

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 2, 2023

Christopher M. Wolpert
Clerk of Court

KATHLEEN MORGAN; TIRSA OTERO,

Plaintiffs - Appellants,

v.

CITY OF OVERLAND PARK, KANSAS,

Defendant - Appellee.

No. 22-3149
(D.C. No. 2:21-CV-02150-DDC)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **McHUGH**, Circuit Judges.

Kathleen Morgan and Tirsa Otero (collectively, Plaintiffs) appeal from the district court’s grant of summary judgment in favor of City of Overland Park on their claims under Title VII and the Age Discrimination in Employment Act. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

The parties are familiar with the undisputed facts underlying the district court’s decision, so we recite only those necessary to our disposition. Plaintiffs are

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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

command staff officers with the City of Overland Park, Kansas, police department. In 2021, the City promoted Morgan to Major and Otero to Captain. In this action, they alleged discrimination and retaliation in connection with the City's failure to promote them to these positions in 2020. Major Morgan claimed sex and age discrimination. She further alleged that the City discriminated against her based on her age and sex when it promoted her to Major in 2021 after requiring her to serve a three-month trial period as Acting Major. Captain Otero claimed that she was twice passed over for promotion in 2020 because of sex, age, and national origin discrimination. Plaintiffs also alleged they were retaliated against for complaining about discrimination.

The district court applied the familiar *McDonnell Douglas* burden-shifting framework to Plaintiffs' claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). At the first step, the court held that some of Major Morgan's claims failed because she did not demonstrate a prima facie case of discrimination.¹ As to the remainder of Plaintiffs' claims, the court concluded the City had come forward with legitimate, nondiscriminatory reasons for not promoting Plaintiffs in 2020. In the 2020 Major promotional process, the City promoted another candidate

¹ The district court first held, based upon the pretrial order, that Major Morgan did not assert a discrimination claim based solely on the City's decision to place her in an Acting Major role before promoting her. It then held that she forfeited her discrimination claim based on her promotion to Major in 2021 because she failed to respond to the City's contention that she did not demonstrate a prima facie case of discrimination. The court further held that Major Morgan did not establish a prima facie case of retaliation based on her placement in the Acting Major role before her promotion.

because he was unanimously ranked first at the conclusion of the City's multi-step promotional process. In the July 2020 Captain promotional process, the City promoted another candidate because he was rated the highest after the multi-step promotional process. In November 2020, the City promoted another candidate to Captain because he had the second highest ranking after the July 2020 promotional process, he had previously been placed in an Acting Captain role based upon his exceptional work coordinating the funeral of a fallen police officer, and he had performed well in that role.

Plaintiffs argued the City's reasons were pretexts for discrimination and retaliation. "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action 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 reasons." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118 (10th Cir. 2007) (internal quotation marks omitted). The question is not "whether the employer's reasons were wise, fair or correct," but "whether the employer honestly believed its reasons and acted in good faith upon them." *Id.* at 1118-19. Thus, "[e]ven a mistaken belief can be a legitimate, non-pretextual reason for an employment decision." *Id.* at 1119 (internal quotation marks omitted).

Importantly,

we consider the facts as they appeared to the person making the decision, and we do not second-guess the employer's decision even if it seems in hindsight that the action taken constituted poor business judgment. The

reason for this rule is plain: our role is to prevent intentional discriminatory hiring practices, not to act as a super personnel department, second guessing employers' honestly held (even if erroneous) business judgments.

Id. (citation and internal quotation marks omitted). Applying these standards, the district court held Plaintiffs failed to demonstrate pretext.

Plaintiffs claimed the record showed the City had a strong bias against promoting women. They relied on testimony by a Deputy Chief in the City's police department regarding challenges faced by women officers. But the district court held that the Deputy Chief's testimony failed to support a finding or inference of bias against women specifically in the 2020 promotional processes. The court also pointed to evidence that the City had recently promoted women to higher ranks, including the Deputy Chief herself.

Plaintiffs argued the City's reasons were pretextual because they were more qualified than the candidates who were promoted. But the district court held they failed to "come forward with facts showing an overwhelming disparity in qualifications," which was necessary to demonstrate pretext on this basis. *Johnson v. Weld Cnty.*, 594 F.3d 1202, 1211 (10th Cir. 2010) (internal quotation marks omitted); *see also Jaramillo v. Colo. Jud. Dep't*, 427 F.3d 1303, 1308-09 (10th Cir. 2005) (holding courts "must proceed with caution when considering the relative merits of individual employees" and that the plaintiff failed to demonstrate pretext where the employer could have believed in good faith that the candidate promoted was at least as well-qualified as the plaintiff).

Major Morgan contended she showed pretext for age discrimination based on a Deputy Chief's comment to her regarding the result of the 2020 Major promotional process, in which he had participated. The Deputy Chief told her (among other things), "Well, we want somebody that's going to stay." Aplt. App., Vol. I at 268. Major Morgan construed this comment as a reference to her age and the possibility she would leave the department. The district court held that, notwithstanding the Deputy Chief's participation in the promotional process, his comment was both isolated and ambiguous and therefore insufficient to support a finding of age discrimination. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994); *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998) (holding a decision-maker's stray remark comparing two men's ages was insufficient on its own to infer discriminatory intent).

Captain Otero argued that comments about her accent were evidence of pretext for discrimination based on her national origin. It was undisputed that Captain Otero's native language is Spanish and that she speaks English with an accent. She presented evidence that her accent was discussed within the department, including by supervisors. For example, a Deputy Chief told Captain Otero that when she is nervous or speaking quickly her accent sometimes made her difficult to understand. The district court concluded that no reasonable jury could find such discussions manifested discriminatory animus. It further held that, aside from the Deputy Chief's testimony, the evidence failed to identify the speakers or connect the discussions about Captain Otero's accent to the relevant promotional processes or the

decision-maker.² *See Cone*, 14 F.3d at 531 (“Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus . . .”). And the court concluded she failed to demonstrate pretext based on the Deputy Chief’s comment alone. *See McKnight*, 149 F.3d at 1129.

Major Morgan contended the City’s decision to promote a substantially younger candidate to Major in 2020 demonstrated pretext.³ But the district court held this fact alone was insufficient to demonstrate pretext for age discrimination. It pointed to evidence that the City had promoted candidates who were in the protected age category and were older than other candidates, including Major Morgan’s promotion in 2021 instead of a younger candidate.

The district court also held that Plaintiffs’ subjective beliefs and perceptions about the City’s hiring preferences and their own qualifications could not support an inference of pretext. *See DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 971 (10th Cir. 2017) (“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.” (internal quotation marks omitted)).

² The district court held that Captain Otero misrepresented the record by alleging that the Police Chief had referred to her accent as a reason not to promote her. We note the court further concluded that some of her other pretext allegations were not supported by the record.

³ Major Morgan was born in 1963, and the candidate promoted was born in 1976.

Finally, the district court rejected Plaintiffs' contention that the City's use of subjective criteria in the 2020 promotional processes was evidence of pretext. It noted this court's holding that "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*, 497 F.3d at 1120. Moreover, "we have consistently recognized that such criteria must play some role in certain management decisions," and we "typically infer pretext only when the criteria on which the employers ultimately rely are *entirely subjective* in nature." *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1145 (10th Cir. 2009) (ellipsis and internal quotation marks omitted). The district court held that the criteria used in the City's 2020 promotional processes were not entirely subjective, and its use of subjective criteria alongside objective criteria did not demonstrate pretext.

In sum, as to Major Morgan, the district court held that the subjective criteria in the 2020 Major promotional process, even when combined with evidence of one ambiguous stray remark, did not present a triable issue whether the City's proffered reason for not promoting her in 2020 was unworthy of credence and therefore probative of pretext. As to Captain Otero, the court held that none of her arguments, considered individually or as a whole, permitted a finding or inference that the City's reasons for promoting other candidates to Captain in July 2020 and November 2020 were pretext for discrimination or retaliation.

We have reviewed the district court's summary judgment order, the record, and the parties' briefs,⁴ and finding no reversible error, we affirm for substantially the reasons in the learned trial court's order.

Entered for the Court

Bobby R. Baldock
Circuit Judge

⁴ We note that Plaintiffs did not file an optional reply brief.