FILED
United States Court of Appeals
Tenth Circuit

June 16, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHARHEA L. WISE,

Plaintiff - Appellant,

v.

LOUIS DEJOY, United States Postal Service Postmaster General,

Defendant - Appellee.

No. 22-1224

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 1:20-CV-01559-RMR-MEH)

Melpomene Vasiliou and Jonathan Murray (Matthew R. Cushing, and Ricardo Rivera, with them on the briefs), University of Colorado Law School Appellate Practicum, Boulder, Colorado, for Plaintiff-Appellant.

Michael C. Johnson, Assistant U.S. Attorney (Cole Finegan, United States Attorney, with him on the brief), Office of the United States Attorney, District of Colorado, Denver, Colorado, for Defendant-Appellee.

Before **TYMKOVICH**, **EBEL**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

This case arose after a mail carrier (Ms. Sharhea Wise) got pregnant and asked to avoid handling heavy items. The Postal Service agreed to provide help when items were too heavy. But Ms. Wise needed to tell someone when she needed help.

On two occasions, Ms. Wise allegedly had to handle items that were too heavy. Both times, she blamed the Postal Service for failing to accommodate her need for help. The Postal Service argued in response that Ms. Wise hadn't asked for help. But this argument rests on disputed factual issues.

Days after Ms. Wise allegedly had to handle the heavy items, she walked off the job and the Postal Service fired her. Ms. Wise claimed retaliation, attributing the firing to her requests for help. The Postal Service denied retaliation, explaining that it had fired Ms. Wise because she walked off the job. Ms. Wise characterizes this explanation as pretextual, but she lacks evidence of pretext.

1. The Postal Service fires Ms. Wise after she allegedly had to handle heavy items.

After Ms. Wise learned that she was pregnant, her physician recommended against lifting, pulling, or pushing items over twenty pounds. So the Postal Service agreed to provide Ms. Wise with help whenever she said that something was too heavy.

Ms. Wise allegedly needed to handle heavy items on two occasions. The first occasion took place when Ms. Wise was told to leave heavy packages for others. She took the lighter packages and left the heavier ones. Her supervisor (Mr. Ron Domingo) said to return and get the heavier packages. The second occasion took place when Ms. Wise struggled to maneuver a gurney. A short time later, the Postal Service fired Ms. Wise and she sued under the Rehabilitation Act for

- failing to accommodate her need for help in handling heavy items[1] and
- retaliating against her for seeking an accommodation.[2]

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[1] Ms. Wise has not been consistent in identifying the statutory basis for her failure-to-accommodate claim. In district court, Ms. Wise invoked the Americans with Disabilities Act, the Pregnancy Discrimination Act, Title VII, and the Rehabilitation Act.

On appeal, Ms. Wise invokes the Americans with Disabilities Act for failing to accommodate her disability. But this statute doesn't apply to entities like the Postal Service. *See* 42 U.S.C. § 12111(5)(B)(i) (excluding the federal government from the definition of an "employer" under the Americans with Disabilities Act); 39 U.S.C. § 201 (creating the Postal Service as an "establishment of the executive branch" of the federal government). So the failure-to-accommodate claim arose under the Rehabilitation Act rather than the Americans with Disabilities Act. *See Brown v. Austin*, 13 F.4th 1079, 1084 n.3 (10th Cir. 2021) ("Because the [Americans with Disabilities Act] does not apply to federal employers, we treat the [federal employee's] claims as if brought solely under the Rehabilitation Act.").

[2] In district court, Ms. Wise based the retaliation claim not only on the Rehabilitation Act but also on Title VII and the Americans with Disabilities Act. On appeal, though, Ms. Wise bases the retaliation claim solely on the Rehabilitation Act.

The district court granted summary judgment to the Postal Service, and Ms. Wise challenges the rulings. We agree with her challenge on the failure-to-accommodate claim. On this claim, a reasonable factfinder could find that the Postal Service had failed to accommodate Ms. Wise's need to avoid handling heavy items. But we agree with the grant of summary judgment on the retaliation claim because (1) the Postal Service presented a neutral, nonretaliatory explanation for the firing and (2) Ms. Wise lacked evidence of pretext.

2. We consider Ms. Wise's challenges under the standard for summary judgment.

We conduct de novo review of the district court's summary-judgment ruling, applying the same standard that governed in district court. *SEC v. GenAudio Inc.*, 32 F.4th 902, 920 (10th Cir. 2022). Under this standard, the district court must view the evidence and draw all justifiable inferences favorably to Ms. Wise. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Viewing the evidence and drawing justifiable inferences favorably to Ms. Wise, the district court could grant summary judgment to the Postal Service only in the absence of a "genuine dispute as to any material fact" and upon a showing of entitlement "to judgment as a matter of law." Fed. R. Civ. P. 56(a).

3. The duty to accommodate Ms. Wise turns on disputed factual issues.

The Rehabilitation Act requires federal employers to "meet the needs of disabled workers and . . . broaden their employment opportunities." *Woodman v. Runyon*, 132 F.3d 1330, 1337–38 (10th Cir. 1997); *see* 29 U.S.C. § 794(a). These needs include "reasonable accommodations" for disabled employees. *Sanchez v. Vilsack*, 695 F.3d 1174, 1177 (10th Cir. 2012).

A duty to accommodate exists if the employee shows (1) a disability, (2) the qualifications for the job, (3) a request for a plausibly reasonable accommodation, and (4) a failure to provide the accommodation. *Hwang v. Kan. State Univ.*, 753 F.3d 1159, 1161 (10th Cir. 2014). If an employee satisfies these requirements, the employer must make an accommodation and "act reasonably in implementing [the] accommodation." *Id.*

Ms. Wise alleged that the Postal Service had failed to provide accommodations by

- declining to provide scales or labels stating how much the packages weighed,
- requiring her to handle packages that she thought were over twenty pounds, and
- failing to provide her with help when she had to use a heavy gurney.

The district court rejected these allegations.

Failure to provide scales or labels. Ms. Wise argues in part that the Postal Service should have provided (1) scales to weigh packages or (2) labels stating how much the packages weighed. The district court rejected this argument, reasoning that Ms. Wise hadn't requested scales or labels. Ms. Wise doesn't challenge this reasoning, so we reject Ms. Wise's argument involving the failure to provide scales or labels. *See Koessel v. Sublette Cnty. Sheriff's Dep't*, 717 F.3d 736, 744–45 (10th Cir. 2013) (rejecting a failure-to-accommodate claim based on a failure to modify the job because the employee had not asked the employer for the modification); *see also Wells v. Shalala*, 228 F.3d 1137, 1145 (10th Cir. 2000) (stating that the plaintiff had the burden to propose a reasonable accommodation).

Failure to help with heavy packages. Ms. Wise testified that she once had to carry items that were too heavy. According to Ms. Wise, Mr. Domingo told her to leave packages that she thought were too heavy. After she left with the lighter packages, Mr. Domingo allegedly told her to return and get the heavier packages:

> Q. . . . And then, in paragraph 21 [of the complaint] you say [your supervisors] did not honor your restrictions for -- your requests for assistance, and you mentioned two specific things here and I'm gonna ask you about those.
>
> The first one you say that [Mr. Domingo] told you to leave a heavy package, but, then, called you on the street to come back and deliver it. Tell me about that event.

> A. Mr. Domingo told me to be -- to leave the heavy package -- that I thought it was heavy -- when I went to the street, when I came back he told me -- well, he called me back and -- to come to deliver those same heavy packages again.

R. at 140. Ms. Wise added that multiple packages had exceeded the weight limit. From this testimony, a factfinder could reasonably find that

- Ms. Wise had left the heavy packages after requesting help from Mr. Domingo,
- Mr. Domingo had remembered instructing Ms. Wise to leave heavy packages and to take only what she could carry, and
- Mr. Domingo retracted this accommodation by telling Ms. Wise to return and pick up the other packages.

Granted, a factfinder could also infer that Mr. Domingo had forgotten about Ms. Wise's need for help. If Mr. Domingo had just forgotten, a reminder might have jogged his memory. But there's no evidence that Mr. Domingo forgot what he had said, and it's reasonable to infer that he had changed his mind about getting another employee to help Ms. Wise. That inference could trigger liability for failing to accommodate a disabled employee. *See Enica v. Principi*, 544 F.3d 328, 343 (1st Cir. 2008) (reversing a grant of summary judgment because the factfinder could reasonably infer that the employer had failed to accommodate an employee's disability by requiring job duties after agreeing to eliminate them).

Assistance with a heavy gurney. Ms. Wise also testified that she had asked another supervisor (Mr. Dean Lego) for help with a heavy

gurney. According to this testimony, Mr. Lego responded by rebuking Ms. Wise for using the gurney improperly.

The Postal Service again argues that Ms. Wise didn't tell anyone that the gurney was too heavy. This argument rests on a cramped interpretation of Ms. Wise's testimony:

> Q. Did you tell [Mr. Lego] why you wanted help to push the gurney?
>
> A. Yes -- or no, actually. Excuse me. Sorry. 'Cause I was pregnant and I gave them my restrictions.

R. at 142.

The answer is ambiguous. A factfinder could reasonably interpret the answer as *no*. But this interpretation isn't the only reasonable one. Ms. Wise not only started the answer with *yes*, but she then pointed to her need for help because of her pregnancy and restrictions.

We must interpret this ambiguity in favor of Ms. Wise as the non-movant. *See Wasatch Transp., Inc. v. Forest River, Inc.*, 53 F.4th 577, 582–84 (10th Cir. 2022) (concluding that the district court had erred in granting summary judgment by resolving ambiguities in deposition testimony in favor of the movant); *see also Burnell v. Gates Rubber Co.*, 647 F.3d 704, 709 (7th Cir. 2011) (concluding that if deposition testimony is ambiguous "at the summary judgment stage, we must resolve any ambiguity in [the non-moving party's] favor"). Interpreted favorably to

Ms. Wise, this testimony indicates that Ms. Wise asked for help with the gurney because of its weight.

The Postal Service suggests that the weight restriction might not apply because the gurney had wheels and Ms. Wise didn't need to pick it up. But the weight restriction included pushing or pulling anything that weighed over twenty pounds, and the Postal Service doesn't deny that the gurney itself weighed twenty pounds even when empty. So a factfinder could reasonably find that the weight restriction had applied when the gurney was loaded with mail.

Summary. Given the potential inferences from the evidence, the district court erred in granting summary judgment to the Postal Service on the failure-to-accommodate claim involving the heavy packages and the gurney.[3]

4. Ms. Wise failed to prove retaliation for seeking an accommodation.

After Ms. Wise had worked for three months, the Postal Service fired her. Mr. Domingo said that he had fired Ms. Wise because she had walked off the job.

[3] Ms. Wise also argues that the Postal Service failed to reengage in the interactive process when the agreed accommodation proved deficient. We need not address this argument because disputed factual issues otherwise existed on the failure-to-accommodate claim.

When Ms. Wise walked off the job, she told the Postal Service that she was quitting. She quickly changed her mind, and the Postal Service let her return to work. Her return was short lived, for she was fired within days. Ms. Wise characterizes the firing as retaliation for requesting help with heavy items.

Because Ms. Wise relies on circumstantial evidence of retaliation, the court considers three steps:

1. Ms. Wise must present a prima facie case of retaliation.

2. If she presents a prima facie case, the Postal Service would need to provide a legitimate, nonretaliatory reason for the firing.

3. If the Postal Service provides a legitimate, nonretaliatory reason for the firing, Ms. Wise would need to show that the Postal Service's stated reason was pretextual.

See Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ., 595 F.3d 1126, 1131 (10th Cir. 2021).

For a prima facie case under the first step, Ms. Wise needed to show

- a protected activity,
- an adverse employment action, and
- a causal connection between the protected activity and the adverse employment action.

Foster v. Mountain Coal Co., 830 F.3d 1178, 1186–87 (10th Cir. 2016).

The parties agree that Ms. Wise satisfied the first two steps. For the third step, Ms. Wise relies on

- the short time (16 days) between the firing and her requests for an accommodation and
- harsh treatment by her supervisors (yelling at her and refusing to provide an accommodation).

The district court concluded that Ms. Wise had failed to present a prima facie case, reasoning that

- she had obtained bad evaluations before she requested an accommodation and
- an intervening event had occurred (walking off the job).

Ms. Wise argues that the district court erred in concluding that she had failed to present a prima facie case. For the sake of argument, we can assume that Ms. Wise is right. With that assumption, we consider the second step (the presence of a legitimate, nonretaliatory reason for the firing). The Postal Service contends that it fired Ms. Wise because she had walked off the job. That contention satisfied the Postal Service's burden at the second step.

The district court didn't reach the third step (pretext for the Postal Service's stated reason). But we have discretion to affirm on any ground adequately supported by the record. *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1321 (10th Cir. 2003). That discretion requires us to consider

- whether the ground was fully briefed and argued on appeal and in district court,

- whether the parties have had an opportunity to develop the record, and
- whether the issue involves only questions of law.

See Elkins v. Comfort, 392 F.3d 1159, 1162 (10th Cir. 2004).

These factors support our consideration of the pretext issue. The issue was briefed on appeal. *See* Appellant's Opening Br. at 47–57; Appellee's Resp. Br. at 45–53; Appellant's Reply Br. at 26–31. The parties also briefed the pretext issue in district court. *See* R. at 186–87 (Postal Service's summary-judgment motion, arguing that legitimate grounds existed for the firing and Ms. Wise could not show pretext); *id.* at 327–29 (Ms. Wise's response to the Postal Service's summary-judgment motion, arguing that the firing had been pretextual); *id.* at 411–14 (Postal Service's reply brief in support of the motion for summary judgment, arguing that there was no evidence of pretext).

Because both parties presented evidence on the issue, resolution turns on whether a reasonable factfinder could find pretext. This inquiry entails a legal judgment rather than a factual finding. *See Stewart v. City of Okla. City*, 47 F.4th 1125, 1133 n.5 (10th Cir. 2022) (recognizing that "our decision as to whether a genuine and material dispute exists is a legal

judgment based on undisputed facts"). So we may consider the pretext issue.[4]

On this issue, "[t]he relevant inquiry is not whether the employer's proffered reasons were wise, fair or correct, but whether [the employer] honestly believed those reasons and acted in good faith upon those beliefs." *Swackhammer v. Sprint/United Mgmt. Co*, 493 F.3d 1160, 1170 (10th Cir. 2007) (quoting *Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 924–25 (10th Cir. 2004)). Ms. Wise needed to show that the Postal Service's stated reason had been "so weak, implausible, inconsistent or incoherent that a reasonable fact finder could conclude that it was not an honestly held belief but rather was subterfuge for discrimination." *Young v. Dillon Cos*., 468 F.3d 1243, 1250 (10th Cir. 2006). That showing would require more than a wrong decision or poor business judgment. *See Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1211 (10th Cir. 2010) (wrong decision); *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1169–70 (10th Cir. 2007) (poor business judgment).

Ms. Wise presents three arguments for pretext:

1. The Postal Service gave conflicting explanations for her termination.

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[4] Ms. Wise argues that the district court deprived her of a chance to show pretext. We reject this argument. In district court, the Postal Service denied any evidence of pretext. Ms. Wise had a chance to respond, and she did so.

2. Supervisors failed to accommodate Ms. Wise just weeks before the firing.

3. Only 16 days elapsed between the requests for an accommodation and the firing.

These arguments don't support a reasonable finding of pretext.

In urging conflicting explanations, Ms. Wise points out that the Postal Service had issued a suspension just days before firing her. The Postal Service explained the suspension in a letter, which

- discussed the refusal to deliver mail and previous warnings for deficient work performance and irregular attendance and
- told Ms. Wise that a failure to meet "legitimate work expectations" could lead to removal or other discipline.

R. at 259–61.

Ms. Wise views the explanations for the suspension and firing as inconsistent with each other. For example, Ms. Wise points out that the suspension letter warned her that a failure to meet work expectations could lead to removal or other discipline. Under her interpretation, this warning eliminated the possibility of removal for walking off the job. Ms. Wise also points to the letter's reference to past warnings, viewing this reference as inconsistent with Mr. Domingo's statement that he ordered the firing because Ms. Wise had walked off the job.

We conclude that no reasonable factfinder could infer pretext from the suspension. Granted, a reasonable factfinder could conclude that the Postal Service had changed its mind about how to discipline Ms. Wise for

walking off the job: The Postal Service first imposed a suspension, then decided to fire Ms. Wise. But "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 v. Colo. Jud. Dep't*, 427 F.3d 1303, 1310 (10th Cir. 2005) (per curiam)).

The Postal Service's upgrade from a suspension to termination doesn't suggest dishonesty or bad faith. Though the Postal Service quickly suspended Ms. Wise, that suspension doesn't undermine the Postal Service's later decision to fire Ms. Wise. After all, the Postal Service suspended Ms. Wise at least partly because she had walked off the job. In later deciding to fire Ms. Wise, the Postal Service relied on the same conduct. *See Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280, 1293 (10th Cir. 2021) (rejecting an allegation of pretext because "[the employer] never deviated from its initial justification for terminating [the plaintiff]"); *see also Rodgers v. U. S. Bank, N.A.*, 417 F.3d 845, 854 (8th Cir. 2005) (rejecting an allegation of pretext because "[the employer] has not backed off from its original reason for terminating [the plaintiff]"), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011).

Ms. Wise points out that the Postal Service had given other reasons for the suspension. But the presence of additional reasons for the

suspension didn't undermine the Postal Service's explanation that it had fired Ms. Wise for walking off the job. *See Litzsinger*, 25 F.4th at 1293 ("Providing additional justifications for termination without abandoning the primary reason for termination does not, without more, establish pretext.").

Ms. Wise also relies on the Postal Service's decision to let her retract her resignation. She argues that the Postal Service must have changed its mind about the seriousness of her walking off the job. But this argument lacks evidentiary support.

One day after resigning, Ms. Wise retracted her resignation. An official (Ms. Theresa Bianchi) explained that when Ms. Wise made the retraction, the Postal Service hadn't yet entered the resignation into the system. So Ms. Bianchi decided to let Ms. Wise retract her resignation.

Though Ms. Bianchi made this decision, there's no evidence that she knew that Ms. Wise had walked off the job. Without such evidence, Ms. Wise's opportunity to retract the resignation doesn't create a reasonable inference of dishonesty or bad faith in Mr. Domingo's explanation for the firing.

Ms. Wise also argues that she showed pretext through the Postal Service's different explanations involving missed scans of mailings. This argument lacks support in the summary-judgment record.

When issuing the suspension, the Postal Service criticized Ms. Wise for "unacceptable work performance," explaining that she had not only walked off the job but also had three unscheduled absences and had failed to scan two pieces of mail. R. at 257, 259. But the Postal Service never said that it had fired Ms. Wise for her unscheduled absences or missed scans.

In firing Ms. Wise, the Postal Service again used the phrase "unacceptable work performance." *Id.* at 262. Ms. Wise argues that the Postal Service was using this phrase as shorthand for the failure to scan mailings. This argument stretches the meaning of "unacceptable work performance" too far. There's nothing in the summary-judgment record to suggest that the Postal Service was limiting the phrase "unacceptable work performance" to a failure to scan mailings.

Ms. Wise relies not only on an inconsistency in the Postal Service's explanation but also on the refusal to help her with heavy items. Ms. Wise doesn't explain how this refusal undermined the Postal Service's explanation for the firing. *See Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999) (concluding that prior incidents of discrimination are "not probative of pretext" unless they "can somehow be tied to the employment actions disputed in the case at hand"), *abrogated on other grounds as recognized in Eisenhour v. Weber Cnty.*, 744 F.3d 1220, 1227 (10th Cir. 2014).

Finally, Ms. Wise bases pretext on the temporal proximity between the grant of the accommodation and the firing. Temporal proximity can bear on pretext. *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1213 (10th Cir. 2007). But pretext can't rest on temporal proximity alone. *Id.*

All we have is temporal proximity, for Ms. Wise presents no other valid evidence of pretext. Without any other evidence of pretext, the district court properly granted summary judgment to the Postal Service on the retaliation claim.

5. Disposition

We reverse the grant of summary judgment to the Postal Service on the failure-to-accommodate claim, affirm the grant of summary judgment to the Postal Service on the retaliation claim, and remand the case to the district court for further proceedings consistent with this opinion.

22-1224, *Wise v. DeJoy*

TYMKOVICH, Circuit Judge, dissenting in part

Because I conclude that the Postal Service adequately accommodated Ms. Wise's disability, I dissent. I otherwise join the rest of the majority opinion.

In my view, the record supports the district court's determination that the Postal Service did what it could to accommodate Ms. Wise's pregnancy. It capped the total weight Ms. Wise lifted, pushed, or pulled at twenty pounds. Because the accommodation required Ms. Wise to seek assistance when items exceeded her weight limit, it necessarily involved an interactive component. But Ms. Wise failed to adequately engage in the interactive process. During both the gurney incident and the packages incident described by the majority, Ms. Wise had an obligation to inform her supervisors of her accommodation. She failed to do so. When Mr. Domingo called Ms. Wise back to the heavy packages, she did not remind him of her accommodation. And even if Ms. Wise's response regarding the gurney is ambiguous, the record shows that Mr. Lego rebuked her *because she was using the gurney improperly*. Because Ms. Wise did not adequately communicate her need for the accommodation to her supervisors when the accommodation was required, the district court correctly granted the Postal Service summary judgment as to Ms. Wise's failure-to-accommodate claim. *See Wilkerson v. Shinseki*, 606 F.3d 1256, 1266 (10th Cir. 2010) (noting that the Rehabilitation Act requires an interactive process) (internal citation omitted).