FILED
United States Court of Appeals
Tenth Circuit

December 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DEBORAH LINGENFELTER,

Plaintiff - Appellant,

v.

KAISER FOUNDATION HEALTH PLAN OF COLORADO,

Defendant - Appellee.

No. 21-1088
(D.C. No. 1:19-CV-01040-DDD-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **MATHESON**, Circuit Judges.

Deborah Lingenfelter alleged that when Kaiser Foundation Health Plan of Colorado terminated her employment, it retaliated against her under the Family and Medical Leave Act ("FMLA") and discriminated against her under the Americans with Disabilities Act ("ADA"). Kaiser said it fired her because she failed to provide a letter to her manager taking responsibility for making workplace comments about a relationship between co-workers. The district court granted summary judgment to

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Kaiser because Ms. Lingenfelter could not show that Kaiser's reason for firing her was pretextual. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual History*

"We present the following facts in the light most favorable to [Ms. Lingenfelter], the non-movant, unless contradicted by the record." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 961 (10th Cir. 2017).

1. Ms. Lingenfelter's Job and FMLA Leave

In 2009, Kaiser hired Ms. Lingenfelter as an MRI technologist. Cynthia Cameron became her supervisor in 2016. From 2011 through 2017, Ms. Lingenfelter took intermittent FMLA leave to care for her sons, who had autism and health issues. She also took FMLA leave in 2015 for her own health condition and in 2017 to care for her mother. Ms. Lingenfelter asked Ms. Cameron on three occasions for a reduced work schedule. Ms. Cameron denied these requests but offered a shift change and also appeared open to reconsidering a reduced work schedule.

2. Discipline at Kaiser

During her employment at Kaiser, Ms. Lingenfelter was a member of the Service Employees International Union Local 105 ("Union"). Under the collective bargaining agreement, discipline against Union members progressed through five levels. Level 1, an Oral Reminder, and Level 2, an Individual Action Plan, were not formal discipline. Level 3, a Corrective Action Plan, was "the first step of the formal discipline procedure." App., Vol. I at 151. Level 4, a Day of Decision, was a paid day off for the employee to

choose whether to make the required changes under the Corrective Action Plan or to resign. *Id.* at 153-54. Level 5 was termination of employment.

To determine the level of discipline for an employee's reported misconduct, a Kaiser official, the employee, and the employee's Union representative would join in a Joint Objective Discovery ("JOD") meeting. A JOD meeting therefore preceded the five-level process.

3. **March to November 2017 JOD Meetings**

From March to November 2017, Ms. Cameron initiated five JOD meetings to discuss Ms. Lingenfelter's conduct regarding patient safety, email responsiveness, and tardiness or sick days. Ms. Lingenfelter received either no or informal discipline (Level 1 or 2) following the JOD meetings. Three of the five JOD meetings concerned issues related to Ms. Lingenfelter's FMLA leave.[1]

4. **August 2017 Staff Meeting**

In an August 2017 monthly staff meeting, imaging and nursing staff discussed how to improve their workflow. At one point, Westley Espinosa, another MRI technologist, stood up and said, "I will rip off the Band-Aid. Everybody is saying

[1] For example, in September 2017, a co-worker sent an email to Ms. Cameron stating that Ms. Lingenfelter skipped a safety check while "in a hurry to leave for her FMLA." App., Vol. I at 168. After Ms. Lingenfelter explained what happened, Ms. Cameron decided not to discipline her.

that the reason for the problems is you, [Ms. Lingenfelter]. You are always calling out on FMLA. We are short-staffed." App., Vol. II at 246.[2]

5. **October 2017 FMLA Leave Request**

In October 2017, Ms. Lingenfelter learned her son had been in a fight at school, which triggered an anxiety attack. She left work to take him to the hospital and requested, via text message, FMLA leave for the next day. Ms. Cameron texted back that Ms. Lingenfelter's FMLA leave did not cover injuries from a fight and asked for a doctor's note, which Ms. Lingenfelter provided. Ms. Lingenfelter's union steward later emailed Ms. Cameron objecting to her request for a doctor's note and to her questioning Ms. Lingenfelter's right to take FMLA leave, which covered the son's disability.

6. **November 30, 2017 "Inappropriate Relationship" Comment**

On November 30, 2017, Ms. Lingenfelter spoke with two Kaiser receptionists. Mr. Espinosa learned about this conversation and emailed Ms. Cameron as follows:

> Today, [Ms. Lingenfelter] attempted to defame my character again, suggesting to [a receptionist] that there is some impropriety between Dr. Marc La[B]erge and I. Comments like this are becoming commonplace, and are undermining my reputation and professional relationships within the department. . . . It is beyond my comprehension that any organization would allow such behavior to continue. . . . Instead of putting an immediate and direct stop to the situation, we drag our feet and set up yet another "discussion". . . . I am beginning to believe that it is in my best interest to obtain legal council [*sic*]. . . . These issues have continued unchecked for far too long,

[2] It is unclear whether Ms. Cameron attended this meeting.

> and are beginning to negatively effect [*sic*] my mental health.

App., Vol. I at 179. The next morning, December 1, the two receptionists, in separate emails to Ms. Cameron, wrote that Ms. Lingenfelter called the relationship between Mr. Espinosa and Dr. LaBerge "inappropriate." *Id.* at 181, 184. Dr. LaBerge also emailed Ms. Cameron on December 1, stating that his relationship with Mr. Espinosa was "strictly professional" and rumors suggesting otherwise were "wrong." *Id.* at 186.

7. **December 1, 2017 Patient Incident**

On December 1, 2017, Mr. Espinosa emailed Ms. Cameron to report that he saw Ms. Lingenfelter "sitting at [a] . . . desk on a personal phone" while she left a patient unattended for "at least a solid minute." *Id.* at 190.

8. **December 6, 2017 JOD Meetings to Address Mr. Espinosa's Complaints**

On December 6, 2017, Ms. Cameron convened two JOD meetings with Ms. Lingenfelter and her union steward to address Mr. Espinosa's complaints. At the meeting about the December 1 incident, Ms. Lingenfelter acknowledged having not observed the patient but denied looking at her phone. She did not receive formal discipline.

At the meeting about the November 30 "inappropriate relationship" comment, Ms. Lingenfelter said the context made clear that "inappropriate" did not mean "intimate." App., Vol. II at 193. Ms. Cameron skipped Levels 1-3 and escalated the disciplinary process to Level 4, the last level before termination of employment.

According to Kaiser's disciplinary policy, Level 4 "should be utilized when the employee has not shown improvement in performance or behavior after having gone through Level 3." *Id.* at 153. As noted above, once management invoked a Level 4 Day of Decision, the employee was given a paid day off "to choose to change . . . her performance or behavior and return to the organization or voluntarily sever the employment relationship." *Id.* And under Level 4, "[i]f the employee returns from a Day of Decision without a commitment to modify performance or behavioral issues, does not participate in development of a Corrective Action Plan which would be incorporated into the Last Chance Agreement,[3] refuses to sign the Last Chance Agreement, or does not voluntarily terminate, the employee will progress to level 5 [termination]." *Id* at 154.[4]

At the December 6 meeting, Ms. Lingenfelter, her union steward, and Ms. Cameron signed a Level 4 notice designating December 6 as the Day of Decision. The notice stated:

> This Day of Decision is to choose to make the required changes and return to work, or to resign. . . .
>
> [Ms. Lingenfelter] will write a letter that will address the statement and her accountability in the statement. She will

[3] Under the disciplinary process, Kaiser and the employee would prepare a Last Chance Agreement at the meeting after a Day of Decision if the employee decided to "change . . . her performance or behavior and continue employment." App., Vol. I at 153. As explained below, the process with Ms. Lingenfelter did not reach this point.

[4] There was no Level 3 Corrective Action Plan for Ms. Lingenfelter because the discipline process began at Level 4.

> also address how she will mend the relationship with [Mr. Espinosa] and Dr. LaBerge.
>
> If you choose to make the required changes you must describe in detail the commitment that you will make in order to effect the change.

App., Vol. II at 194 (second paragraph handwritten). As part of the Day of Decision process, Ms. Cameron sent Ms. Lingenfelter home after the meeting. Normally, Ms. Lingenfelter would have had 24 hours to write the letter and return with it the next day, but the follow-up meeting was postponed until December 11 because she fired her union steward on December 6 and replaced her with Victoria Mayberry.

9. **December 7, 2017 Commitment Letter**

On December 7, 2017, Ms. Lingenfelter typed a letter on her cell phone that acknowledged her "inappropriate relationship" comment and said that, taken out of context, "it appear[ed] more slanderous." *Id.* at 272. She asserted the word "inappropriate" referred to Mr. Espinosa's and Dr. LaBerge's "discussing . . . opinions of other staff members." *Id.* She said she would "gladly apologize" to Dr. LaBerge. *Id.*

10. **December 11, 2017 Meeting**

On December 11, 2017, Ms. Cameron and Janet Larkins, Ms. Lingenfelter's former supervisor, met with Ms. Lingenfelter and Ms. Mayberry, Ms. Lingenfelter's new union steward, to receive the commitment letter. App., Vol. I at 51, 67, 117-18. Just before the meeting, Ms. Mayberry told Ms. Lingenfelter not to present the December 7 letter. *Id.* at 128; App., Vol. II at 247, 249.

At 9:30 a.m., the start of the meeting, Ms. Cameron and Ms. Larkins requested the letter. App., Vol. II at 273. Ms. Mayberry objected to Ms. Cameron's escalating the process to Level 4 and alleged that Mike Harold, a Kaiser Human Resources official, had told her the meeting would merely continue the December 6 conversation. *Id*. Ms. Cameron and Ms. Larkins consulted with Staci Wolf in Human Resources. Ms. Wolf told them she had spoken with Mr. Harold, who denied making this statement to Ms. Mayberry. *Id.*

Rather than produce the December 7 letter, Ms. Lingenfelter presented a one-sentence handwritten letter stating, "I, Deborah Lingenfelter[,] will act professionally." *Id.* at 221. Ms. Cameron and Ms. Larkins told her the letter did not comply with the Level 4 Day of Decision notice. *Id.* at 274. Ms. Mayberry called Mr. Harold, who told her the handwritten letter sufficed and to reschedule the meeting. *Id.* at 249. At some point, Ms. Lingenfelter revised her letter by adding, "I will not discuss work place issues at the front desk with co-workers." *Id.* at 223.

Ms. Cameron and Ms. Larkins left to consult again with Ms. Wolf in Human Resources. Based on the consultation, they decided to terminate Ms. Lingenfelter's employment. *Id.* at 274. When Ms. Cameron and Ms. Larkins returned, sometime after 10:10 a.m. (according to Ms. Cameron's notes), they told Ms. Lingenfelter they

"were moving for a termination" because she did not provide an adequate commitment letter. *Id.*[5]

After the termination decision, Ms. Mayberry tried to present Ms. Lingenfelter's December 7 letter (sometime after 11:20 a.m.) by waving a paper at Ms. Cameron and Ms. Larkins and telling them to look at the date of the letter on Ms. Lingenfelter's phone. *Id.* at 275. Ms. Cameron and Ms. Larkins said the process required Ms. Lingenfelter to present the letter at the beginning of the meeting. *Id.* They left the room again and came back with a termination letter, which stated that Kaiser fired Ms. Lingenfelter for "unsatisfactory job performance." *Id.* at 276. The meeting concluded around 12:35 p.m. *Id.* at 275.

B. ***Procedural History***

In district court, Ms. Lingenfelter brought claims for (1) breach of contract against Kaiser, (2) breach of the duty of fair representation against the Union, (3) FMLA retaliation against Kaiser under 29 U.S.C. § 2615(a), and (4) ADA discrimination against Kaiser under 42 § U.S.C. 12112(a).[6] She voluntarily

[5] Ms. Lingenfelter and Ms. Mayberry dispute that Ms. Cameron said she was firing Ms. Lingenfelter based on failing to provide an adequate commitment letter. *See* App., Vol. II at 247, 249. We address this issue below.

[6] The complaint listed an "ADA Retaliation" claim under 42 U.S.C. § 12112(a), but Kaiser and the district court construed it as an § 12112(b)(4) association discrimination claim. *See* App., Vol. I at 42-43; App., Vol. II at 303, 312. Section 12112(b)(4) defines the term "discriminate against a qualified individual on the basis of disability" in § 12112(a) as "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known

dismissed the breach of contract and fair representation claims. Kaiser moved for summary judgment, arguing that Ms. Lingenfelter had not established causation or pretext on her FMLA and ADA claims.

The district court granted Kaiser's motion. It said Ms. Lingenfelter established her prima facie case, including causation, on both claims. But it determined she had not met her burden on pretext and granted summary judgment to Kaiser.

II. **DISCUSSION**

We affirm the grant of summary judgment. Ms. Lingenfelter did not establish a dispute of material fact that Kaiser's legitimate termination reason was pretextual.

A. ***Standard of Review***

"We review a grant of summary judgment de novo, drawing all reasonable inferences and resolving all factual disputes in favor of the non-moving party." *DePaula*, 859 F.3d at 968 (quotations omitted). Summary judgment shall be granted if "the movant shows that 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).

B. ***Legal Background***

The parties agree that the *McDonnell Douglas* burden-shifting framework applies to Ms. Lingenfelter's FMLA retaliation and ADA association discrimination

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disability of an individual with whom the qualified individual is known to have a relationship or association."

claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Brown v. ScriptPro, LLC*, 700 F.3d 1222, 1229 (10th Cir. 2012) (FMLA); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1085 (10th Cir. 1997) (ADA). Under *McDonnell Douglas*, "[f]irst, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 252-53 (1981). "Second, . . . the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's [termination].'" *Id.* at 253 (quoting *McDonnell Douglas*, 411 U.S. at 802). "Third, . . . the plaintiff must then . . . prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id*. Only pretext is at issue here.

"To survive a motion for summary judgment at the pretext step, the plaintiff must present evidence to establish there is a genuine issue of material fact as to whether the defendant's articulated reason for the adverse employment action was pretextual." *DePaula*, 859 F.3d at 970. A plaintiff may establish pretext "by revealing weaknesses, implausibilities, inconsistencies, incoherenc[i]es, or contradictions in the employer's proffered reason, such that a reasonable fact finder could deem the employer's reason unworthy of credence." *Id.* (quotations omitted).

The law gives employers room to exercise business judgment in these circumstances. "Evidence that the employer should not have made the termination decision—for example, that the employer was mistaken or used poor business judgment—is not sufficient to show that the employer's explanation is unworthy of

credibility." *Id.* at 970-71 (quotations 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.* at 971 (quotations omitted); *see Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1307-08 (10th Cir. 2017). "An articulated motivating reason is not converted into pretext merely because, with the benefit of hindsight, it turned out to be poor business judgment." *Rivera v. City and Cnty. of Denver*, 365 F.3d 912, 925 (10th Cir. 2004) (quotations omitted). "But this principle does not immunize all potential 'business judgments' from judicial review for illegal discrimination." *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1169 (10th Cir. 1998). "There may be circumstances in which a claimed business judgment is so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination." *Id.*

C. ***Analysis***

Ms. Lingenfelter failed to establish a genuine issue of material fact that Kaiser's legitimate termination reason—failing to provide an adequate commitment letter—was pretextual. On appeal, Ms. Lingenfelter argues she can show pretext based on Kaiser's (1) violation of company procedures and (2) inconsistent termination reasons.[7] We find her arguments unconvincing.

[7] Ms. Lingenfelter also argues that the district court should not have considered comments her co-workers made before November 2017 about how her FMLA leave interfered with her job. She argues that these comments related only to her prima facie case, and that by considering them at the pretext stage, the court "lost

1. **Kaiser's Policies and Procedures**

"A plaintiff may . . . show pretext by demonstrating the defendant acted contrary to a . . . company policy . . . or a company practice . . . ." *DePaula*, 859 F.3d at 970 (quotations omitted). But "not every failure to follow every directive in an employer's policy manual gives rise to an inference of pretext." *Johnson v. Weld Cnty.*, 594 F.3d 1202, 1213 (10th Cir. 2010). "[T]here must be some evidence that the irregularity directly and uniquely disadvantaged a [protected] employee." *Id.* (quotations omitted). Ms. Lingenfelter asserts two deviations.

First, she argues her "inappropriate relationship" comment did not warrant a Level 4 notice because she did not intend to refer to a sexual relationship. According to Ms. Mayberry, Ms. Cameron's skipping Levels 1-3 showed she "wanted to railroad Ms. Lingenfelter out of her job." App. Vol. II at 249.

Although Kaiser's discipline policy provided for a five-level process beginning at Level 1, it did not forbid starting the process at a higher level. In his declaration, Mr. Harold stated that "managers can and do skip levels if they believe an employee's underlying behavior is sufficiently serious to warrant more severe

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focus on what was determinative in analyzing the question of pretext." Aplt. Br. at 19.

The district court did not err. The co-workers' comments about Ms. Lingenfelter's FMLA leave were relevant to pretext—whether Kaiser's proffered legitimate termination reason was a pretext for FMLA retaliation. Moreover, "[n]othing about the *McDonnell Douglas* formula requires us to ration the evidence between one stage or the other." *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1218 (10th Cir. 2003) (quotations omitted); *see Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1172 (10th Cir. 2006) (considering temporal proximity for both prima facie case and pretext).

discipline." *Id.* at 298. He had "seen managers . . . begin the corrective action process at Level 4 for a wide variety of issues." *Id.* And Ms. Mayberry was familiar with a drug use case that was elevated directly to a Level 4. Based on this evidence of Kaiser's disciplinary practices, its beginning the discipline process at Level 4 does not suggest pretext. *See Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1237 n.11 (10th Cir. 2015) (no pretext where policy gave employer authority to begin discipline "with a more severe step").

Further, Ms. Lingenfelter's intent in making the "inappropriate relationship" comment does not bear on pretext. "In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear *to the person making the decision.* [W]e do not look to the plaintiff's subjective evaluation of the situation." *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1044 (10th Cir. 2011) (quotations and citations omitted).

Ms. Cameron made a business judgment that the "inappropriate relationship" comment warranted a Level 4 notice. Even if this decision could be second-guessed, "[e]vidence that . . . the employer was mistaken or used poor business judgment[] is not sufficient to show that the employer's explanation is unworthy of credibility." *DePaula*, 859 F.3d at 970-71 (quotations omitted). Mr. Espinosa told Ms. Cameron that Ms. Lingenfelter's comments interfered with his job and his mental health.[8] Ms.

[8] Ms. Lingenfelter's assertion that "[t]here are no facts showing any demand from Dr. LaBerge to discipline [her]," Aplt. Br. at 20, is beside the point. He told Ms. Cameron that any rumors of an unprofessional relationship were false, and Mr.

Cameron then required Ms. Lingenfelter to "describe in detail" how she would "mend the relationship with [Mr. Espinosa] and Dr. LaBerge." App., Vol. II at 194. Her business judgment to proceed in this manner was not "so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext." *Beaird*, 145 F.3d at 1169.

Second, Ms. Lingenfelter argues Kaiser (1) would normally let an employee correct a commitment letter, (2) never reviewed her December 7 letter, and (3) never fired someone over a deficient commitment letter.

As an initial matter, at some point during the December 11 meeting, Ms. Lingenfelter revised her one-sentence letter. She added, "I will not discuss work place issues at the front desk with co-workers." App., Vol. II at 223; *see* App., Vol. I at 123-24. But her nominal revision did not, as required in the Day of Decision notice, "describe in detail" "how she will mend the relationship" with her colleagues. App., Vol. II at 194.

In addition, Ms. Lingenfelter had ample time during the December 11 meeting to submit her December 7 commitment letter. She had at least 40 minutes from the start of the meeting (9:30 to 10:10 a.m.) to present the letter before Ms. Cameron and Ms. Larkins decided to fire her. *See id.* at 273-74. Instead, Ms. Lingenfelter and Ms. Mayberry did not attempt to present the December 7 letter until *after* Ms. Cameron

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Espinosa's email stated "[i]t is beyond my comprehension that any organization would allow such behavior to continue." App., Vol. I at 179.

and Ms. Larkins decided to fire her. *Id.* at 274-75. Ms. Lingenfelter concedes "[t]he fact that the submission [of the December 7 letter] came after the termination decision." Aplt. Reply Br. at 14; *see also id.* at 3-4. Around 11:20 a.m. (according to Ms. Cameron's notes), once aware of the December 7 letter's existence, App., Vol. II at 275, Kaiser exercised its business judgment not to revisit its termination decision. "We may not second guess the business judgment of the employer." *Dewitt*, 845 F.3d at 1307 (quotations omitted).

2. **Kaiser's Reasons for Termination**

A plaintiff may establish pretext when an employer gives inconsistent termination reasons. *See Whittington v. Nordam Grp. Inc*., 429 F.3d 986, 994 (10th Cir. 2005). But "the mere fact that the [employer] has offered different explanations for its decision does not create a genuine question of pretext." *Jaramillo v. Colo. Jud. Dep't*, 427 F.3d 1303, 1311 (10th Cir. 2005), *as modified on denial of reh'g* (Dec. 20, 2005). "[I]nconsistency 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) (quotations omitted).

Ms. Lingenfelter contends that Kaiser gave inconsistent termination reasons. She says that in the December 11 meeting, "Ms. Cameron told Ms. Mayberry that she was terminating Ms. Lingenfelter for leaving a patient unattended and made no

mention that she was terminating her for failing to produce the commitment letter." Aplt. Br. at 23.[9]

Assuming Ms. Cameron said this and did not reference the commitment letter, the statement is not sufficient to infer pretext. First, on December 6, Kaiser addressed the unattended patient incident and did not impose formal discipline, let alone terminate Ms. Lingenfelter's employment. *See* App., Vol. I at 188-89. Second, the three-hour December 11 meeting at which Kaiser fired Ms. Lingenfelter focused on her failure to provide a commitment letter—not the patient safety incident. *See* App., Vol. II at 273-75.[10] Third, even if Ms. Cameron's comment about the unattended patient created an inconsistency, it does not "suggest dishonesty or bad faith," *Twigg*, 659 F.3d at 1002 (quotations omitted), or make Kaiser's proffered reason so "unworthy of credence" that it shows pretext, *Jaramillo v. Adams Cnty.*

[9] According to Ms. Mayberry's declaration, Ms. Cameron never mentioned the commitment letter and said "she was terminating Ms. Lingenfelter for performance, because she had left a patient in a room unattended." App., Vol. II at 249. But Ms. Lingenfelter said in her declaration that "Ms. Cameron told me that I was being terminated for performance reasons, but she did not explain what those were." *Id.* at 247.

[10] The termination letter presented at the December 11 meeting stated that Kaiser fired Ms. Lingenfelter for "unsatisfactory job performance." App., Vol. II at 276. In her deposition, Ms. Larkins said "unsatisfactory job performance" "encompasses" the commitment letter issue. *Id.* at 212. Any distinction between "unsatisfactory job performance" and the commitment letter thus does not suggest "shifting or inconsistent explanations, which can be evidence of pretext," but instead reflects "explanations that are merely elaborations of prior justifications, which do not support a finding of pretext." *Mueggenborg v. Nortek Air Sols.*, LLC, No. 20-6147, 2021 WL 4807176, at *8 (10th Cir. Oct. 15, 2021) (unpublished) (cited for persuasive value under 10th Cir. R. 32.1 and Fed. R. App. P. 32.1).

Sch. Dist. 14, 680 F.3d 1267, 1269 (10th Cir. 2012), *as amended on denial of reh'g* (June 28, 2012) (quotations omitted).[11]

III. **CONCLUSION**

We affirm the grant of summary judgment to Kaiser.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[11] Ms. Lingenfelter also argues that Kaiser's failure to follow guidance from Mr. Harold in Human Resources establishes pretext. We disagree.

First, she asserts that Mr. Harold told Ms. Mayberry the one-sentence note sufficed and to continue the December 11 meeting later. *See* Aplt. Br. at 22. But Ms. Cameron and Ms. Larkins repeatedly consulted with Ms. Wolf in Human Resources on how to proceed during the December 11 meeting. *See* App., Vol. II at 273-75. Even if Human Resources officials offered conflicting advice, determining whose advice to follow was a business judgment we cannot second guess. *See Dewitt*, 845 F.3d at 1307.

Second, in reply to Kaiser's brief, Ms. Lingenfelter argues for the first time that Mr. Harold said she did not need to bring a letter to the December 11 meeting. *See* Aplt. Reply Br. at 12. She has waived this argument by not including it in her opening brief. *See In re: Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d 1094, 1105 n.2 (10th Cir. 2017) (declining to consider a "different, albeit related, argument" raised for the first time in a reply brief). Regardless, the argument is unavailing. The Day of Decision notice specified she needed to write a commitment letter. App., Vol. II at 194. And Ms. Lingenfelter understood what the notice required because she wrote the December 7 letter. *Id.* at 272, 275.