discrimination or to "dig up as much dirt on her as possible in retaliation, or both," Aplt. Opening Br. at 44–45. In support of this last point, Oldridge contends that Doshier did not provide the interviewees with sufficient context for the May 9 email, inform them that Oldridge was correct that Nicholson did not have one year as a lieutenant at the time he applied for the promotion, or rigorously ask follow-up questions or otherwise scrutinize their answers to her questions.