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United States Court of Appeals
Tenth Circuit

July 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHELE BROWN; ANDREW J. MAIKOVICH,

Plaintiffs - Appellants,

v.

COLORADO JUDICIAL DEPARTMENT,

Defendant - Appellee.

No. 22-1065
(D.C. No. 1:19-CV-03362-MEH)
(D. Colo.)

ORDER AND JUDGMENT*

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

This case stemmed from the Colorado Supreme Court's effort to hire a fourth staff attorney.[1] Among the applicants was Ms. Michele Brown, an African-American individual in her 60s. But the job went to a younger, Caucasian woman.

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* The parties don't request oral argument, so we consider this appeal based on the briefs and appellate record.

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

[1] The Colorado Supreme Court is part of the Colorado Judicial Department.

Ms. Brown's husband, Mr. Andrew Maikovich, was then working for the State Court Administrator's Office, which is also part of the Colorado Judicial Department. He told two supervisors in the Administrator's Office that (1) he and his wife viewed the selection as discriminatory and (2) she would likely file an administrative complaint and eventually sue.

Ms. Brown did sue, and we face two general sets of issues:

- **Mr. Maikovich's claims.** The State Court Administrator's Office investigated Mr. Maikovich's statement and interviewed him. Mr. Maikovich claims that the Administrator's Office retaliated and breached his contract by forcing him to participate in an interview.

  Liability for retaliation would exist only if Mr. Maikovich had suffered an adverse employment action. So we must decide whether the need to appear for an interview constituted an adverse employment action. We answer *no*.

  On the contract claim, the defendant wouldn't incur liability from the alleged events because Mr. Maikovich hadn't identified a violation of policy when the Administrator's Office told him to appear for an interview.

- **Ms. Brown's claims.** Ms. Brown claims discrimination based on her race and age. On this claim, the Colorado Supreme Court's hiring panel explained that it had selected another woman because she had better qualifications than Ms. Brown. Liability turns on whether this explanation was pretextual. We conclude that Ms. Brown failed to create a genuine dispute about pretext.

1. The district court properly dismissed Mr. Maikovich's claims for retaliation and breach of contract.

Mr. Maikovich's claims were facially deficient.

1.1 The Department investigates after Mr. Maikovich reports discrimination.

A supervisor allegedly told Mr. Maikovich that Ms. Brown could file a complaint with the State Court Administrator's human resources office. But Mr. Maikovich responded that his wife preferred to file an administrative complaint and then sue. The Administrator's Office investigated anyway and allegedly required Mr. Maikovich to participate in an interview with two individuals. Mr. Maikovich claims that requiring him to answer questions at an interview constituted (1) retaliation under the Colorado Anti-Discrimination Act and (2) breach of contract.[2] The district court dismissed the complaint, and Mr. Maikovich moved for leave to amend. The district court denied leave to amend on the basis of futility.

Mr. Maikovich appeals only the dismissal of his original complaint. (He never mentions his motion for leave to amend or the denial of that motion.) *See* p. 6 & note 4.

1.2 We conduct de novo review over the dismissal of Mr. Maikovich's claims.

For the dismissal of Mr. Maikovich's claims, we conduct de novo review. *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012). We base that review on Federal Rule of Civil Procedure 12(b)(6) because

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[2] Mr. Maikovich also pleaded claims involving breach of the marital privilege and retaliation under Title VII and the Age Discrimination in Employment Act. But these claims are not at issue in the appeal.

this is the rule that the district court applied. Under this rule, the complaint must contain enough factual allegations to state a facially plausible claim for relief. *Id.*[3] The complaint doesn't contain enough factual content to state a valid claim of retaliation or breach of contract.

1.3 The retaliation claim is deficient.

Mr. Maikovich bases his retaliation claim on the Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-402(1)(e)(IV). This statute prohibits retaliation against someone for opposing a discriminatory practice. *Id.*

To prove retaliation, Mr. Maikovich relies on circumstantial evidence. For a prima facie case, he must allege facts that plausibly show an "adverse employment action." *Williams v. Dep't of Pub. Safety*, 369 P.3d 760, 771 (Colo. App. 2015). For an adverse employment action, Mr. Maikovich relies on the State Court Administrator's

- directive to appear for an interview and
- disclosure of what he had said to the Chief Justice of the Colorado Supreme Court and his legal counsel.

We consider these allegations based on what is required for an "adverse employment action." An employment action is considered adverse

[3] Mr. Maikovich is pro se, and we ordinarily interpret pro se complaints liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). But Mr. Maikovich is a licensed attorney, so we don't give him the benefit of liberal construction. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001).

when it might well have dissuaded a reasonable employee from charging discrimination. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). In our view, the allegations in the complaint don't create a plausible inference that the requirement for an interview might have dissuaded a reasonable employee from reporting discrimination.

The investigation took place because Mr. Maikovich had told the State Court Administrator's Office that he and his wife

- believed that the hiring committee had committed discrimination in selecting the new staff attorney and
- was likely to file an administrative complaint and then sue.

Mr. Maikovich insists that he didn't want an internal investigation, but the Department argues that it was at least entitled to conduct an investigation when someone reports discrimination in the hiring of a judicial employee.

We agree. Regardless of whether Mr. Maikovich was making his own complaint, the Department had a legal right "to investigate . . . potential misconduct . . . without the fear of the investigation being interpreted as an adverse employment action." *Churchill v. Univ. of Colo. at Boulder*, 293 P.3d 16, 36 (Colo. App. 2010), *aff'd on other grounds*, 285 P.3d 986 (Colo. 2012). Though Mr. Maikovich might not have wanted an internal investigation, he doesn't allege harassment or a change in his employment benefits or responsibilities. He instead argues that he objected to participating, the State Court Administrator's office revealed what he'd

said, the investigation was a sham, and the questioning invaded the testimonial privilege for spouses.

Mr. Maikovich also argues that the State Court Administrator's Office promised confidentiality and then disclosed what he'd said. Again, no such allegation appears in the original complaint. (These allegations surfaced for the first time in the proposed amendment complaint, but Mr. Maikovich hasn't challenged denial of leave to amend.) *See* p. 3 & note 4.[4]

In the absence of any allegations in the complaint about confidentiality, Mr. Maikovich urges us to take judicial notice of the need for confidentiality when an employer investigates complaints of discrimination. We lack any basis to judicially notice this alleged fact.

Judicial notice may be appropriate when a fact is generally known or can be readily determined from indisputable sources. Fed. R. Evid. 201(b). But the need for confidentiality in similar circumstances isn't generally known or apparent from indisputable sources. Here the alleged disclosures went to the Chief Justice of the Colorado Supreme Court and his legal counsel. The Chief Justice, of course, headed the state judiciary and could

[4] The district court dismissed Mr. Maikovich's claims. The court later allowed his wife, Ms. Brown, to amend her complaint. But the court expressly disallowed reinstatement of Mr. Maikovich's involvement as a plaintiff. Mr. Maikovich has not challenged the district court's denial of reinstatement of Mr. Maikovich in the amended complaint.

take corrective action. We lack indisputable sources that would prohibit disclosure to an official who could take corrective action.

Finally, Mr. Maikovich argues that the interview undermined the testimonial privilege for spouses. But he didn't develop this argument either in district court or on appeal. In the complaint, Mr. Maikovich alleged only the existence of a spousal privilege under state law. Then, in opposing dismissal based on the absence of an adverse employment action, Mr. Maikovich addressed marital privacy in one line, stating that the Department had "violat[ed] an employee's First Amendment right to marital privacy." Appellants' App'x vol. 1, at 51. And on appeal, Mr. Maikovich again gave one line to marital privacy, stating that the Department had violated "an employee's 'sacrosanct right to marital privacy.'" Appellant Maikovich's Opening Br. at 33. But he never addresses the statutory privilege for spouses.

Nor has Mr. Maikovich identified any questions intruding into a spousal privilege. Without allegations about intrusive questioning, the complaint didn't plausibly allege an adverse employment action through intrusion into a testimonial privilege.

1.4 The contract claim is deficient.

Mr. Maikovich also alleges breach of contract, relying primarily on a failure to follow the Chief Justice's policy against harassment and discrimination. According to Mr. Maikovich, the filing of a complaint

about discrimination or harassment would trigger the protections provided in the policy.

The district court concluded that the policy had not created an enforceable obligation under the terms of Mr. Maikovich's employment. *See Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1465–66 (10th Cir. 1994) (concluding that anti-discrimination policies are not enforceable contracts under Colorado law). Even if the policy had created an enforceable contract, however, the complaint contained no allegations reflecting a breach.

Mr. Maikovich also argues that the human resources department created a contractual right through an email that promised confidentiality for the interview itself. However, Mr. Maikovich forfeited this argument by failing to raise it in district court. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011). Forfeited arguments are ordinarily reviewable under the plain-error standard. *Id.* But Mr. Maikovich doesn't urge plain error, so we decline to consider his new appellate argument involving the email. *See id.* (stating that the failure to argue plain error "marks the end of the road" for arguments that hadn't been presented in district court).

2. The district court properly granted summary judgment to the Department on Ms. Brown's claims.

Ms. Brown also sued, claiming discrimination based on both her age and race. For racial discrimination, Ms. Brown relied on Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1)–(2). For age discrimination, she invoked the Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-402(1)(a). On both claims, the district court granted summary judgment to the Department.

2.1 Ms. Brown gets an interview, but not the job.

When the vacancy arose for a staff attorney, the Colorado Supreme Court formed a hiring panel consisting of two justices, the court's clerk, and the three existing staff attorneys. The hiring panel posted a job description, which said that the new staff attorney would primarily work with the rules committees.

The panel decided to interview Ms. Brown, who was a senior annotations attorney with the Office of Legislative Legal Services. The hiring panel ultimately selected another applicant: Ms. Kathleen Michaels. At the time, Ms. Michaels was working for the Colorado Supreme Court as a law librarian.

2.2 We again apply de novo review.

In reviewing the grant of summary judgment, we conduct de novo review. *Kilcrease v. Demenico Transp. Co.*, 828 F.3d 1214, 1218 (10th Cir.

2016). We conduct this review by viewing the evidence in the light most favorable to the nonmovant (Ms. Brown). *Id.*

2.3 Ms. Brown lacks evidence of pretext.

A claimant can prove discrimination through either direct or circumstantial evidence. *See Stover v. Martinez*, 382 F.3d 1064, 1075 (10th Cir. 2004). Ms. Brown relies solely on circumstantial evidence, so we apply a three-part test. *See id.* (Title VII); *Colo. Civ. Rts. Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 399–400 (Colo. 1997) (Colorado Anti-Discrimination Act).

The first step required Ms. Brown to make a prima facie case of discrimination. *See Johnson v. Weld Cnty.*, 594 F.3d 1202, 1210–11 (10th Cir. 2010). The parties agree that Ms. Brown established a prima facie case.

The second step required the hiring panel to articulate a legitimate, nondiscriminatory reason for the decision to hire someone else. *Id.* at 1211. At this step, the panel explained that Ms. Michaels had better qualifications than Ms. Brown. Given this explanation, Ms. Brown doesn't question satisfaction of the second step.

The disagreement comes at the third step. At this step, Ms. Brown needed to show by a preponderance of the evidence that the panel's stated reason had constituted a pretext for discrimination. *Id.* The district court

concluded that Ms. Brown hadn't presented evidence of pretext, and we agree.

For pretext, Ms. Brown argues that Ms. Michaels didn't meet the minimum qualifications for the job, that Ms. Brown was better qualified, that the Department provided inconsistent explanations for the selection, that irregularities existed in the hiring process, and that the initial screening reflected a bias toward younger applicants. We reject these arguments.

2.3.1 Ms. Michaels met the minimum qualifications for the job.

The job posting stated that the "position require[d] that the applicant be currently admitted to practice law in Colorado, with an active license." Appellants' App'x vol. 2, at 519. Ms. Michaels had a law license, but it became inactive because she was not practicing law when she applied for the position. Because the license wasn't active, Ms. Brown argues that Ms. Michaels lacked the minimum qualifications. The Department responds that applicants could activate their licenses upon selection as a staff attorney.

For the sake of argument, we can assume that the job posting was ambiguous on whether an applicant could activate the license upon selection. Regardless of any ambiguity, however, we consider pretext by viewing the facts from the perspective of the hiring panel. *Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 925 (10th Cir. 2004).

From this perspective, all members of the hiring panel interpreted the job posting to require only the ability to activate a law license upon selection. Ms. Brown lacks any contrary evidence about this interpretation. Given the panel members' undisputed interpretation of the requirement, a factfinder couldn't reasonably infer pretext from Ms. Michael's need to activate her license upon selection.

We've gone further in an unpublished opinion to conclude that pretext wouldn't exist even when an employer deviates from the requirements stated in a job posting. *Hamilton v. Okla. City Univ.*, 563 F. App'x 597, 603–04 (10th Cir. 2014) (unpublished). We reasoned that a deviation from the job posting wouldn't suggest a discriminatory motive. *Id.* That part of our reasoning is persuasive here, for a factfinder couldn't reasonably infer pretext when the hiring panel indisputably believed that an applicant could activate the license upon selection. We thus conclude that Ms. Michaels' need to activate her license wouldn't create a triable dispute on pretext.

2.3.2 Ms. Brown didn't show that she was overwhelmingly a better choice than Ms. Michael.

Ms. Brown also bases pretext on her belief that she was a better choice than Ms. Michaels. When we address who was a better choice, we must proceed with caution. *Jaramillo v. Colo. Jud. Dep't*, 427 F.3d 1303, 1308 (10th Cir. 2005). Given the need for caution, we require the plaintiff

to present "facts showing an 'overwhelming' 'disparity in qualifications.'" *Johnson*, 594 F.3d at 1211 (quoting *Jaramillo*, 427 F.3d at 1309).

No such facts existed here. Every member of the hiring panel concluded that Ms. Michaels was a better choice than Ms. Brown. The job required legal research, and Ms. Michaels had worked as a law librarian and had a master's degree in library science. Ms. Brown's experience was arguably greater in editing and drafting, but didn't include high-level legal research.

Ms. Brown also asserts that Ms. Michaels had never even read a Supreme Court rule. But Ms. Brown cites nothing in the record, and the undisputed evidence showed that Ms. Michaels' job as a law librarian required her to regularly read, review, and research historical versions of Supreme Court rules. Appellants' App'x vol. 4, at 942–43. We thus conclude that a triable dispute on pretext didn't arise from Ms. Brown's alleged superiority for the job.

2.3.3 Ms. Brown presents no evidence of inconsistencies showing dishonesty or bad faith.

Ms. Brown also argues that the Department gave inconsistent explanations for hiring Ms. Michaels. The alleged inconsistencies involved

- an inaccurate statement to the EEOC that the hiring panel had asked the same questions to each applicant,
- a violation of personnel rules by asking different questions to the applicants,

- an inaccurate statement to the EEOC that Ms. Brown had acknowledged discomfort with research duties, and
- a false statement about the job responsibilities.

But "inconsistency evidence is only helpful to a plaintiff if 'the employer has changed its explanation under circumstances that suggest dishonesty or bad faith.'" *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1002 (10th Cir. 2011) (quoting *Jaramillo*, 427 F.3d at 1310).

Though Ms. Brown points to inconsistencies, they involved evidentiary conflicts rather than inconsistent explanations for the hiring decision itself. Notwithstanding these evidentiary conflicts, the hiring panel consistently explained that it had viewed Ms. Michaels as better qualified for the job. So the evidentiary conflicts wouldn't show pretext. *See Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1121–22 (10th Cir. 2007) (stating that evidentiary inconsistencies didn't support pretext because they didn't involve the misconduct that the employer had relied upon); *accord Bonefont-Igaravidez v. Int'l Shipping Corp.*, 659 F.3d 120, 124 (1st Cir. 2011) (stating that evidentiary consistencies could support pretext only if they had a "cognizable nexus" to the employer's stated reason for firing).

For example, Ms. Brown argues that the Department falsely told the EEOC that Ms. Brown had "*specifically stated*" that she was uncomfortable with some of the staff attorney's responsibilities, such as research.

Appellant Brown's Opening Br. at 18. Ms. Brown denies telling interviewers that she was uncomfortable in conducting research.

This denial could create an evidentiary conflict on what Ms. Brown had said during her interview. But this evidentiary conflict is immaterial because the hiring panel indisputably concluded that Ms. Michaels had shown greater confidence than Ms. Brown in conducting research.

Finally, Ms. Brown argues that the Colorado Supreme Court didn't actually rely on Ms. Michaels' ability to conduct research. The parties appear to agree that the new staff attorney's primary duties would involve work with the rules committees. And the Court ultimately allowed Ms. Michaels to work 32 hours per week, rather than 40 hours. Based on Ms. Michaels' ability to work only 32 hours per week, Ms. Brown argues that no time would be left for research projects.

But undisputed evidence showed that (1) the new staff attorney's duties would be fluid and (2) Ms. Michaels had conducted research in her new job as a staff attorney. In response, Ms. Brown says that the research project was simple and designed only to counter her allegation of pretext. But Ms. Brown hasn't presented any evidence to support her characterization of Ms. Michaels' research project.

We thus conclude that Ms. Brown failed to present evidence of inconsistencies showing dishonesty or bad faith in the hiring panel's explanation for its hiring decision.

2.3.4 Ms. Brown's evidence of procedural irregularities doesn't show pretext.

Ms. Brown also argues that the hiring panel deviated from procedural requirements by (1) asking different questions of the applicants, (2) failing to preserve notes from the interviews, (3) preselecting Ms. Michaels for the position, and (4) commenting about some candidates' overqualifications.

First, Ms. Brown argues that the hiring panel violated the Department's personnel rule requiring the same questions to each applicant. But Ms. Brown failed to present evidence of this alleged personnel rule.

Second, interviewers didn't keep their notes from the interviews. These interviewers discarded all of their notes, and Ms. Brown does not suggest that the interviewers were trying to hide evidence of discriminatory intent. In these circumstances, the interviewers' discarding of their notes wouldn't undermine the panel's explanation for its selection of Ms. Michaels.

Third, Ms. Brown suggests that the panel preselected Ms. Michaels for the position. As evidence, Ms. Brown points out that the court clerk allegedly wrote Ms. Michaels' name on a note with a list of the job requirements early in the hiring process. Ms. Brown also points out that one of the staff attorneys advised Ms. Michaels on how to dress for the

interview and how to answer questions about her need for supervision. But preselection of someone for the position wouldn't show pretext in the absence of any evidence suggesting that the decision was based on age or race. *See Jaramillo*, 427 F.3d at 1313 (stating that the Colorado Judicial Department's preselection of another candidate for the job doesn't show pretext absent evidence that the preselection was motivated by gender discrimination); *accord Beck v. Dep't of the Navy*, 997 F.3d 1171, 1189 (Fed. Cir. 2021) ("The motivation is key because preselection based on a reason not prohibited by the federal anti-discrimination statutes is not probative of pretext." (quoting *Blackledge v. Ala. Dep't of Mental Health & Mental Retardation*, No. 06-CV-321-ID, 2007 WL 3124452, at *24 (M.D. Ala. Oct. 25, 2007))); *Jeffries v. Barr*, 965 F.3d 843, 863 (D.C. Cir. 2020) (concluding that preselection does not show racial discrimination); *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1350 (11th Cir. 2007) (stating that preselection of another applicant, without internal posting of the job, was not enough to show pretext); *Mackey v. Shalala*, 360 F.3d 463, 468–69 (4th Cir. 2004) (concluding that evidence of preselection wouldn't show pretext for the employer's decision that the candidate who was chosen had better qualifications than the plaintiff).

Ms. Brown acknowledged that she didn't believe that the staff attorney had helped Ms. Michaels because of her age or race. Appellants' App'x vol. 3, at 683. If the staff attorney or court clerk had helped Ms.

Michaels impress other members of the hiring panel, "[t]his might be inconsiderate or unfair, but it [would] not support the inference that the [hiring panel's] employment decision was motivated by" discrimination based on age or race. *Jamarillo*, 427 F.3d at 1314.

Fourth, Ms. Brown points to comments by one member of the hiring panel, who stated during the hiring process that some applicants were overqualified. Ms. Brown views this comment as age-related because older candidates were more likely to draw concern about overqualification.

Courts have sometimes suggested that when the term "overqualification" isn't defined, it can serve as a proxy for age. *See, e.g.*, *EEOC v. Ins. Co. of N. Am.*, 49 F.3d 1418, 1420–21 (9th Cir. 1995). But the only evidence of overqualification came from a staff attorney's testimony about questions by another interviewer, Justice Richard Gabriel. The staff attorney testified that Justice Gabriel had asked questions about "overqualification" as an interview prompt to gauge enthusiasm for the job. Appellants' App'x vol. 2, at 493. The panel's explanation for hiring Ms. Michaels wasn't undermined by questions designed to evaluate applicants' enthusiasm for the job. *See Bay v. Times Mirror Mags., Inc.*, 936 F.2d 112, 118 (2d Cir. 1991) (concluding that an applicant's overqualification doesn't support pretext because overqualification could lead to dissatisfaction in the job).

We thus conclude that evidence of alleged irregularities wouldn't create a triable dispute on pretext.

2.3.5 Statistical evidence doesn't support pretext.

Ms. Brown also argues that the hiring panel decided mostly to interview candidates who had graduated law school since 2003. According to Ms. Brown, this preference for more recent graduates could suggest bias toward younger applicants.

But statistical evidence could suggest discrimination only if the plaintiff eliminated nondiscriminatory reasons for the disparity. *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991). And Ms. Brown hasn't addressed any nondiscriminatory reasons for the statistics. For example, she hasn't addressed how many applicants had graduation dates before 2003 or whether they would have merited interviews. This omission is telling, for Ms. Brown obtained an interview even though she had graduated prior to 2003.

Though Ms. Brown hasn't addressed any nondiscriminatory explanations, she argues that the Department bore this burden based on an alleged statistical anomaly. But Ms. Brown doesn't cite any support for this argument.

We've held more generally that the plaintiff bears the overarching burden on pretext. *Drake v. City of Fort Collins*, 927 F.2d 1156, 1160 (10th Cir. 1991). Given this overarching burden, the plaintiff incurs the

subordinate burden of addressing nondiscriminatory reasons for any purported anomaly in the statistics. *See Doan v. Seagate Tech., Inc.*, 82 F. 3d 974, 979 (10th Cir. 1996) (concluding that the statistical evidence didn't show pretext given the plaintiff's failure to address nondiscriminatory explanations). In our view, Ms. Brown hasn't satisfied her burden to address nondiscriminatory reasons for the predominance of newer graduates among the interviewees.

3. The district court didn't deny discovery to Ms. Brown.

Ms. Brown argues that the district court should have allowed depositions of two individuals. But Ms. Brown did not notice either deposition or seek a ruling on her right to take these depositions. Given the failure to present this issue to the district court, we have no discovery ruling to review.

4. The plaintiffs don't justify the filing of a supplemental appendix.

Mr. Maikovich and Ms. Brown request leave to file a supplemental appendix, which would contain four deposition pages and the Chief Justice's policy on harassment and discrimination. The Court denies this request.

The appellate record is generally limited to documents that were filed in district court. Fed. R. App. P. 10(a)(1). We thus ordinarily exclude deposition pages from the appellate record unless these pages had been used as evidence. 10th Cir. R. 10.4(E).

The Chief Justice's policy and the four deposition pages were never filed in district court. So the district court didn't have them when ruling on the Department's motions for dismissal and summary judgment. We would thus ordinarily decline to consider these documents when reviewing the rulings on dismissal and summary judgment. *See Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1474–76 (10th Cir.1993) (stating that our review of a summary-judgment ruling couldn't include consideration of deposition excerpts that hadn't been filed in district court).

The plaintiffs haven't justified deviation from this ordinary practice. They could have presented these documents in district court, but didn't; and we can't fault the district court based on documents that hadn't been presented. So we deny the plaintiffs' request for leave to file a supplemental appendix.

5. Conclusion

We affirm

- the dismissal of Mr. Maikovich's claims and
- the grant of summary judgment to the Department on Ms. Brown's claims.

Entered for the Court

Robert E. Bacharach
Circuit Judge