

10th Circuit Pretext Cases

"A plaintiff can show pretext by revealing 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." *Green v. New Mexico*, 420 F.3d 1189, 1192-93 (10th Cir.2005)

As a general rule, however, **"the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent."** *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir.1990); see also *Atchley v. Nordam Group, Inc.*, 180 F.3d 1143, 1149 (10th Cir.1999).

A plaintiff also **"may show pretext 'by providing evidence that he was treated differently from other similarly situated, nonprotected employees who violated work rules of comparable seriousness,'** " provided the "similarly situated" employee shares the same supervisor, is subject to the same performance standards, and otherwise faces comparable "relevant employment circumstances." *Green v. New Mexico*, 420 F.3d 1189, 1194 (10th Cir.2005); *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006)

Where an employee is selected for RIF termination **"solely on the basis of position elimination,"** qualifications become irrelevant and one way that employee can show pretext is to present evidence that his job was not in fact eliminated but instead remained **"a single, distinct position."** *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 988 (10th Cir.1996); *Pippin v. Burlington Resources Oil and Gas Co.* 440 F.3d 1186, 1194 (10th Cir. 2006)

Our precedent does not require a plaintiff to offer any evidence of actual discrimination when attempting to show pretext. See *Ingels v. Thiokol Corp.*, 42 F.3d 616, 621 (10th Cir.1994), Evidence tending to show pretext permits an inference that the employer acted for discriminatory reasons. *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir.1997) . "Thus, a factfinder may, but is not required to, find discrimination when a plaintiff presents evidence that the defendant's proffered reasons are unworthy of credence." *Ingels*, 42 F.3d at 621-22. *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1125 (10th Cir. 2005)

minor differences between a plaintiff's qualifications and those of a successful applicant are not sufficient to show pretext. *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir.1999), overruled on other grounds, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). To show pretext, the disparity in qualifications must be "overwhelming." *Id.* at 1319 (citing *Sanchez v. Philip Morris*, 992 F.2d 244, 247-48 (10th Cir.1993)); see also *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir.1993) (explaining that the difference in qualifications must be so glaring as to "jump off the page and slap us in the face").
[overruled by Ash]

MacKenzie designates six employees and "several part time

staff" as "comparable" employees. However, two of the named employees engaged in "misconduct" fundamentally distinct from MacKenzie's conduct (arriving at work late and insubordination). See *Salguero v. City of Clovis*, 366 F.3d 1168, 1177 (10th Cir.2004) ("Because the facts indicate significant differences in conduct, allegations of disparate discipline do not suffice to show pretext."). Three of the named employees worked under a different supervisor. See *Rivera v. City & County of Denver*, 365 F.3d 912, 922 (10th Cir.2004) ("**Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline.**").

We have previously held that if a plaintiff "presents evidence that the defendant's proffered reason for the employment decision was pretextual-i.e. unworthy of belief, the plaintiff can withstand a summary judgment motion and is entitled to go to trial." *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir.1995); see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) (holding that "a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability" under the ADEA). Significantly, "[t]he evidence which [a plaintiff] can present in an attempt to establish that [a defendant's] stated reasons are pretextual may take a variety of forms.... [A plaintiff] may not be forced to pursue any particular means of demonstrating that [a defendant's] stated reasons are pretextual." *Patterson*, 491 U.S. at 187-88, 109 S.Ct. 2363. A plaintiff typically makes a showing of pretext in one of three ways: (1) with evidence that **the defendant's stated reason for the adverse employment action was false**, see, e.g., *Cole*, 43 F.3d at 1380-81 (finding that evidence supporting the conclusion that the defendant's reason for the nonrenewal of plaintiff's employment contract was false was sufficient for plaintiff to survive summary judgment); (2) with evidence that **the defendant acted contrary to a written company policy** prescribing the action to be taken by the defendant under the circumstances, see, e.g., *Mohammed*, 698 F.2d at 400-01 (finding that departure from employment criteria set out in job announcement so as to disadvantage minority employee seeking promotion was probative of discrimination); or (3) with evidence that the defendant **acted contrary to an unwritten policy** or contrary to company practice when making the adverse employment decision affecting the plaintiff.FN9 A plaintiff who wishes to show that the company acted contrary to an unwritten policy or to company practice often does so by providing evidence that he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness. See *Aramburu*, 112 F.3d at 1404.FN10 *Kendrick v. Penske Transp. Services, Inc.* 220 F.3d 1220, *1230 (C.A.10 (Kan.),2000)

The plaintiff's evidence can also allow for an inference that the

"employer's proffered non-discriminatory reasons [were] either a post hoc fabrication or otherwise did *1103 not actually motivate the employment action (that is, the proffered reason is a pretext)." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir.1994).

We have previously held that a pretext instruction "is required where, as here, a **rational finder of fact could reasonably find the [employer's] explanation false and could 'infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.'**" Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir.2002) Miller v. Eby Real Estate Group LLC, 396 F.3d 1105 (10th Cir. 2005)

To show pretext, the plaintiff must call into question the honesty or good faith of the USOC's assessment of his abilities. See Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1318 (10th Cir.1999), *1138 abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). It is not enough that a factfinder could disagree with the employer's assessments. **"The relevant inquiry is not whether [the defendant's] proffered reasons were wise, fair or correct, but whether [it] honestly believed those reasons and acted in good faith upon those beliefs."** Id.; see also Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406, 411 (7th Cir.1997) (**"[A plaintiff] cannot avoid summary judgment with an unadorned claim that a jury might not believe [defendant's] explanation for his termination; he must point to evidence suggesting that [defendant] itself did not honestly believe that explanation."**). Exum v. U.S. Olympic Committee, 389 F.3d 1130, 1137 (10th Cir. 2004)

We first point out **the court erred in ruling that a plaintiff must show she was treated differently from other similarly situated employees to survive summary judgment.** "Significantly, '[t]he evidence which [a plaintiff] can present in an attempt to establish that [a defendant's] stated reasons are pretextual may take a variety of forms..... [A plaintiff] may not be forced to pursue any particular means of demonstrating that [a defendant's] stated reasons are pretextual.'" Kendrick v. Penske Trans. Servs., Inc., 220 F.3d 1220, 1230 (10th Cir.2000) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 187-88, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989)). As the above authority makes clear, pretext may be shown by a variety of evidence and no one type of evidence is required. It is true that a plaintiff who attempts to show pretext with evidence that the defendant acted contrary to company practice when making the adverse employment decision may often do so with evidence that she was treated differently from other similarly situated employees. Id. It is also true that the failure to present probative evidence that the plaintiff was in fact treated differently than those similarly situated may permit the grant of summary judgment. Id. at 1232-34. However, this assessment must be made by adding up the differences and similarities in light of all the evidence of pretext to determine whether a plaintiff has created a fact issue on the matter of pretext. Id. at 1234.

Doebele v. Sprint / United Management Co., 342 F.3d 1117, 1137 (10th Cir. 2003)

evidence of **pretext may include**, but is not limited to, the following: "**prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g., falsifying or manipulating criteria); and the use of subjective criteria.**" Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1328 (10th Cir.1999)). (citing Colon-Sanchez v. Marsh, 733 F.2d 78, 81 (10th Cir.1984); and Beard v. Seagate Tech., Inc., 145 F.3d 1159, 1165 (10th Cir.1998)).

Our review of the record reflects ample evidence of inconsistent treatment of plaintiff, disturbing procedural irregularities, and the use of subjective criteria. Garrett v. Hewlett-Packard Co. 305 F.3d 1210 (10th Cir. 2002)

We have already discussed, in the context of direct evidence, the comment Dr. Garner overheard during the selection committee meeting that plaintiff "**might not be around very long.**" Although the comment does not constitute direct evidence of age discrimination sufficient to take the case to a jury, it is circumstantial evidence from which an inference of discriminatory intent might be drawn. See Fernandes, 199 F.3d at 588-89. Tricore characterizes this comment as an isolated, stray, ambiguous remark that is insufficient to show pretext. While the remark may be "ambiguous" in the sense of being susceptible to more than one interpretation, and "isolated" in the sense that it was only made once, **this is not a "stray" remark in the sense that it lacks a nexus to the employment decision. The remark referred directly to the plaintiff and was made during the committee meeting at which interview candidates were selected.** There was evidence from which a jury could conclude that the remark was intended to explain why plaintiff was not being interviewed. Plaintiff has shown an adequate nexus to the employment decision to treat the remark as evidence of pretext. See Tomsic v. State Farm Mut. Auto. Ins. Co., 85 F.3d 1472, 1479 (10th Cir.1996). Danville v. Regional Lab Corp., 292 F.3d 1246, 1251 ((10th Cir. 2002)

The firing of a qualified minority employee raises the inference of discrimination because it is facially illogical for an employer to randomly fire an otherwise qualified employee and thereby incur the considerable expense and loss of productivity associated with hiring and training a replacement." Perry v. Woodward, 199 F.3d 1126, 1140 (10th Cir.1999), Ortiz v. Norton 254 F.3d 889 (10th Cir. 2001)

The district judge here also said that plaintiff's evidence of discrimination in promotion practices was irrelevant in any event because the adverse employment action in question was not the failure to promote. However, as noted, all rational inferences from the evidence must be made in favor of the party opposing the summary judgment motion. Curtis v. Oklahoma City Public Sch. Bd. of Ed., 147 F.3d 1200, 1214 (10th Cir.1998). **The evidence could support an inference that the decision makers harbored a bias against Hispanics which might have affected other**

decisions, including the decisions adverse to plaintiff Ortiz. The evidence thus meets the test of relevance set out in Fed.R.Evid. 401. Ortiz v. Norton, 254 F.3d 889, 896-97 (10th Cir. 2001)

("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."); see also Randle v. City of Aurora, 69 F.3d 441, 453 (10th Cir.1995). EEOC f. Horizon/ CMS Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000)

Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir.1990) (**testimony of other employees about their treatment by defendant is relevant to issue of the employer's discriminatory intent**). Atchley v. Nordam Group, Inc. 180 F.3d 1143, 1149 (10th Cir. 1999)

Pretext in cases such as this may be established by showing either "that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence." Rea v. Martin Marietta Corp., 29 F.3d 1450, 1455 (10th Cir.1994) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). Where as here plaintiff seeks to demonstrate that the employer's explanation is merely a pretext, this court "requires a showing that the tendered reason for the employment decision was not the genuine motivating reason, but rather was a disingenuous or sham reason." Reynolds v. School District No.1 Denver, 69 F.3d 1523, 1535 (10th Cir.1995). **Summary judgment is not ordinarily appropriate for settling issues of intent or motivation.** Setliff v. Memorial Hosp.of Sheridan County, 850 F.2d 1384, 1394 n. 12 (10th Cir.1988).

Moreover, **the required link between the protected activity and subsequent adverse employment action can be inferred if the action occurs within a short period of time after the protected activity.** See O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir.2001) ("Unless there is very close temporal proximity between the protected activity and the retaliatory conduct, the plaintiff must offer additional evidence to establish causation."); Haynes v. Level 3 Commc'n, 456 F.3d 1215, 1229 (10th Cir.2006) (quoting O'Neal for same proposition). Here, McGowan was fired the day after she gave deposition testimony in this case. While proximity alone may not always support an adverse inference of retaliation, McGowan's deposition testimony containing allegations of wrongful conduct by current police department employees suffices to establish an inference of causation. McGowan v. City of Eufala, 472 F.3d 736 (10th Cir., 2006).

Proctor v. UPS, 502 F.3d 1200, 1209 (10th Cir. 2007); Temporal proximity may be enough to show pretext, by itself, if the time is very short; If the time is not short it requires other showing of pretext

Lack of contemporaneous reason at time of termination infers

**pretext; termination for reason other than poor performance or
misconduct infers pretext** Uintah Basin Medical Center v. Hardy,
179 P.3d 786 (Utah 2008)