FILED
United States Court of Appeals
Tenth Circuit

April 17, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRIAN WAGGONER,

Plaintiff - Appellant,

v.

FRITO-LAY, INC.,

Defendant - Appellee.

No. 22-3111
(D.C. No. 5:20-CV-04086-JWB)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MORITZ**, **EID**, and **ROSSMAN**, Circuit Judges.

Brian Waggoner appeals from the district court's grant of summary judgment to his former employer, Frito-Lay, Inc., in his suit under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse the district court's grant of summary judgment on Mr. Waggoner's failure-to-promote claim, but we affirm the judgment in favor of Frito-Lay on his constructive-discharge claim.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

BACKGROUND

Mr. Waggoner was born in June 1979. He began his employment at Frito-Lay's Topeka plant as a part-time sanitation worker in 2004, while he was in college. After graduation, he continued working at the Topeka plant, receiving promotions in 2005, 2008, 2010, and 2011. He further advanced in 2016, with a promotion to Extruded Manager and then to Process Support Manager, a level 9 manager position. However, in 2016 and 2018, when he was 37 and 38 years old respectively, he was denied promotion to three level 10 manager positions. All three openings were filled by employees in their 20s.

In June 2019, the same month Mr. Waggoner turned 40 years old, he applied for a level 10 manager position called a Processing Manager. Site Director Mark Brinker was the sole decisionmaker for the Processing Manager position. The two candidates were Mr. Waggoner and a 27-year-old employee, Breven Graham. After interviewing both employees, Mr. Brinker promoted Mr. Graham.

Mr. Waggoner resigned from his employment with Frito-Lay on January 11, 2020. After exhausting his administrative remedies, Mr. Waggoner filed this lawsuit in federal district court in Kansas alleging two claims under the ADEA, one for discriminatory failure to promote him to the Processing Manager position and one for constructive discharge. The district court granted Frito-Lay's motion for summary judgment on both claims.

DISCUSSION

We review a grant of summary judgment de novo, viewing "the evidence and all reasonable inferences derived therefrom in the light most favorable to the nonmoving party." *Danville v. Reg'l Lab Corp.*, 292 F.3d 1246, 1249 (10th Cir. 2002) (internal quotation marks omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "There is a genuine dispute of material fact if a rational jury could find in favor of the nonmoving party on the evidence presented." *Fassbender v. Correct Care Sols., LLC*, 890 F.3d 875, 882 (10th Cir. 2018) (internal quotation marks omitted).

I. Failure to Promote

A. Legal Standards

The ADEA prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). It protects "individuals who are at least 40 years of age." *Id.* § 631(a). "To establish a disparate-treatment claim under the plain language of the ADEA, a plaintiff must prove that age was the but-for cause of the employer's adverse decision." *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1056 (10th Cir. 2020) (ellipsis and internal quotation marks omitted).

Mr. Waggoner did not come under the protection of the ADEA until June 2019, so he can claim age discrimination only as to the failure to promote him to the

Processing Manager position. Acknowledging he lacks direct evidence of discrimination, however, Mr. Waggoner contends, and we agree, the burden-shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), applies here. *See Frappied*, 966 F.3d at 1056 (applying the *McDonnell Douglas* framework in an ADEA case). Under that framework, Mr. Waggoner first must establish a prima facie case of age discrimination. *See id.* The burden then shifts to Frito-Lay to proffer a legitimate, non-discriminatory reason for failing to promote Mr. Waggoner to the Processing Manager position. *See id.* Once it has done so, the burden shifts back to Mr. Waggoner to identify evidence from which a reasonable factfinder could conclude Frito-Lay's proffered reason was pretext for discrimination. *See id.*

The district court held Mr. Waggoner had made a prima facie showing but determined Frito-Lay proffered a legitimate, non-discriminatory reason for not promoting Mr. Waggoner—that "[Mr.] Brinker considered [Mr.] Graham's employment history and interview performance to be superior to [Mr. Waggoner's]." Aplt. App. at 135. The district court then held Mr. Waggoner had not identified sufficient evidence to satisfy his burden on the pretext prong. Before this court, neither party disputes the district court's rulings as to the first two prongs of the *McDonnell Douglas* framework, instead concentrating on the pretext prong. We therefore focus on pretext as well.

"[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to

conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000). It is well settled

> [a] plaintiff can show pretext by revealing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action such that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reason.

Frappied, 966 F.3d at 1059 (internal quotation marks omitted). The plaintiff's evidence of pretext "may take a variety of forms," *id.* (internal quotation marks omitted), including "prior treatment of plaintiff; the employer's policy and practice regarding . . . employment [of protected persons] (including statistical data); . . . and the use of subjective criteria," *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002) (internal quotation marks omitted).

"[A]t the summary judgment stage, the inference of discrimination permitted by evidence of pretext must be resolved in favor of the plaintiff." *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1125 (10th Cir. 2005); *see also Randle v. City of Aurora*, 69 F.3d 441, 453 (10th Cir. 1995) ("So long as the plaintiff has presented evidence of pretext (by demonstrating that the defendant's proffered non-discriminatory reason is unworthy of belief) upon which a jury could infer discriminatory motive, the case should go to trial."). "Thus, once a plaintiff presents evidence sufficient to create a genuine factual dispute regarding the veracity of a defendant's nondiscriminatory reason, we presume the jury could infer that the employer acted for a discriminatory reason and must deny summary judgment." *Bryant*, 432 F.3d at 1125. But "[w]hen reviewing for pretext, we are mindful we must not sit as a superpersonnel department

that second-guesses the company's business decisions, with the benefit of twenty-twenty hindsight." *Frappied*, 966 F.3d at 1059 (brackets and internal quotation marks omitted).

B. Evidence of Pretext

Mr. Waggoner relies on four pieces of evidence to establish pretext: (1) age-related remarks Mr. Brinker made to him; (2) evidence showing Mr. Brinker's proffered reasons for choosing Mr. Graham were false; (3) Mr. Brinker's use of subjective criteria in making the promotion decision; and (4) statistics showing the Topeka plant's general practice of promoting younger employees to level 10 positions. We do not "look at each piece of evidence in isolation; rather, in assessing whether plaintiffs have shown pretext, we are obliged to consider their evidence in its totality." *Orr v. City of Albuquerque*, 531 F.3d 1210, 1215 (10th Cir. 2008). This is a close case, but considering the evidence as a whole under the applicable legal standards, the district court erroneously granted summary judgment to Frito-Lay on Mr. Waggoner's failure-to-promote claim.

1. Age-Related Remarks by Mr. Brinker

Mr. Waggoner stated in a sworn declaration that during his interview for the Processing Manager position, Mr. Brinker said to him, "'I know historically it is known that older managers are let go, but just keep working hard and adding value.'" Aplt. App. at 120. He also testified that when Mr. Brinker met with him to tell him he did not receive the promotion, Mr. Brinker said "'they are going in a different direction.'" *Id.* at 121. According to Mr. Waggoner, when he expressed frustration

that three employees he had managed (including Mr. Graham) were promoted over him, Mr. Brinker then stated Frito-Lay "was going through a 'youth movement.'" *Id.* Mr. Brinker denied making these remarks.

We frequently have considered evidence of discriminatory remarks to be relevant to a showing of pretext. *See, e.g.*, *Fassbender*, 890 F.3d at 885; *Plotke v. White*, 405 F.3d 1092, 1107 (10th Cir. 2005); *Danville*, 292 F.3d at 1251; *Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1479 (10th Cir. 1996). "A plaintiff simply must show a nexus between the allegedly discriminatory statements and the employer's decision." *Plotke*, 405 F.3d at 1107.

Mr. Waggoner alleges the remarks at issue were directed to him individually; were made by Mr. Brinker, undisputedly the sole decisionmaker regarding the promotion; and were made in the context of the interview for the position and then again to explain his non-promotion. Accordingly, Mr. Waggoner "has shown an adequate nexus to the employment decision to treat the remark[s] as evidence of pretext." *Danville*, 292 F.3d at 1251 (remark about plaintiff at meeting in which interviewees were selected); *see also Plotke*, 405 F.3d at 1107 (remarks by decisionmaker, specifically directed to or about the plaintiff); *Tomsic*, 85 F.3d at 1479 (remarks by person who influenced final decision, directed to plaintiffs).

Frito-Lay characterizes Mr. Waggoner's evidence as his "own self-serving and speculative belief that Frito-Lay did not want to promote employees over the age of 40 because of a youth movement at the Topeka, Kansas facility." Aplee. Resp. Br. at 18. And the district court discounted the "youth movement" comment, stating

Mr. Waggoner "cites nothing to show that the comment was anything other than an observation of a recent trend, as opposed to a suggestion that the company had a policy of favoring younger applicants or that Brinker was suggesting he decided to promote Graham because he was younger than [Mr. Waggoner]." Aplt. App. at 137. This reasoning, however, improperly views the evidence in the light most favorable to Frito-Lay, rather than in the light most favorable to Mr. Waggoner. As discussed, "at the summary judgment stage, the inference of discrimination permitted by evidence of pretext must be resolved in favor of the plaintiff." *Bryant*, 432 F.3d at 1125; *see, e.g.*, *Fassbender*, 890 F.3d at 885 (recognizing, in addressing critical remarks, "[i]t's reasonable to infer that [the] comments reflected some hostility or frustration toward pregnant employees, so we must draw that inference in [plaintiff's] favor"). Moreover, Frito-Lay's characterization of the testimony as "self-serving" misses the mark. "[V]irtually any party's testimony can be considered 'self-serving,' and self-serving testimony is competent to oppose summary judgment. Even standing alone, self-serving testimony can suffice to prevent summary judgment." *Greer v. City of Wichita*, 943 F.3d 1320, 1325 (10th Cir. 2019) (citation omitted). Whether Mr. Brinker made the alleged comments, and the significance of any comments he did make, are all jury questions. *See Fassbender*, 890 F.3d at 890 ("[I]t is not our role at the summary-judgment stage to choose between two reasonable explanations. Such is the jury's province.").

2. Evidence Contradicting Mr. Brinker's Proffered Reasons

Frito-Lay asserts Mr. Brinker promoted Mr. Graham because his work performance and his interview were better than Mr. Waggoner's. But Mr. Waggoner offered evidence that, viewed in the light most favorable to him, creates a genuine issue of material fact as to the veracity of Frito-Lay's proffered reasons.

We first address the evidence about performance. The record shows Frito-Lay uses a 5-point rating system for each of an employee's short-term and long-term goals. As Mr. Brinker explained, "[a] 3 rating would be met some expectations and missed some expectations, 4 would be hit all expectations or objectives, and 5 would [be] hit all and exceeded, significantly, several or maybe some." Aplt. App. at 83. The yearly reviews score the employee's total by combining the short-term and long-term ratings. Frito-Lay offered evidence that Mr. Waggoner's 2017 and 2018 reviews both resulted in a 6 rating, reflecting the combination of a 3 for short-term goals and a 3 for long-term goals. Frito-Lay states a 6 is a below-average rating.

Mr. Waggoner, however, offered evidence Mr. Graham also scored a 6 on his 2018 review, while he reported to Mr. Brinker. Frito-Lay suggests "the numerical score for one employee is not necessarily the same or equal to the numerical score for another employee," Aplee. Resp. Br. at 5, but nothing in the summary judgment record shows any difference between Mr. Waggoner's 6 rating and Mr. Graham's 6 rating. On this record, a reasonable factfinder could conclude the evidence that both Mr. Graham and Mr. Waggoner received the same total score for 2018—recall it was Mr. Brinker who gave Mr. Graham that 6 rating—undermines Mr. Brinker's

testimony that Mr. Graham performed better than Mr. Waggoner. *See Danville*, 292 F.3d at 1252 ("While it is the employer's understanding of an employee's qualifications that counts, one could draw a reasonable inference that [the successful candidate's] qualifications were unreasonably inflated by the committee, while plaintiff's were unreasonably denigrated.").

Mr. Brinker testified he had concerns about Mr. Waggoner's performance, including absenteeism and struggling to have tough conversations with subordinates. He also testified he and Mr. Waggoner discussed Mr. Waggoner's results during the interview, including "some challenges [he] had asked [Mr. Waggoner] to take on over the years, particularly around food safety and efficiencies in the extruding department that he simply had not driven to completion." Aplt. App. at 87. Mr. Waggoner disputes this testimony.

"In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear to the person making the decision, and do not look to the plaintiff's subjective evaluation of the situation." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 971 (10th Cir. 2017) (emphasis and internal quotation marks omitted). "Instead of asking whether the employer's reasons were wise, fair or correct, the relevant inquiry is whether the employer honestly believed those reasons and acted in good faith upon those beliefs." *Id.* (internal quotation marks omitted). However, Mr. Waggoner's evidence is of the type that, if believed, would undermine the veracity of Mr. Brinker's expressed reasons. *See Danville*, 292 F.3d at 1252.

Mr. Waggoner's reviews for 2017 and 2018 do not mention any concerns about absenteeism or ability to have tough conversations with subordinates.[1] Further, he offered evidence his "direct supervisors never indicated to [him] that they had any of these concerns about [his] performance." Aplt. App. at 120. He also contradicted Mr. Brinker's testimony that the interview covered his failure to complete assignments, testifying, "we did not discuss any failure of mine to follow through on my assigned projects." *Id.* Viewing this evidence in the light most favorable to

[1] The manager comments in the review for 2017 state "[s]till some opportunities with floor execution and general cleanliness especially in Extruded departments[.] Also some opportunity with execution of preventative controls for PQA compliance[.]" Aplt. App. at 94. "[W]e have come a long way in driving long term success at the site level with a long way to go. Looking to change the food safety culture to gain buy in from teams in execution of controls[.]" *Id.* But Mr. Waggoner also "[s]howed great quality improvements in 2017," "showed great development in depth of knowledge for department metrics," did "his part to make the site a welcome place for both teams and managers," and "worked diligently to increase his knowledge of the processing business looking to leverage his cross functional experience as he has years of ops experience to provide solid backbone for the processing department." *Id.* at 94-95. His manager stated that although he had only managed Mr. Waggoner for a few months, he had "also been witness to the consistent improvement with [his] performance as a manager." *Id.* at 95. Mr. Brinker added the comment, "some solid improvements in '17 particularly in [the second half] of the year. Leading directs performance and [will] be a key to MFG team winning in '18." *Id.*

In the review for 2018, Mr. Waggoner's manager commented it was a "[t]ough year" for some metrics, but noted Mr. Waggoner "was a key player in our daily QEE cadence and cost gapping for the processing department . . . . [He] also executed some strong tactics that delivered measurable productivity for us in 2018." *Id.* at 98. He suggested Mr. Waggoner "develop further in technical expertise in PC/Extruded to guide the young group of SCLs and superstars in today's environment[.] He will also be challenged in guiding our daily cadence to promote business continuity at the SCL level as we continue to balance critical experiences for managers with delivering results[.]" *Id.*

Mr. Waggoner, a reasonable factfinder could disbelieve Mr. Brinker's testimony about his perception of Mr. Waggoner's performance. Mr. Waggoner's evidence is certainly not overwhelming, but it sufficiently controverts Mr. Brinker's proffered reasoning for the purposes of summary judgment. *See Garrett*, 305 F.3d at 1218-19 ("A jury could reasonably infer that [plaintiff's] supervisors discriminated against him by inflating and exaggerating long-standing critiques of his performance as a means of exercising racist and ageist animus towards him.").

We next address the evidence about the interviews. Mr. Brinker testified Frito-Lay had no written policies or procedures for promotion selection. He stated he "had four or five questions that were standard questions that [he] asked when interviewing for these types of roles." Aplt. App. at 86. He had not kept the written notes he said he took, but he testified the questions were (1) "[T]ell me why you're interested in the performance or the processing manager role"; (2) "If you were in this role, what would you like to see get accomplished in the first hundred days?"; (3) "What would be those priorities that you would focus on?"; (4) "If you look at the facility, what are some things, if you were me, what are some things you think we could do better at or improve upon as a site to improve performance results engagement by the front line?"; and (5) "[T]ell me about some results that you're particularly proud of that you helped drive." *Id.* According to Mr. Brinker, Mr. Graham "was very organized" and offered detailed, thoughtful answers to Mr. Brinker's questions. *Id.* In contrast, Mr. Brinker perceived Mr. Waggoner as

"very unprepared . . . to talk about why he might be interested in the role," "talk[ing] very vaguely." *Id.* at 86-87.

Mr. Waggoner controverted this testimony in his declaration, asserting that "Mr. Brinker did not ask any formal interview questions, nor did he take any notes." *Id.* at 120. Particularly, he stated that "Mr. Brinker did not specifically ask me: (i) what I wanted to accomplish within the first 100 days in the position; (ii) what my priorities would be in the position; (iii) my ideas for improvement in the area; and (iv) past results I was particularly proud of during my employment." *Id.*

The district court discounted Mr. Waggoner's testimony, stating "[i]t is not clear what [he] means by 'formal' interview questions or not being 'specifically' asked about his goals and priorities." Aplt. App. at 136 n.2. Again, this reasoning improperly views the evidence in the light most favorable to Frito-Lay rather than to Mr. Waggoner. Viewing this evidence in the light most favorable to Mr. Waggoner, a reasonable jury could believe his description of the interview and disbelieve Mr. Brinker's account. Mr. Waggoner therefore has created a genuine issue of fact as to the veracity of Mr. Brinker's explanation that both candidates answered the same questions, and Mr. Graham's answers were better than Mr. Waggoner's. Under the standards applicable at summary judgment, Mr. Waggoner's testimony sufficiently controverts Mr. Brinker's testimony about the interview.

3. Reliance on Subjective Criteria

Mr. Waggoner points out Mr. Brinker relied on subjective criteria in making the promotion decision. "Courts view with skepticism the use of subjective

evaluations in making [employment] decisions." *Plotke*, 405 F.3d at 1106. "However, the existence of subjective criteria alone is not considered evidence of pretext; rather, the existence of other circumstantial evidence may provoke a stronger inference of discrimination in the context of subjective evaluation standards." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1120 (10th Cir. 2007).

"[W]e typically will infer pretext from the employers' use of subjective evaluation criteria in the hiring process only when the criteria on which the employers ultimately rely are entirely subjective in nature." *Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202, 1218 (10th Cir. 2022) (emphasis and internal quotation marks omitted). Frito-Lay asserts Mr. Brinker relied on objective and subjective criteria. *See* Aplee. Resp. Br. at 10, 14. But as to objective criteria, Frito-Lay relies solely on Mr. Brinker's general statement that he considered "assignments [Mr. Waggoner] did not complete or the hard results or efficiencies that were achieved or not achieved," Aplt. App. at 89, without ever identifying any such assignments or giving even one specific example of such "hard results" or "efficiencies." This conclusory assertion is insufficient to establish that Mr. Brinker did not rely solely on subjective criteria. *See Frappied*, 966 F.3d at 1060 ("Although [the employer] lists a litany of complaints and infractions relating to each plaintiff, it offers no evidence that it used objective criteria to evaluate its employees."); *Garrett*, 305 F.3d at 1218 ("Absent evidence that [the employer's] system of ranking and evaluation relies on objective criteria, we hold that [plaintiff] has satisfied his burden to demonstrate pretext . . . for the purposes of avoiding summary judgment.").

When combined with the evidence of age-related remarks by Mr. Brinker and the evidence disputing Mr. Brinker's assertions that Mr. Graham's performance and interview for the Processing Manager were better than Mr. Waggoner's, the evidence that Mr. Brinker relied on subjective criteria supports a showing of pretext. *See Frappied*, 966 F.3d at 1060-61; *Danville*, 292 F.3d at 1252-53.

4. Frito-Lay's Promotion of Younger Workers

Finally, Mr. Waggoner asserts Mr. Brinker's "youth movement" comment "is an accurate description of Frito-Lay's, or at least [Mr. Brinker's] own, policy and practice with respect to older employees." Aplt. Opening Br. at 17. He states that between September 2016 and July 2019, eight Topeka plant employees were promoted to level 10 manager positions. Of those, seven were under age 30, and the eighth was 35 years old. Mr. Brinker made seven of the promotion decisions. In response, Frito-Lay points out that in 2016-2017, Mr. Brinker promoted one employee over 40 to a level 11 position and one employee over 40 to a higher position designated LG1.

Evidence of an employer's "general policy and practice with respect to . . . employment [of protected persons]" may be relevant to pretext. *McDonnell Douglas*, 411 U.S. at 804-05. "On [this] point, statistics as to . . . employment policy and practice may be helpful to a determination of whether [the employer's conduct] conformed to a general pattern of discrimination . . . ." *Id.* at 805. But we have cautioned that "statistics taken in isolation are generally not probative of discrimination, and statistical evidence on its own will rarely suffice to show

pretext." *Luster v. Vilsack*, 667 F.3d 1089, 1094 (10th Cir. 2011) (alterations, citation, and internal quotation marks omitted). "In order to be probative of discrimination, statistical evidence must eliminate nondiscriminatory explanations for the disparity." *Id.* (internal quotation marks omitted). Otherwise, statistics are "nearly meaningless." *Id.* (internal quotation marks omitted); *see also Colon-Sanchez v. Marsh*, 733 F.2d 78, 82 (10th Cir. 1984) ("Although we cannot agree with the district court's conclusion that these statistics were wholly without probative value, we must conclude that their value was, indeed, slight." (footnote omitted)).

Mr. Brinker's promotion of employees older than age 40 to higher-level positions does not absolve Frito-Lay from this discrimination claim. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group."). At the same time, Mr. Waggoner has presented evidence only as to the bare number of promotions to level 10 positions and the ages of the candidates promoted, without eliminating nondiscriminatory explanations. For example, he has not shown the pool of candidates for the positions, the ages of unsuccessful candidates, or performance comparisons between successful and unsuccessful candidates. Thus, this statistical evidence "is insufficient to raise a jury question" as to pretext. *Ford*, 45 F.4th at 1217.

C. The Totality of the Evidence

In sum, Mr. Waggoner produced evidence of age-related remarks by the decisionmaker, evidence contradicting the asserted reasons for the promotion decision, and evidence Mr. Brinker relied on subjective criteria. Affording him the benefit of inferences in his favor and viewing the evidence in totality, a reasonable decisionmaker could find Frito-Lay's asserted reasons unworthy of belief and infer Frito-Lay did not act for those reasons.

In *Reeves*, the Supreme Court recognized that in some circumstances, even if a plaintiff has established a prima facie case and pretext, the employer nevertheless would be entitled to summary judgment. 530 U.S. at 148. The first example the Court gave is when "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." *Id.* That is not this case; the record is not conclusive. The second example is when "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* That also is not this case; even if Mr. Waggoner "created only a weak issue of fact," *id.*, Frito-Lay's evidence is not abundant, uncontroverted, or independent.

For these reasons, we reverse the grant of summary judgment to Frito-Lay on the failure-to-promote claim and remand to the district court for further proceedings.

II. Constructive Discharge

Mr. Waggoner also appeals from the grant of summary judgment to Frito-Lay on his constructive-discharge claim. "Under federal law, constructive discharge

occurs when the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Bennett v. Windstream Commc'ns, Inc.*, 792 F.3d 1261, 1269 (10th Cir. 2015) (brackets and internal quotation marks omitted). The standard is an objective one: "The conditions of employment must be objectively intolerable; the plaintiff's subjective views of the situation are irrelevant." *Id.* (internal quotation marks omitted). "To establish constructive discharge, a plaintiff must show that she had no other choice but to quit." *Id.* (internal quotation marks omitted). "If an employee resigns of her own free will, even as a result of the employer's actions, that employee will not be held to have been constructively discharged." *Rivero v. Bd. of Regents*, 950 F.3d 754, 761 (10th Cir. 2020) (internal quotation marks omitted).

Mr. Waggoner argues a reasonable person in his position would feel compelled to resign because (1) he "could no longer obtain an important benefit of being employed by Frito-Lay, namely, an equal opportunity to be promoted," Aplt. Opening Br. at 19; and (2) he "believed his job was in jeopardy because Mr. Brinker told him that 'historically it is known that older managers are let go,'" *id.* at 21. Neither of these assertions shows Mr. Waggoner had no choice but to quit.

Mr. Waggoner admitted he was speculating that he would never again be promoted at Frito-Lay. *See* Aplt. App. at 68. In any event, we have held a denial of promotion, even if discriminatory, does not necessarily establish a reasonable person would have felt compelled to resign. *See Jones v. Barnhart*, 349 F.3d 1260, 1265, 1270 (10th Cir. 2003) (conditions alleged, including denial of promotion, did not

establish constructive discharge); *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1508, 1514 (10th Cir. 1997) (no constructive discharge although plaintiff was denied several promotions over a period of years); *see also Muller v. U.S. Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1975) (upholding a judgment that the employer's promotion policies discriminated against the plaintiff, but then rejecting a judgment that the plaintiff had been constructively discharged).[2]

Mr. Waggoner's second reason also is based on his own speculation. And even if he believed his job was in jeopardy, it would not mean that he had no other choice but to quit.[3]

Because Mr. Waggoner has not established that a reasonable person would have felt compelled to resign under all the circumstances of this case, we affirm the grant of summary judgment to Frito-Lay on the constructive-discharge claim.

CONCLUSION

We affirm the grant of summary judgment to Frito-Lay on the constructive-discharge claim. However, viewing the evidence and resolving

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[2] In light of this precedent, Mr. Waggoner misplaces his reliance on *Jeffries v. Kansas*, 147 F.3d 1220, 1234 (10th Cir. 1998). There is no indication the denial of promotion to Processing Manager rose to the level of the discontinuation of the educational portion of plaintiff's position in *Jeffries*.

[3] Mr. Waggoner admitted his assignments as a Process Support Manager were not given for the purposes of embarrassing him or trying to make him leave Frito-Lay. This distinguishes his case from *Strickland v. United Parcel Service, Inc.*, 555 F.3d 1224, 1229 (10th Cir. 2009), which involved evidence the employer set the plaintiff up to fail.

inferences in the light most favorable to Mr. Waggoner, we reverse the judgment in Frito-Lay's favor on the failure-to-promote claim and remand for further proceedings.

Entered for the Court

Veronica S. Rossman
Circuit Judge