United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 13, 2022
Lyle W. Cayce
Clerk

No. 21-10760

GRACE OWENS,

Plaintiff—Appellant,

versus

CIRCASSIA PHARMACEUTICALS, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-2231

Before WILLETT, ENGELHARDT, and WILSON, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

This case turns on what circumstantial evidence of pretext a plaintiff in an employment-discrimination case must present to survive summary judgment under the "unworthy of credence" standard set forth in *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 147 (2000).[1] The plaintiff, Grace Owens, alleges that her former employer, Circassia Pharmaceuticals

[1] Although *Reeves* considered a motion for judgment as a matter of law under Rule 50, we apply it to summary judgment cases. *Pratt v. City of Houston*, 247 F.3d 601, 606 n.3 (5th Cir. 2001).

("Circassia"), fired her for discriminatory and retaliatory reasons. The district court granted summary judgment for Circassia, holding that Owens had failed to create a genuine dispute of material fact as to pretext. Owens presents substantial evidence that could lead a reasonable trier of fact to conclude that Circassia's justification for her termination is false. But she presents next to no evidence that Circassia was motivated in any way by discrimination or retaliation. We therefore AFFIRM.

I

A. Factual Background

Owens, an Asian woman, worked for a medical company named Aerocrine starting in 2010. She was promoted to Regional Sales Manager ("RSM") in 2013. In 2015, Circassia acquired Aerocrine and kept Owens on as RSM. While initially supervised by David Acheson, a white man and a Senior Vice President, Circassia later hired Scott Casey, another white man, as Area Sales Director and Owens' immediate supervisor. Circassia sold NIOX, a medical device, and Tudorza, a pharmaceutical product.

Both Acheson and Casey conducted performance reviews of Owens. Three reviews are relevant here: the 2016 year-end review, the 2017 mid-year review, and the 2017 year-end review. Common themes emerge from each. In each review Owens was rated a 3 out of 5 overall, or a "Valuable Contribution" under Circassia's metrics. Likewise, each review flags Owens' "team development" as an area that needed improvement.

The 2016 year-end review identified multiple flaws. First, by doing "one off business calls," Owens was "position[ing] herself more as a 'super rep' than a manager" and causing her team to "rely on [her] to save them all the time." Second, Owens was not putting enough effort into development and needed to "observe, coach, and regularly develop" her team more. Third, Owens was not spending enough time on field visits and her field

reports were subpar. The bottom line was that Owens had strong "business acumen and drive for results," but that strength became a weakness when it interfered with developing her subordinates into independent salespeople who could succeed "not always with [Owens'] direct involvement/actions."

The 2017 mid-year report noted no improvement. Specifically, Owens "continue[d] to take on much more of the workload than [wa]s required . . . sacrificing the development of [her] people." Owens' continued "drive for results" and "sole[] focus[] on the business" got in the way of "develop[ing] and hold[ing] [her] people accountable." Ditto for the year-end review. In addition to repeating the deficiencies mentioned in the mid-year report, the year-end report noted that Owens continued to spend insufficient time on field visits, something that Circassia believed critical to development and that had been an issue since 2016. Further, her field reports were still lacking. The upshot was that Owens was "not meeting expectations" for development, an important component of being a manager, as "her hyper focus on the business and her desire to control all the business needs in her region" became "a considerable concern."

Owens was aware of these issues as she read each review and discussed it with the relevant reviewer. However, she believed that there was a misunderstanding between her and Circassia "of how to develop people," and that her team's "high accolades and high achievements" demonstrated that she was developing them adequately. Circassia believed it necessary for Owens to allow her team members latitude to fail at times in order to develop. Owens disagreed.

Nevertheless, each performance review ranked Owens' performance as a "3" overall. According to Circassia's rating system, that meant that Owens was "a solid performer" who was "consistently performing well in

all aspects of [her] job" and "[c]onsistently display[ing] expected competencies at the correct level."

Aside from the reviews themselves, Owens' region consistently ranked among the best in the company in overall revenue, although revenue was not the ultimate metric of sales success at Circassia. Owens' subordinates succeeded as well. In 2016, both Melanie Tsakonas and Christy Grounds were promoted. Tsakonas was selected for membership in Circassia's Sales Leadership Council, while Grounds became a representative for the Managed Markets team. In 2017, Gary Koop, Leah McDonald, and Carl Rose were listed as top performers in various categories. Also in 2017, Kareem Berdai, Carl Rose, Gary Koop, Patrick Brogan, and Troy Lott were promoted.

On February 1, 2018, Owens reported to Casey an incident with Chili Hill, an Accounts Director at Circassia. According to Owens, she spoke with Hill over the phone after she had emailed him about a new account and copied her team. Hill took a hostile volume and tone, stated that Owens' team was underperforming, and spoke to her in a way Owens described as abusive. The parties dispute whether Owens reported any discriminatory treatment. Owens states that Hill made "sexist comments" and that she reported them to Casey. But Casey says that "Owens did not assert that she thought Hill's conduct was because she was a female or based on her race or national origin."

Casey informed Lori Antieau,[2] Circassia's Senior Director of Human Resources, about Owens' problems with Hill. Antieau, who handled the complaint, states that Owens never painted Hill's conduct as discriminatory

[2] Antieau's last name is now O'Sullivan, but Owens refers to her as Antieau. To avoid confusion, we likewise refer to her as Antieau.

or otherwise based on gender, race, or national origin, either in the initial report or in subsequent meetings. Owens, on the other hand, asserts that when she met with Antieau on February 21, she "expressly state[d] to . . . Antieau[] that Circassia is and has been discriminating against me and others because of gender." Antieau sent an email to, among others, Owens and Casey following that meeting recapping what was discussed, but it did not mention any allegations of discrimination. On March 22, Antieau asked Owens how things were going with Hill. Owens replied that they were "good," and that communication had improved. Owens did not dispute Antieau's description of the meeting or discuss discrimination.

On March 27 and 28, Casey and Antieau met with two other directors and determined that Owens, based on her performance issues and lack of improvement, should be placed on a Performance Improvement Plan ("PIP") along with two other RSMs, both white men. Tom Scaccia, Circassia's National Sales Director, supported putting Owens on a PIP based on his attendance of several of Owens' team conference calls. Scaccia highlighted two calls that occurred in February and March 2018, noting that they lacked structure, Owens did not review current business, each team member shared successful NIOX sales stories despite a national directive to focus on Tudorza, Owens did not focus on Tudorza, and Owens did not review a new company initiative.

On April 11, 2018, Casey met with Owens and placed her on the PIP. It summarized the issues with Owens' performance, described what Owens was expected to improve, and warned that unless things improved within 60 days,[3] Owens could be terminated.

[3] The PIP expired on June 10, 2018, which was a Sunday.

On April 18, Antieau discussed the PIP with Owens. According to Antieau's notes, Owens asserted that she was being discriminated against and pushed out via the PIP. She complained about the interaction with Hill, claimed that she was passed over for promotion, and alleged differential treatment compared to male RSMs. Antieau promised to investigate Owens' concerns. On April 25, Antieau discussed her findings with Owens. Specifically, Antieau interviewed Casey, Acheson, and three other individuals, including "one of Owens' peers." Antieau's investigation did not substantiate Owens' claims. Based on Antieau's notes, Owens responded by pointing out perceived deficiencies with Antieau's methodology and a statement that she would take legal action.

Casey continued to observe deficiencies in Owens' performance into May. On May 10, about halfway through the PIP, Antieau met with Owens. According to Antieau's notes, she discussed these deficiencies with Owens as well as a severance option. Owens asked how she was not meeting expectations.

On May 17, Owens emailed Antieau, copying Acheson, alleging discrimination and retaliation by Circassia. She alleged that the PIP was "completely unfounded" and "based on subjective criteria." She pointed out that her team members were recognized and promoted, and that her region was a consistent top performer. According to Owens, "[t]he difference" in treatment between her and other RSMs was "gender and ethnicity." According to Owens, Circassia did not explain how she was not meeting performance expectations, nor did Circassia provide "specifics concerning [her] performance."

Owens also alleged that Circassia was "involved in unlawful kickbacks and pricing" and "excessively charging Medicare." Antieau forwarded Owens' email to Preah Dalton, Director of Compliance, on May 21. Antieau

also conducted her own investigation. Owens later emailed Dalton about compliance issues specifically surrounding one customer. Dalton investigated and found no evidence supporting the allegations.

Over the following month, Owens, Casey, and Antieau went back and forth on the PIP, Owens' performance generally, and Owens' allegations of discrimination. During this period Casey met with Owens to discuss the PIP. He also received feedback about Owens from other Circassia employees. Scaccia attended a May 2018 team conference call and observed little improvement from his previous experiences. He informed Casey about his misgivings on May 30. Tim Moran, Circassia's Regional Director of the South, also informed Casey of some communication and leadership issues he had observed with Owens.

On June 7, three days before the PIP expired, Casey and Antieau met to discuss the outcome of the PIP. According to Antieau's email memorializing the meeting, Owens had improved in some areas but had not done so overall. The next step was to terminate Owens. Casey scheduled a meeting with Owens on Friday, June 8th but Owens took paid time off for that day. Thus, Owens was terminated on June 7, 2018. Her team was divided between three other RSMs, including two white men and one Hispanic man.

B. Procedural Background

Owens sued Circassia in the United States District Court for the Central District of California alleging violations of California Labor Code § 1102.5 (the "Whistleblower Statute"), 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and California Government Code § 12940 (California Fair Employment and Housing Act or "FEHA"). After several amendments, motions, and briefs, that court granted Circassia's motion to transfer venue to the United States District Court for the Northern District of Texas.

After further motion practice, Owens filed a second amended complaint similarly alleging wrongful termination under the Whistleblower Statute, a California claim for wrongful discharge in violation of public policy, discrimination in violation of 42 U.S.C. § 1981, 42 U.S.C. § 2000e, Title VII, and the FEHA, and retaliation in violation of the same. Following discovery, the district court granted summary judgment for Circassia on all claims. It held that Owens had failed to show that Circassia's stated nondiscriminatory reason for her termination was pretextual, defeating her federal discrimination and retaliation claims, and that she failed to establish a prima facie case for wrongful termination in violation of public policy, wrongful discharge in violation of the Whistleblower Statute, or discrimination under the FEHA. Owens appeals, arguing that she put forth sufficient evidence of pretext to survive summary judgment.

II

We review the district court's grant of summary judgment de novo and affirm 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); *Renfroe v. Parker*, 974 F.3d 594, 599 (5th Cir. 2020). A fact is material if it "might affect the outcome of the suit under the governing law," while a dispute about that fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We construe all the evidence and make all reasonable inferences in the light most favorable to Owens. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

Circassia bears the burden of demonstrating that there is no genuine dispute of material fact. *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 994 F.3d 704, 708 (5th Cir. 2021). It carries that burden if it can demonstrate that Owens has completely failed to prove "an essential element of [her] case."

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); *see Coleman v. BP Expl. & Prod., Inc.*, 19 F.4th 720, 726 (5th Cir. 2021). If Circassia meets that burden, then Owens must point to "specific facts showing that there is a genuine [dispute] for trial." *Jones v. United States*, 936 F.3d 318, 321 (5th Cir. 2019) (cleaned up). If the record "could not lead a rational trier of fact to find for [Owens], there is no genuine [dispute] for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (cleaned up).

III

We first consider Owens' claims of discrimination under Title VII and 42 U.S.C. § 1981.[4]

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[4] These and Owens' claims of retaliation under the same provisions are the only claims properly before this court.

We do not consider Owens' California wrongful termination claims because she has forfeited them. The district court held that Owens failed to make out a prima facie case for each claim, and in her opening brief Owens does not challenge that holding. *See Rollins v. Home Depot*, 8 F.4th 393, 397 n.1 (5th Cir. 2021). She broaches the issue on reply, but arguments raised for the first time in a reply brief are waived. *Est. of Duncan v. Comm'r*, 890 F.3d 192, 202 (5th Cir. 2018).

Likewise, we do not consider Owens' argument that Circassia is liable under a negligence, disparate impact, or implicit bias theory because it was not raised before the district court. *Id.* Owens' complaint makes no mention of it. Nor does her response to Circassia's motion for summary judgment.

Finally, Owens has failed to preserve her two FEHA claims. First, she forfeited her FEHA discrimination claim because the district court held that Owens did not establish a prima facie case, yet Owens does not challenge that holding on appeal. *See id.*

Second, she has waived her FEHA retaliation claim for more complex reasons. Although she invokes the FEHA in the retaliation section of her complaint, there is nary a mention of it in her response to Circassia's motion for summary judgment even though Circassia expressly moved for summary judgment on that claim. *See Rollins*, 8 F.4th at 397 (abandoning a known right is waiver). Further, the district court only addressed retaliation under Title VII and § 1981, not the FEHA. Owens does not challenge that omission on appeal. Thus, Owens did not defend her FEHA claim at the summary-judgment stage nor does she take issue with the district court's obvious omission of it from the summary-

It is unlawful to terminate an employee "because of" her "race . . . , sex, or national origin." 42 U.S.C. § 2000e-2(a)(1); *see* 42 U.S.C. § 1981 (prohibiting intentional racial discrimination).[5] Because Owens does not present direct evidence of discrimination, she must satisfy the *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973); *Sanders v. Christwood*, 970 F.3d 558, 561 (5th Cir. 2020). We analyze employment discrimination claims arising under both 42 U.S.C. § 1981 and Title VII on this basis. *Sanders*, 970 F.3d 558, 561 n.7 (5th Cir. 2020); *Turner v. Kan. City S. Ry. Co.*, 675 F.3d 887, 891 n.2 (5th Cir. 2012); *Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999).

Under that framework, Owens must make out a prima facie case of discrimination. *Watkins v. Tregre*, 997 F.3d 275, 281 (5th Cir. 2021). If she succeeds, Circassia must respond with a "legitimate, nondiscriminatory reason" for terminating Owens. *Id.* at 282. Then the burden shifts back to Owens, who must counter with substantial evidence that Circassia's proffered reason is pretextual. *Id.*

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judgment order. Even if it was not waived, we have long held that an argument raised "as an afterthought" is abandoned. *United States v. Scroggins*, 599 F.3d 433, 446–47 (5th Cir. 2010) (gathering cases). A party may not "merely mention or allude to a legal theory" but rather must, "[a]t the very least . . . [,] clearly identify[] [that] theory as a proposed basis for deciding the case." *Knatt v. Hospital Serv. Dist. No. 1 of E. Baton Rouge Par.*, 327 F. App'x. 472, 483 (5th Cir. 2009) (unpublished) (citations omitted) (quoted as persuasive authority and adopted in *Scroggins*, 599 F.3d at 446–47; *id.* at 447 n.7). Thus, by failing to press her FEHA retaliation claim both before the district court and this court, Owens has failed to preserve it.

[5] While Owens' operative complaint contains broad language that could encompass a panoply of claims, she later clarified in her response to Circassia's motion for summary judgment that she is only invoking these laws in response to her termination.

A. Prima Facie Case

Owens has established a prima facie case. To make a prima facie case of discrimination, Owens must show that: 1) she belongs to a protected group; 2) she was qualified for her position; 3) she suffered an adverse employment action; and 4) she was replaced by someone outside of her protected group or a similarly situated employee outside of her protected group was treated more favorably. *See id*; *Vaughn v. Woodforest Bank*, 665 F.3d 632, 636 (5th Cir. 2011).

While the parties do not dispute that Owens belongs to a protected group or that she suffered an adverse employment action, Circassia argues that because Owens failed to meet performance expectations, Owens was not qualified for her position and therefore fails to present a prima facie case. That argument fails for two reasons. First, the sole authority Circassia cites for this proposition is an unpublished district court case that in turn cites no authority for *its* holding. *See Smith v. ExxonMobil Corp.*, No. CV H-18-367, 2020 WL 5576695, at *2 (S.D. Tex. Sept. 17, 2020).[6] Second, Circassia's own performance reviews make clear that, at all relevant times, Owens was "a solid performer" who was "consistently performing well in all aspects of [her] job" and "[c]onsistently display[ing] expected competencies at the correct level." Thus, Owens has satisfied this element.

Circassia also disputes the fourth element by arguing that Owens failed to show that RSMs outside her protected group were treated more favorably. But the district court's holding on this element was based on Owens being replaced by Rich Kosar, a white man, as Owens submitted

[6] Circassia invokes the holding of *Smith* as the holding of "this Court," i.e., the Court of Appeals for the Fifth Circuit. That's incorrect. *Smith* is the holding of a judge in the Southern District of Texas and is not binding here.

declarations from multiple individuals supporting that proposition. Circassia offers no challenge to that holding and, in any event, we agree that Owens has surpassed the "very minimal" barrier of making her prima facie case. *Guthrie v. Tifco Indus.*, 941 F.2d 374, 377 (5th Cir. 1994) (quotation omitted).

B. Legitimate Nondiscriminatory Reason

We likewise agree with the district court that Circassia, by claiming to have fired Owens for poor performance, has presented a legitimate, nondiscriminatory reason for doing so. Owens does not dispute that this justification satisfies the second step of *McDonnell Douglas*. Thus, we consider whether Owens has offered sufficient evidence on the third step: pretext.

C. Pretext

Pretext is the crux of this appeal. At this stage, Owens must present "substantial evidence" that Circassia's asserted reason for terminating her is pretext for discrimination. *Watkins*, 997 F.3d at 283. "Evidence is substantial if it is of such quality and weight that reasonable and fair-minded [triers of fact] in the exercise of impartial judgment might reach different conclusions." *Laxton v. Gap Inc.*, 333 F.3d 572, 579 (5th Cir. 2003) (quotation and internal quotation marks omitted). Because Circassia's "reasons for [Owens'] termination were her poor performance and demonstrated lack of effort to change her behavior[,] to prevail at this stage, [Owens] must show that reasonable minds could disagree that these were, indeed, the reasons for her discharge." *Salazar v. Lubbock Cnty. Hosp. Dist.*, 982 F.3d 386, 389 (5th Cir. 2020).

Owens may meet her burden through use of various forms of circumstantial evidence, including evidence of disparate treatment or evidence tending to show that Circassia's "explanation is unworthy of credence." *Reeves*, 530 U.S. at 147; *Watkins*, 997 F.3d at 283. But

employment laws do not transform federal courts into human resources managers, so the inquiry is not whether Circassia made a wise or even correct decision to terminate Owens. *Bryant v. Compass Grp. USA Inc.*, 413 F.3d 471, 478 (5th Cir. 2005) (citation omitted). Instead, "[t]he ultimate determination, in every case, is whether, viewing all of the evidence in a light most favorable to the plaintiff, a reasonable factfinder could infer discrimination." *Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 902 (5th Cir. 2000). Thus, evidence must be of sufficient "nature, extent, and quality" to permit a jury to reasonably infer discrimination. *Id.* at 903.

Owens focuses primarily on evidence that tends to show that Circassia's justification is unworthy of credence. But even if Owens has provided sufficient evidence for a jury to disbelieve Circassia's explanation for her termination, that is not necessarily enough.[7] Employers are "entitled to be unreasonable" in terminating their employees "so long as [they] do[] not act with discriminatory animus." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 899 (5th Cir. 2002). Thus, it is the employee's burden to create a fact dispute as to reasonableness that could give rise to an inference of discrimination. *Id.* As the Supreme Court explained in *Reeves*, "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." 530 U.S. at 148. As we explain below, this is one of those instances.

[7] To be clear, it *can* be enough in some cases. *See Reeves*, 530 U.S. at 147 ("[I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."). But evidence of falsity must be of sufficient "nature, extent, and quality" to make the inferential leap to discrimination a rational one. *Crawford*, 234 F.3d at 903.

Owens advances six categories of evidence that she argues demonstrate that Circassia's reason for firing her was pretextual. We address each in turn and explain why, or why not, that evidence is sufficient to reject Circassia's proffered explanation.[8]

1. Disparate Treatment

Owens first argues that she experienced disparate treatment compared to white male comparators. To show disparate treatment, Owens must identify such comparators and "produce . . . evidence that [they] were similarly situated employees." *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 515 (5th Cir. 2001). But, outside of vaguely referencing "white male comparators" or "her peers," Owens does not identify comparators. Nor does she produce any evidence whatsoever that these comparators were similarly situated outside of their job titles. Instead, she asserts—in conclusory fashion—that she has personal knowledge that she was making more field rides with her team, that her Field Coaching Reports ("FCRs") were of the same or better quality, and that her team performed well compared to her peers.[9] Conclusory declarations are insufficient to create

[8] Both parties make hay of a so-called "honest belief defense." Other than two unpublished district court cases that use that phrase in a descriptive manner, the parties cite nothing to support the existence of that defense and we find nothing in our caselaw that does so. *Singleton v. YMCA*, No. CV H-17-2903, 2019 WL 2617097, at *9 (S.D. Tex. June 26, 2019); *Royall v. Enter. Prods. Co.*, No. 3:19-CV-00092, 2021 WL 260770, at *7 (S.D. Tex. Jan. 5, 2021). Instead, these cases merely use that phrase to describe pretext itself. *See Singleton*, 2019 WL 2617097, at *9 (quoting *Sandstad*, 309 F.3d at 899). Honest belief is the same thing as absence of pretext because giving a false reason for an action to obscure the real reason—i.e., dishonesty—is the very definition of pretext. *See Pretext*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016). Because pretext is already front-and-center in the *McDonnell Douglas* inquiry, we see little basis to spin off honesty as a standalone doctrinal issue.

[9] While Owens asserts additional types of disparate treatment in her declaration, she does not argue that they were disparate treatment on appeal. These arguments are

issues of fact[10] and, save for a concession in Antieau's deposition that we discuss below, Owens fails to cite any specific factual basis in the record to support her conclusions.[11] We cannot compare Owens to other RSMs when she fails to name or otherwise identify comparator RSMs, much less explain why they are similarly situated.

The comparative data we *do* have is presented by Circassia and consists of 2017 performance reviews for all other RSMs. They do not show different treatment. For example, Casey gave Nicole Bennett, a female RSM, a performance rating of "4," which he states—and the record supports—was the highest rating that year. All other RSMs received, like Owens, a "3" overall rating, but only one RSM, Jeff Pearl, received a "2" rating in "developing others." Owens does not discuss these reports or any specific facts demonstrating that any of these RSMs were treated favorably compared to her. Nor does she argue that Pearl is a comparator, even though

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unavailing for much the same reason as those discussed here, but since they are not briefed, we do not address them.

[10] The problem is not that Owens' declaration is self-serving, because "[t]here is nothing inherently wrong with self-serving statements." *Salazar*, 982 F.3d at 392 (Ho, J., concurring). The problem is that most of her declaration, a liturgical recitation of legal conclusions and factual inferences, does not provide the underlying facts supporting those inferences and conclusions. *See id.* (citations omitted).

[11] It appears that Owens moved to compel production of data relevant to other RSMs including FCRs, communications between themselves, Casey, and their sales teams, and performance reviews. The problem is that Owens never requested production of those documents in and of themselves. Instead, she requested comparative data "that Circassia considered in arriving at the decision to terminate Owens' employment." Thus, Circassia produced all documents that it considered in its decision, which evidently fell short of what Owens thought Circassia had—or should have—considered. The magistrate judge to whom the motion was referred agreed with Circassia's position and denied the motion, so the record is devoid of documents we could use to compare Owens to other RSMs. We recount this not to say that the magistrate judge was incorrect, only to explain the dearth of useful data in the record.

he seems the most suitable candidate. Thus, neither Owens nor the record reveals an appropriate comparator that would permit a rational finding of disparate treatment.

One wrinkle worth mentioning is that Antieau did concede in her deposition that Owens' team exceeded the sales performance of some other teams, yet the RSMs overseeing those teams were not placed on a PIP. But Owens again does not provide evidence or argument that these RSMs were similarly situated. She does not provide any evidence, for example, that her team outperformed similar teams in similar markets, which the record and common sense dictate to be an important consideration.[12] Because Owens has failed to present evidence—or argument, for that matter—tending to establish a suitable comparator, she has failed to create a fact issue as to disparate treatment.[13] *See Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) ("The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim.").

2. Lack of Investigation

Next, Owens argues that Circassia's failure to investigate whether she was developing her team, failure to interview her team, failure to compare her to other RSMs, and failure to adequately investigate her discrimination and pricing misconduct allegation are evidence of pretext.

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[12] Specifically, Casey testified that he expected higher performance from teams in mature markets with experienced reps than teams in new markets with inexperienced reps.

[13] Circassia urges us to reject Owens' arguments on an additional basis: that two white male RSMs were placed on a PIP at the same time as Owens and are therefore appropriate comparators for disparate-treatment purposes, notwithstanding that they had a different supervisor. We do not reach this argument because Owens fails at the outset to establish that *any* RSM is a comparator.

We have only recently addressed failure-to-investigate in the context of pretext. In an unpublished opinion, a panel of this court rejected the Sixth Circuit's requirement that, while an "employer need not leave 'no stone unturned,'" it must "make a 'reasonably informed and considered decision'" to undertake the adverse action. *Gill v. DIRTT Env't Sols., Inc.*, 790 F. App'x 601, 605 (5th Cir. 2019) (per curiam) (quoting *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 398 (6th Cir. 2008)). Instead, the panel held that the employer was entitled to summary judgment, dismissing out of hand the argument that the employer conducting *no* investigation into the complaints that formed the basis for its action was evidence of pretext. *Id.*

While we do not pass on whether the Sixth Circuit's approach is the correct one, *Gill*'s language implies that lack-of-investigation evidence is never sufficient and, in that respect, *Gill* goes too far.[14] An employer's investigatory choices might, depending on the facts of a particular case, be suspicious in a way that renders the "defendant's explanation . . . unworthy of credence" and permits an inference of discrimination. *Reeves*, 530 U.S. at 147 (2000); *see also EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 624–25 (5th Cir. 2009) (in the ADA context, failing to "ma[ke] any attempt to check the accuracy of [an] incorrect assumption" when presented with objective evidence that the assumption is false can be evidence of pretext if it tends to show that an employer's true motivation was discriminatory).

Contra *Gill*, permitting such evidence to defeat a motion for summary judgment does not require employers to make "objectively verifiable showing[s]" or to make correct decisions. *Gill*, 790 F. App'x 605 (citing *LeMaire v. La. Dep't of Transp. & Dev. ex rel. La.*, 480 F.3d 383, 391 (5th Cir.

[14] *Gill* also held, applying the Sixth Circuit test in the alternative, that the plaintiff had failed to show that the employer had not made a sufficiently informed and considered decision. 790 F. App'x at 605–06.

2007)). Instead, we simply recognize that such evidence does not require us to evaluate whether an employer's investigatory practices were *sufficient* or *correct*, but only whether, considered with all other evidence, they tend to permit a rational inference that the employer's ultimate reason for taking an adverse action is *unbelievable*. Whether evidence does so in a particular case depends on its "nature, extent, and quality." *Crawford*, 234 F.3d at 903.

Under that standard, most of Owens' arguments on this point clearly fall short. Regarding Circassia's discrimination and compliance issues, Circassia appears to have conducted serious investigations. Specifically, Antieau investigated Owens' complaints of discrimination and retaliation, and Dalton investigated the pricing allegations and a different instance of alleged retaliation. Both appear to have interviewed relevant witnesses and analyzed relevant law and company policy. Owens argues that these investigations were inadequate. But while Circassia certainly could have interviewed more or different people, the mere fact that Circassia did not conduct these investigations as Owens might have preferred is not sufficient to show that the investigations were inadequate. *Bryant*, 413 F.3d at 478.

Regarding Circassia's investigation of Owens' performance vis-à-vis other RSMs, Owens cites no requirement, either in law or Circassia's policies, that Circassia must only place an employee on a PIP or terminate an employee after comparing that employee to his or her peers. Thus, even if Owens is right, she has only shown that Circassia's investigatory practices do not involve comparative analysis. That is not enough to show that such practices are inadequate, to say nothing of discriminatory.

Owens' argument that Circassia's investigation was inadequate—to the extent of being pretextual—because Circassia failed to interview Owens' team is stronger, but still falls short. Owens' authority for the proposition that failure to interview is relevant consists solely of out-of-circuit caselaw.

See Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 108 (2d Cir. 2010); *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 414–15 (6th Cir. 2008); *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1159 (10th Cir. 2008); *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 529–30 (6th Cir. 2005).[15] In *Gorzynski*, the relevant decisionmaker conceded that additional witnesses should have been interviewed before terminating the plaintiff based on a complaint. 596 F.3d at 108. There is no such concession here. *Martin* and *Tisdale* rely on Sixth Circuit tests, neither of which has been adopted in this circuit. *Martin*, 548 F.3d at 414–15; *Tisdale*, 415 F.3d at 529–30.

Trujillo, however, is relevant. In that case, the employer failed to interview one of the employees' supervisors regarding an alleged infraction that led to their terminations. 524 F.3d at 1159. That supervisor submitted an affidavit that undercut the employer's justification for the terminations. *Id.* If the employer had interviewed the supervisor, therefore, it may have found that its basis for the terminations was mistaken. Its failure to interview was consequently suspicious and "a significant circumstance contributing to the inference of discrimination." *Id.*

Here, however, the record shows that while Antieau did not interview Owens' team, Casey *did* have conversations with them on topics relevant to Circassia's concerns. Casey testified that his understanding of Owens'

[15] Some of our precedent rejects failure-to-interview as a valid consideration in the pretext inquiry. *See Hanchey v. Energas Co.*, 925 F.2d 96, 99 (5th Cir. 1990) ("[F]ail[ing] to consult local personnel" before firing an employee cannot show that the employer's "reasons are unworthy of credence"). But *Hanchey* and cases like it require a "pretext plus" evidentiary showing, wherein a plaintiff *must* provide some evidence of discriminatory motive because a factfinder could *never* infer that motive from the apparent falsity of an employer's justification alone. *See Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1508 n.6 (5th Cir. 1988) (relied upon by *Hanchey*). That approach was unequivocally rejected by our en banc court in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc), and by the Supreme Court in *Reeves*, 530 U.S. at 147.

deficiencies came from "calls, . . . observations, . . . peer coaching reports . . . [a]ll of it." He specifically recalls talking with Owens' subordinates at various points and hearing stories of Owens "com[ing] in and fix[ing]" problems rather than helping her team members develop by handling those situations themselves. Casey did not conduct formal interviews, as he testified that he would not discuss Owens' deficiencies or her need for improvement with her subordinates.

At bottom, then, this dispute is two ships passing in the night. Owens, citing Antieau's deposition, argues that Circassia did not interview her team. Casey testified that he based his concerns about Owens' performance on, among other things, conversations he had with her team. Owens does not reference or dispute Casey's testimony. Nor does she argue that informal conversations, either in general or as they took place here, are inadequate to the extent that they are evidence of pretext. Thus, Owens has failed to demonstrate that Circassia's investigation was inadequate at all, let alone inadequate in a way that could give rise to a reasonable inference of pretext for discrimination.

3. Illogic and Inconsistency

Owens also argues that Circassia's stated reasons for firing her were inconsistent with reality and, given Circassia's own behavior, illogical. She cites Circassia's appraisals of her team's performance and introduces fact evidence that contradicts Circassia's version of events. This is her strongest argument. But while she has likely presented sufficient evidence for a reasonable factfinder to reject Circassia's explanation for her termination, she has not presented sufficient evidence to permit a rational inference that the proffered reason was pretext for discrimination. *See Crawford*, 234 F.3d at 902.

We have recently held that evidence of "inconsistent explanations and the absence of clear criteria" in an employer's decisionmaking can be enough to survive summary judgment if, under the facts of a particular case, that inconsistency and lack of criteria could lead to a reasonable inference of pretext. *Gosby v. Apache Indus. Servs., Inc.*, 30 F.4th 523, 528 (5th Cir. 2022). That kind of evidence makes an employer's decision seem illogical and, therefore, unworthy of credence. But again, "[t]he ultimate determination . . . is whether, viewing all of the evidence in a light most favorable to the plaintiff, a reasonable factfinder could infer discrimination." *Crawford*, 234 F.3d at 902. Thus, to survive summary judgment, Owens must produce sufficient evidence of implausibility to permit an inference of *discrimination*, not merely an inference that Circassia's proffered reason is false. *See Reeves*, 530 U.S. at 148 ("[T]here will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.").

Mere disputes over an employer's assessment of an employee's performance do not create issues of fact. *Salazar*, 982 F.3d at 389. But in policing this line, courts should be cautious to not dismiss *any* dispute as a *mere* dispute. *Salazar* is a prime example of the latter. In that case, the employee submitted conclusory affidavits stating that her performance was adequate with scant evidence to support such assertions. *Id.* at 389; *see id.* at 392 (Ho, J., concurring) (clarifying that the problem with the statements was that they were conclusory). Thus, the employee had not provided enough evidence to raise anything more than a "mere" dispute.

To be sure, much of Owens' declaration and those of her subordinates contain bald assertions of Owens' prowess as a manager and conclusory legal analysis. Likewise, many declarations contain threadbare rejections of Circassia's reasons for terminating Owens and conclusory assertions that

Owens developed her team. If that was all they contained, then that would be the end of the matter.

But that is not all.[16] Several declarations attest to specific facts which, if credited by a factfinder, could lead to a reasonable rejection of Circassia's proffered reason for firing Owens. Further, Owens presents objective evidence that Circassia acted in a way that does not logically comport with its assessment of her performance. Three of the underlying reasons for placing Owens on a PIP and eventually terminating her were that she was failing to develop her team, she was doing the work of her team and acting as a "super rep" rather than a manager, and she was not conducting proper field visits. Owens presents substantial evidence to contest each.

Start with the field visits. The PIP stated that Owens' field visits were insufficient and needed to be a 1.5 to 2 days in length. Kareem Berdai's declaration attests to Owens conducting field rides with him "about once a quarter . . . for about 3–4 days at a time." Jodie Eades, Patrick Brogan, and Troy Lott all state—with some detail—that Owens visited for two days at a time. Christy Grounds attests to "1–2 days." These declarations therefore provide *facts*, not conclusory opinions or factual inferences. Further, they directly contradict one of Circassia's *factual* assumptions—i.e., that Owens was *not* visiting for at least a 1.5 days at a time—for Owens' PIP and eventual termination. A reasonable factfinder could credit and weigh them as evidence supporting a rejection of Circassia's proffered justification.

[16] Although the district court characterized the sum of Owens' evidence as mere disagreement with Circassia's assessment and investigatory practices, that is not entirely accurate. We nevertheless affirm because we may do so "on any ground supported by the record." *McIntosh v. Partridge*, 540 F.3d 315, 326 (5th Cir. 2008) (quotation and internal quotation marks omitted).

Next, development. The PIP stated that Owens needed to provide challenge, have "frequent developmental discussions," be aware of career goals, create development plans and execute them, facilitate "developmental moves," and support subordinates who need help. While the meaning of these phrases is not completely clear, Owens has introduced substantial evidence tending to show that she had developed her team. More than that, Circassia appears to have agreed.

First, the declarations identified above also speak to development. On "frequent developmental discussions," multiple subordinates attest to a "mandatory 2:00pm conference call on every Friday with the whole team" to discuss "best practices, updates, and development." On more general development, Berdai recounts details about how he discussed his goals and priorities with Owens and how she helped him manage those priorities "for six straight years every quarter." When Troy Lott was Circassia's top salesman, Owens arranged for Berdai to ride with him to help Berdai's development. She was also aware of Berdai's career aspirations, as part of the reason Owens had Berdai ride with Lott was to "kickstart . . . developing [his] role as a manager." Further, Owens put Berdai's name in for a group of top sales representatives, encouraging his "interest in future leadership." Berdai's declaration is not the only one to include such details.

Second, Circassia was evidently pleased with how Owens had developed her team. In 2016, two of Owens' subordinates were promoted. In 2017, five of her subordinates were promoted. Her team also found success on other terms, including membership on Circassia's Sales Leadership Council, membership on the Managed Markets team, and top performance awards. Further, Antieau testified that the 2017 promotions occurred under a "career ladder," Circassia's internal development metric. To be sure, there is also evidence that not all these promotions and accolades are reflective of development. Casey, for example, testified that the 2016 promotions of

Christy Grounds and Melanie Tsakonas were tenure-based, not performance-based. But Casey does not dispute every promotion and award. Indeed, he confirmed that membership on the Sales Leadership Council reflected "ability and skill set competencies." Thus, the import of these promotions and accolades appears to be a classic fact dispute wherein a reasonable factfinder could choose how to weigh the evidence either for or against Owens.

Third, Owens' region consistently ranked among the best in the company in overall sales revenue. Circassia dismisses her team's sales performance as "only one factor in how well they were being developed." But Circassia does not explain how a company that sells products can so easily dismiss how many products it sells as a measure of how well a team is performing which, in turn, reflects on how well that team is being managed and developed. To the contrary, as Antieau testified, sales performance speaks, at least to some extent, to Owens' influence on her team's development.

Finally, we consider Owens' propensity for stepping in and doing sales representative work. Here, again, the declarations provided by Owens contradict the facts underlying Circassia's rationale. The declarations bear out two consistent themes. First, Owens made introductions, while the team members themselves closed the deals. Second, Owens only provided support and resources when asked, including moral support and marketing materials.

Owens has accordingly presented evidence that directly and specifically contradicts several factual bases for her placement on the PIP and her eventual termination. Although there are alternative explanations for some of this evidence, reasonable inferences are drawn in favor of Owens. *Scott*, 550 U.S. at 378. Thus, a reasonable trier of fact could find that Circassia's proffered justification for terminating Owens is false. But that

alone is not enough. The evidence must permit a reasonable inference that Circassia's false reason was pretext for the true, discriminatory, reason. *Reeves*, 530 U.S. at 147–48; *Crawford*, 234 F.3d at 902.

Aside from the incident with Chili Hill, who was not involved in the decision to place Owens on the PIP or to fire her, Owens provides scant evidence of discriminatory treatment. In her briefs, Owens cites several documents in the record that she alleges are evidence of discrimination. But those portions of the record reveal nothing of the sort. For example, Owens alleges that Acheson "engage[d] in . . . discrimination," but for support she cites an email that is Antieau's response to Owens' allegations of pricing misconduct and a portion of Jodie Eades' declaration that discusses the same thing. The only other suggested basis for a finding of discrimination is disparate treatment which, as we explained above, is not enough without identifying a comparator and providing *something* to compare. Perhaps recognizing this difficulty, Owens argues discrimination based on negligence, disparate impact, and implicit bias. But that argument was not raised before the district court, so we do not consider it here. *Est. of Duncan*, 890 F.3d at 202.

Thus, although Owens likely presents enough evidence of illogic to permit a rational factfinder to think Circassia's proffered reason might be false, Owens does not present the type of evidence necessary to permit an inference of discrimination. Instead, this is a case where, "although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148; *see Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002) (same). In other words, a juror could reasonably conclude that Circassia wanted Owens gone for some reason other than her performance, but an "inference of discrimination

[would] be weak or nonexistent." *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1338 (2d Cir. 1997) (quoted approvingly in *Reeves*, 530 U.S. at 148).

4. Subjectivity, Failure to Follow Policy, and Severance Agreement

Owens raises three more arguments that Circassia's proffered reason is pretext. None hold water. First, Owens argues that employers may not use subjective criteria. Not so. The case Owens cites did not consider subjective criteria at the pretext stage, but rather "whether an employer can defeat an employee's claim via summary judgment *at the prima facie case stage* by claiming that he failed to meet entirely subjective hiring criteria." *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 681 (5th Cir. 2001) (emphasis added). Owens provides no further support for the proposition that employers are barred from using subjective criteria to evaluate employees, and we reject this argument.

Next, Owens argues that Circassia's firing of Owens on the 57th day of the 60-day PIP is evidence of pretext. But the cases Owens cites betray why her argument fails. Trying to terminate someone on a Friday because the PIP expires on a Sunday, then rescheduling the firing for Thursday because the employee can't make the Friday meeting, is hardly on the same level as firing someone without warning when policy dictates that discipline be progressive or other evidence showing meaningful departure from policy. *See Lindsey v. Bio-Med. Applications of La., L.L.C.*, 9 F.4th 317, 326 (5th Cir. 2021). Other than the fact that Owens was fired three days shy of the running of the PIP's stated period, Owens provides neither evidence nor argument that the departure was meaningful in any way. Thus, we reject this argument as well.

Finally, Owens argues that the fact that she was offered a severance agreement during the PIP is evidence that the Circassia never allowed for Owens to complete the PIP and remain employed. Severance offers may

constitute evidence of discrimination when the offeree cannot decline and continue working under lawful conditions. *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 577 (5th Cir. 2003) (quotation and internal quotation marks omitted). *Palasota* illustrates why that is not the case here. In *Palasota*, a Sales Associate was offered a severance package. *Id.* He was fired, along with twelve others, two months after he declined the offer as part of an alleged restructuring. *Id.* Within a year, all Sales Associates had been fired and replaced by Retail Marketing Associates. *Id.* The now-fired Sales Associates were ninety-five percent men over forty, while the newly hired Retail Marketing Associates were ninety-five percent women under forty. *Id.* That, combined with substantial evidence that the roles were the same, permitted an inference of discrimination. *Id.* Here, Owens presents no evidence that her firing was part of a larger plot that made it inevitable even if she improved her performance. Nor does she present any other evidence that her termination was inevitable. Thus, there is no reason to believe that the severance agreement is evidence of pretext.

At bottom, Owens has provided enough evidence to permit a finding that Circassia's proffered justification for her termination is false. But she has presented a mere scintilla of evidence that the true reason for her termination was discriminatory animus, and "the burden of proof [is hers] throughout." *Saketkoo v. Adm'rs of Tulane Educ. Fund*, --- F.4th ---, 2022 WL 1183824, at *4 (5th Cir. Apr. 21, 2022). It is not enough to permit a reasonable inference that *some* reason other than the proffered one motivated the adverse employment action. *Reeves*, 530 U.S. at 148; *see Price*, 283 F.3d at 720. An aggrieved employee's evidence must, at the summary-judgment stage, permit a reasonable inference that the real reason was impermissible

discrimination. *Sandstad*, 309 F.3d at 899.[17] Summary judgment for Circassia is therefore appropriate because Owens' evidence is of insufficient "nature, extent, and quality" to permit a reasonable factfinder to resolve "[t]he ultimate determination" of discrimination in her favor. *Crawford*, 234 F.3d 902–03.

IV

We next consider Owens' claims of retaliation under Title VII and 42 U.S.C. § 1981.[18] These claims are likewise "subject to the *McDonnell Douglas* burden-shifting framework" because Owens seeks to prove retaliation by circumstantial evidence. *Jones v. Gulf Coast Rest. Grp., Inc.*, 8 F.4th 363, 368 (5th Cir. 2021); *see also Saketkoo*, 2022 WL 1183824, at *4.

To establish a prima facie case of retaliation, Owens must show that: 1) she engaged in a protected activity; 2) she suffered an adverse employment action; and 3) there is a causal connection between the two. *Saketkoo*, 2022 WL 1183824, at *4. The district court found that Owens had established a prima facie case, and Circassia only disputes that Owens has established the third element on appeal. Circassia's arguments are without merit. As the district court found, Circassia terminated Owens weeks after she complained of discrimination and price violations. "[T]he mere fact that some adverse action is taken *after* an employee engages in some protected activity will not

[17] Owens has not, for example, provided evidence that Circassia was "unable to express coherent, consistent criteria" for terminating her, invoking "different rationales . . . at different times." *Gosby*, 30 F.4th at 528. That kind of freewheeling, standardless rationale is inherently suspicious in a way that, depending on the facts of a particular case, could give rise to a rational inference of discrimination when combined with a prima facie case.

[18] As with discrimination, retaliation claims under § 1981 and Title VII "are parallel causes of action" that require "proof of the same elements in order to establish liability." *Foley v. Univ. of Hous. Sys.*, 355 F.3d 333, 340 (5th Cir. 2003).

always be enough for a *prima facie* case." *Swanson v. GSA*, 110 F.3d 1180, 1188 n.3 (5th Cir. 1997). Nevertheless, "[c]lose timing" between the protected activity and adverse action can establish the causal link required to assert a prima facie case. *Id*. at 1188. An interval of weeks between Owens' complaints and her termination is certainly close timing, so we agree with the district court and hold that Owens has established a prima facie case. The parties do not dispute the second step of *McDonnell Douglas*, that Circassia has put forth a legitimate, nondiscriminatory reason for terminating Owens. Thus, we move to the third step which asks "whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision." *Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996) (citation omitted); *see also Saketkoo*, 2022 WL 1183824, at *5.

This inquiry requires a greater showing than mere causal connection. It requires that the plaintiff show that protected conduct was *the* reason for the adverse action. "In other words, even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct." *Long*, 88 F.3d at 305 n.4 (citation omitted). Plaintiffs may combine "suspicious timing with other significant evidence of pretext" to survive summary judgment, and that is precisely what Owens attempts to do here. *Saketkoo*, 2022 WL 1183824, at *7.

Owens raises no additional arguments regarding pretext to support her retaliation claim. Thus, for the same reasons discussed above, she falls short of creating a genuine dispute of material fact. We agree with the district court that summary judgment for Circassia is appropriate.

V

There is a gray area between firing an employee for obvious performance deficiencies and firing an employee for discriminatory reasons. But under Title VII and 42 U.S.C. § 1981, discrimination is what matters. Even when an employee presents evidence that would allow a jury to conclude that an employer's proffered justification for an adverse action is false, that does not necessarily permit a rational inference that the real reason was discrimination. The Supreme Court warned of such cases, and this happens to be one. Thus, we AFFIRM.