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United States Court of Appeals
Tenth Circuit

July 19, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RON RUTLEDGE,

Plaintiff - Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY, KANSAS,

Defendant - Appellee.

No. 22-3081
(D.C. No. 2:20-CV-02012-DDC)
(D. Kan.)

ORDER AND JUDGMENT[*]

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

For more than a decade, Ron Rutledge worked for the Board of County Commissioners of Johnson County, Kansas. But in 2018, the County terminated his employment after he sat in the breakroom one morning and refused to work: Rutledge insisted, over the contrary opinions of two supervisors, that he had permission to socialize for an hour after clocking in. Rutledge responded to the termination of his employment with this lawsuit against the County, alleging violations of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213, the Family and

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[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Medical Leave Act (FMLA), 29 U.S.C. §§ 2611–2654, and Kansas law. The district court awarded summary judgment to the County, and Rutledge appeals. Because Rutledge fails to provide evidence that the County's facially legitimate reason for terminating his employment—his dishonesty and insubordinate refusal to work—was a pretext for discrimination or retaliation, we affirm.

Background

Rutledge began working for the County in the Wastewater Department in 2005. He started out as a line and inspection crew member, checking utility holes and cleaning sewer lines. But about a year into the job, he suffered a serious work-related injury to his neck and shoulder. This injury resulted in a workers' compensation claim, required three surgeries, and left Rutledge with a permanent disability and various work restrictions. In accommodating those restrictions, the County initially granted leaves of absence and changed his job requirements, but it ultimately transferred him to a truck-driver position in 2009. Rutledge remained in that position until the County terminated his employment in December 2018.

The record in this case includes a painstakingly detailed account of the eventful 13-year employment relationship between Rutledge and the County. For instance, Rutledge reported ten additional work-related injuries during his employment. These injuries often resulted in work restrictions, which the County accommodated by placing him on leaves of absence and adjusting his job duties. Over the years, Rutledge also made several complaints against his coworkers,

alleging harassment and bullying. The County investigated his complaints, but it found no merit in them.

The particular events leading up to the termination of Rutledge's employment began in May 2018, when the County promoted Jeremy McCracken to assistant superintendent for the wastewater plant at which Rutledge worked. When McCracken applied for the position, Rutledge complained that he had overheard coworkers saying that if McCracken landed the job, "Rutledge would be bullied at work." App. vol. 4, 67. Jeanette Klamm, assistant director of operations and maintenance at the Wastewater Department, investigated the complaint. When she spoke with Rutledge, however, he would not answer her questions. And after interviewing several other employees, she concluded that although "Rutledge had alienated many of his coworkers," she "had no reason to believe . . . McCracken had [treated] or would treat . . . Rutledge inappropriately." *Id.*

Shortly after McCracken became his supervisor, Rutledge sustained two work-related injuries. The first occurred in June 2018, when Rutledge fell out of a chair with a missing back and injured his neck, lower back, right shoulder, and left wrist. This injury resulted in various work restrictions, including limitations on lifting, pushing, and pulling. Rutledge suffered the second injury the next month, when a sewer hose spewed sludge on him.

Although the County had approved Rutledge for intermittent FMLA leave through the end of the year for his injuries, Rutledge testified that McCracken and superintendent George Cloud made negative comments about him taking such leave.

Rutledge reported that McCracken told him that he "couldn't take" FMLA leave. App. vol. 1, 207. And when he did take FMLA leave, Rutledge explained, McCracken and Cloud told him that they wanted him at work "all the time." *Id.* Rutledge also testified that McCracken had sometimes called him "half-timer," although he never reported this to anyone. *Id.* at 219.

In September 2018, Rutledge informed McCracken that a ladder he used to perform truck checks—which met his lifting restrictions—was missing. There is no dispute that McCracken eventually purchased a rolling ladder that required no lifting as a replacement to accommodate Rutledge's restrictions. But there is a dispute about a comment McCracken made during the ladder incident. On Rutledge's telling, when he first told McCracken that the ladder was missing and that it was specifically ordered to accommodate his lifting restrictions, McCracken responded: "[T]ough shit[,] you will use what[ever ladder] we [give] you." *Id.* at 196. Rutledge believes that this comment was directed at his lifting restrictions. But the County, relying on handwritten notes taken during a human-resources call with Rutledge, maintains that McCracken made the comment in response to Rutledge's complaint that he did not like the new ladder, even though it conformed to his lifting restrictions.

In early November, Rutledge took two days of FMLA leave. The day he returned to work, Rutledge attended a performance-review meeting with McCracken and Cloud. The pair informed Rutledge that his work performance was satisfactory, but he needed to improve in the areas of teamwork, leadership, and learning and development. They also told Rutledge that he would only receive a one-percent merit

increase for the year—the lowest increase the County could award. According to Cloud's notes from the meeting, this news upset Rutledge, and he reported feeling "targeted" and "singled out" because of his work-related injuries. App. vol. 6, 299. Rutledge also asserted that some employees sat in the breakroom for an hour every morning after clocking in and that he would start doing the same. Cloud and McCracken urged Rutledge not to diminish his work performance.

McCracken then left the meeting. Cloud and Rutledge continued talking for about half an hour, but they provide conflicting accounts of what they discussed. According to Cloud, he again discouraged Rutledge from sitting in the breakroom for an hour in the mornings, and Rutledge ultimately agreed not to do so. Rutledge, for his part, maintains that Cloud specifically said he could "stay in the break[]room and mingle with" coworkers for an hour. App. vol. 1, 197.

The next workday was November 13. At around 6:30 a.m., Rutledge left a voicemail for Leslie Fortney, who worked in human resources, in which he complained about his one-percent raise and reported that McCracken was bullying and retaliating against him. Rutledge then clocked in at 7:00 a.m. and sat in the breakroom with several coworkers. At some point, McCracken walked in and asked Rutledge to begin working. Rutledge refused, maintaining that he would remain in the breakroom until 8:00 a.m. because Cloud said he could. When McCracken called Cloud to see if this was true, however, Cloud denied giving Rutledge such permission. Eventually, Cloud spoke directly to Rutledge over the phone and asked him to begin working. Rutledge agreed but told McCracken on his way out to his

truck that he planned to visit human resources because he felt "picked on and bullied." App. vol. 4, 132. By then, it was around 7:45 a.m.

Later that day, Rutledge met with Cloud. Rutledge repeated his concerns about feeling singled out at work due to his work-related injuries, and Cloud suggested that he transfer to a different plant in the new year. After their conversation, Cloud emailed Klamm (copying McCracken) and wrote that Rutledge had agreed to the proposed transfer and to "end his one[-]hour strike in the mornings, which was triggered from his 'needs improvement' rating for his merit increase." *Id.* at 134. That same day, McCracken emailed Klamm and Cloud to report Rutledge's harassment complaint against him. McCracken attached some notes to the email that detailed his recent interactions with Rutledge, including the performance-review meeting and the breakroom incident. Klamm passed McCracken's email on to Fortney in human resources.

Based on the day's events, the County initiated two separate investigations—one into Rutledge's harassment and retaliation complaint against McCracken and another into Rutledge's alleged misconduct during the breakroom incident. Fortney conducted the investigation into Rutledge's complaint. She reviewed various documents and interviewed several employees, including Rutledge, McCracken, and Cloud. In the end, she found no evidence that McCracken harassed, bullied, or retaliated against Rutledge. Fortney shared her findings with Klamm and director of operations and maintenance Kenneth Kellison, the individual who would ultimately make the decision to terminate Rutledge's employment. Fortney did not, however,

produce an investigation report memorializing those findings until after the County terminated Rutledge's employment.[1]

After Fortney shared her findings with Klamm and Kellison, Klamm placed Rutledge on paid administrative leave and began investigating his alleged misconduct during the breakroom incident. During his interview with Klamm, Rutledge said that other employees sat in the breakroom after clocking in and that Cloud gave him permission to do the same. Cloud and McCracken, on the other hand, each said in their interviews that Cloud specifically told Rutledge not to do that. Klamm also interviewed an employee who reported witnessing the breakroom incident (though Rutledge later testified that the employee was not in the breakroom). According to Klamm, this employee reported that "Rutledge was sitting in the break[]room with a purpose" and "seemed to be picking a fight" with McCracken and "stirring up trouble." *Id.* at 71.

After investigating the breakroom incident, Klamm spoke with Kellison to discuss next steps. They agreed that Rutledge's assertion about having permission from Cloud to not work for the first hour of the workday "was not credible on its

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[1] Although Fortney uncovered no evidence of harassment, bullying, or retaliation, her report included two findings in Rutledge's favor. She found that "McCracken was unaware of the expectations for how to rotate overtime across the team," so she recommended that Klamm work with him to establish a "fair and equitable" overtime-distribution procedure. App. vol. 4, 247–48. She also found that, unbeknownst to McCracken, employees had been able to view Rutledge's medical appointments logged on McCracken's Outlook calendar, which had been set to public. By the time of Fortney's report, McCracken had "appropriately adjusted his settings to ensure privacy of any confidential or sensitive information on his calendar." *Id.* at 247.

face" and "was contradicted by both . . . Cloud and . . . McCracken." App. vol. 2, 166. In fact, they observed, "nearly all of . . . Rutledge's allegations were contradicted by one or more witnesses." *Id.* Kellison also reported knowing that "Rutledge had historically raised allegations against others that were not supported" and expressed "concern[] about the message it would send to the other employees" if the County permitted "Rutledge to refuse to work and to lie about the reasons he was not working." *Id.* Kellison then sent an email to Fortney, writing that the "plan . . . [wa]s to proceed with termination" and that Klamm would draft a termination notice. App. vol. 4, 269.

The next day, Klamm sent a draft termination notice to Kellison, Fortney, and deputy director of human resources Tiffany Hentschel. The draft focused mainly on the breakroom incident, stating that Rutledge "l[ied] to [his] supervisor" and "was insubordinate by refusing to work, even after his supervisor asked him to start working." App. vol. 6, 230. The draft additionally explained that this was not the first time Rutledge had engaged in insubordinate conduct, noting vaguely that he had, for example, "used unverifiable third parties to unnecessarily convince [his] supervisor to take or allow [him] to take specific actions" and intentionally recorded data in "illegible [handwriting] or basic scribbles." *Id.* at 229. The draft also briefly listed "[m]ultiple examples of [Rutledge] disrupting the work[]place[,] . . . including taunting co[]workers with favoritism or threats, arguing over electrical outlets, shutting off motion[-]sensor lights, among many other irritants, which continue[d] to

cause disruption, tension, and stress between [Rutledge] and [his] co[]workers." *Id.* at 230.

After reviewing the draft, Fortney and Hentschel both suggested some revisions. Relevant here, Hentschel recommended deleting the additional examples of insubordination and disruption that were unrelated to the breakroom incident, commenting: "I suggest that you keep this [termination notice] simple and focus on [Rutledge] being untruthful and insubordinate" during the breakroom incident. *Id.* at 247. Hentschel explained that "[e]very single thing" included in the notice would "be subject to debate[,] and the first"—meaning the breakroom incident—was "enough to support separation." *Id.* Klamm accepted Hentschel's suggestion and revised the draft to focus exclusively on the breakroom incident.

The next day (December 6), Kellison, Klamm, and Fortney attended a predisciplinary meeting with Rutledge. Kellison announced the County's intent to terminate Rutledge's employment and gave Rutledge a chance to explain the breakroom incident before making a final decision. After the meeting, Kellison chose to move forward with the termination because, in his view, "Rutledge took no accountability for his behavior" and "made allegations . . . that were even more far-fetched than the ones he had previously made." App. vol. 2, 167. So the County updated the termination notice to include Rutledge's version of events, adding that "[Rutledge] continued to state that . . . Cloud approved [his] sitting in the breakroom and [Rutledge] did not take any ownership for [his] behavior." App. vol 6, 258. Kellison then informed Rutledge of the termination decision and presented him with

the final termination notice. Rutledge appealed the termination decision to an administrative review panel, and the panel upheld the decision on December 18, 2018.

About a year later, Rutledge sued the County, asserting four claims stemming from the termination of his employment: (1) disability discrimination under the ADA; (2) retaliation under the ADA; (3) retaliation under the FMLA; and (4) retaliatory discharge under Kansas common law.[2] The district court granted the County's motion for summary judgment on all four claims. Rutledge appeals.

Analysis

Rutledge argues that his claims for ADA discrimination, ADA retaliation, FMLA retaliation, and retaliatory discharge under Kansas law should survive summary judgment. "We review the district court's order granting summary judgment de novo, applying the same standard as the district court." *Fassbender v. Correct Care Sols., LLC*, 890 F.3d 875, 882 (10th Cir. 2018). Summary judgment is appropriate "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). A genuine factual dispute exists if "the evidence, construed in the light most favorable to the non[]moving party, is such that a reasonable jury could return a verdict for the non[]moving party." *Carter v. Pathfinder Energy Servs., Inc.*, 662

[2] Rutledge's complaint also asserted several other ADA and FMLA claims unrelated to the termination of his employment. But he did not defend those claims at summary judgment and does not argue on appeal that the district court erred in treating them as abandoned, so we do not address them.

F.3d 1134, 1141 (10th Cir. 2011) (quoting *Zwygart v. Bd. of Cnty. Comm'rs*, 483 F.3d 1086, 1090 (10th Cir. 2007)).

Here, Rutledge lacks direct evidence of discrimination or retaliation, so we evaluate his claims under the familiar burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1135 (10th Cir. 2003) (applying framework to ADA and FMLA claims); *Macon v. United Parcel Serv., Inc.*, 743 F.3d 708, 713 (10th Cir. 2014) (noting that Kansas applies framework to retaliatory-discharge claims). At the first step of this framework, the plaintiff must establish a prima facie case of discrimination or retaliation. *See DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 969 (10th Cir. 2017). At the second step, the burden shifts to the employer to "articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id.* at 970. If the employer does so, the burden returns to the plaintiff at the third step to show by a preponderance of the evidence "that the employer's justification is pretextual." *Id.* (quoting *Smothers v. Solvay Chems., Inc.*, 740 F.3d 530, 540 (10th Cir. 2014)).

Applying this framework, the district court determined that Rutledge made out prima facie cases of ADA discrimination, ADA retaliation, and FMLA retaliation. And although it was "skeptical" that Rutledge met his prima facie burden on his retaliatory-discharge claim, it assumed for argument's sake that he did. App. vol. 7, 213. Next, citing the final termination notice given to Rutledge, the district court determined that the County had offered a legitimate, nondiscriminatory reason for

terminating Rutledge's employment: his insubordination and dishonesty during the breakroom incident. And at the pretext stage, the district court concluded that Rutledge failed to show a genuine issue of material fact as to whether the County's stated reason for the termination was pretextual.

Rutledge now challenges the district court's *McDonnell Douglas* analysis. We will assume at the first step that Rutledge met his prima facie burden on all his claims. Rutledge asserts that the County failed to meet its burden at step two, but we agree with the district court that the County offered a facially legitimate, nondiscriminatory reason for Rutledge's termination. Indeed, the County specifically stated in Rutledge's final termination notice that he had "engaged in conduct in violation of Johnson County Human Resources Policies by being insubordinate through [his] refusal to work and being dishonest to [his] supervisor." App. vol. 6, 258. This explanation satisfies the County's "exceedingly light" second-step burden. *DePaula*, 859 F.3d at 970 (quoting *Williams v. FedEx Corp. Servs.*, 849 F.3d 889, 900 (10th Cir. 2017)); *see also Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1058 (10th Cir. 2020) (explaining that second stage only requires employer "to articulate a reason for the discipline that is not, on its face, prohibited" and is "reasonably specific and clear" (quoting *EEOC v. Flasher Co.*, 986 F.2d 1312, 1316 & n.4 (10th Cir. 1992))). So the burden shifts back to Rutledge show pretext.

"A plaintiff may show pretext by demonstrating the 'proffered reason is factually false[]' or that 'discrimination was a primary factor in the employer's decision.'" *DePaula*, 859 F.3d at 970 (quoting *Tabor v. Hilti, Inc.*, 703 F.3d 1206,

1218 (10th Cir. 2013)). A plaintiff may accomplish this "by revealing weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered reason, such that a reasonable fact finder could deem the employer's reason unworthy of credence." *Id.* (quoting *Tabor*, 703 F.3d at 1218). "A plaintiff may also show pretext by demonstrating 'the defendant acted contrary to a written company policy,' an unwritten company policy, or a company practice 'when making the adverse employment decision affecting the plaintiff.'" *Id.* (quoting *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000)). "'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.'" *Id.* at 971 (quoting *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1044 (10th Cir. 2011)). Or put another way, a court reviewing for pretext does not "sit as a superpersonnel department that second-guesses the company's business decisions." *Frappied*, 966 F.3d at 1059 (quoting *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 813–14 (10th Cir. 2000)).

Rutledge contends that he has met his burden of showing a genuine issue of material fact as to whether the County's proffered reason for terminating his employment was pretextual. We consider his pretext arguments in turn.[3]

[3] As he did below, Rutledge relies on the same pretext arguments for all four of his claims. Thus, like the district court, we follow his lead and analyze his pretext arguments as applying to all four claims.

I. Falsity of the Proffered Reason

Rutledge first argues that he can show pretext because the County's proffered reason for firing him is false: He insists that Cloud did, in fact, give him permission to sit in the breakroom for an hour after clocking in. So as Rutledge sees it, he was neither dishonest nor insubordinate. But Rutledge focuses on the wrong question. Because we look at the facts as they appeared to the person making the termination decision, "[w]e do not ask whether the employer's reasons were wise, fair[,] or correct." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118–19 (10th Cir. 2007). Instead, "the relevant inquiry is whether the employer honestly believed its reasons and acted in good faith upon them." *Id.* And Rutledge offers no evidence that the County honestly believed anything other than that Cloud never told Rutledge he could spend an hour in the breakroom.

To be sure, as Rutledge stresses, the County "knew *he said* he had permission from Cloud to sit in the breakroom after clocking in." Aplt. Br. 49 (emphasis added). But the County—through Kellison, the decision-maker—concluded that Rutledge's assertion (1) "was not credible on its face" and (2) "was contradicted by both . . . Cloud and . . . McCracken."[4] App. vol. 2, 166. And because the County did not

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[4] Rutledge attempts to dispute that McCracken and Cloud contradicted his assertion, contending that "neither McCracken nor Cloud could even remember if Cloud gave Rutledge permission to sit in the breakroom after clocking in." Aplt. Br. 50. But the record belies this contention. McCracken's and Cloud's notes of the performance-review meeting both state that Rutledge "was encouraged not to" sit in the breakroom for the first hour of the workday. App. vol. 6, 299; App. vol. 4, 132. And when Klamm spoke with Cloud and McCracken about the breakroom incident, they each said that Cloud told Rutledge "*not* to do that." App. vol. 4, 69–70.

believe that Cloud ever gave Rutledge such permission, it decided to fire Rutledge for his dishonesty and insubordinate refusal to work. Even if the County was mistaken, Rutledge presents no evidence suggesting that the County did not honestly hold that belief. At best, Rutledge faults the County for not accepting his side of the story. But that is simply not enough to show pretext. *See Est. of Bassatt v. Sch. Dist. No. 1*, 775 F.3d 1233, 1240 (10th Cir. 2014) (holding that employer's "decision to believe [one employee] over [another], when there was no direct evidence either way, is not evidence of pretext"); *Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 925 (10th Cir. 2004) ("Perhaps a reasonable factfinder could observe all the witnesses and believe [p]laintiff's version of the events . . . [, but] that is not the issue.").

II. Inconsistent Reasons

Rutledge next attempts to discredit the County's proffered reason with evidence that the County has offered inconsistent explanations for terminating his employment. "Contradictions or inconsistencies in an employer's proffered reason for termination can be evidence of pretext." *Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280, 1291 (10th Cir. 2022). But "pretext cannot be established by 'the mere fact that the [employer] has offered different explanations for its decision.'" *Id.* (alteration in original) (quoting *Jaramillo v. Colo. Jud. Dep't*, 427 F.3d 1303, 1311 (10th Cir. 2005) (per curiam)). Instead, evidence of inconsistent explanations helps demonstrate pretext only if the employer "changed its explanation under circumstances that suggest dishonesty or bad faith." *Id.* (quoting *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1002 (10th Cir. 2011)).

Rutledge contends that the County considered different reasons for terminating his employment before it settled on the proffered reason, pointing to the various drafts of the termination notice. Recall that although Klamm's first draft centered on Rutledge's dishonesty and insubordinate refusal to work during the breakroom incident, it also listed several other examples of Rutledge's insubordinate and disruptive behavior as additional justifications for the termination. When Hentschel reviewed the draft, however, she recommended that Klamm keep the termination notice "simple and focus[ed] on [Rutledge] being untruthful and insubordinate" during the breakroom incident. App. vol. 6, 247. Hentschel reasoned that "[e]very single thing" listed in the notice would "be subject to debate[,] and the first"—Rutledge's insubordination and dishonesty during the breakroom incident—was "enough to support separation" on its own. *Id.* Klamm followed Hentschel's advice and focused the final termination notice on only the breakroom incident.

Relying on our decision in *Fassbender*, Rutledge argues that a jury could infer from these revisions that the County strategically "abandoned its original explanations in favor of one that's harder to assail because it knew that none of the explanations were true." 890 F.3d at 888. But this case contains a key factual distinction: Unlike the employer in *Fassbender*, the County never abandoned its original, primary explanation for the termination. In *Fassbender*, a prison contractor fired a pregnant employee after she accepted an inmate's handwritten note, took it home, and waited over 24 hours to report it. *See id.* at 880. Yet the contractor could not pin down which specific conduct (and thus which specific policy violation) it

fired her for, advancing several inconsistent explanations. *See id.* The contractor continued to shift position even after the employee filed a formal EEOC charge, offering in its response letter three distinct reasons for terminating her employment. *See id.* The contractor then pivoted yet again at summary judgment, abandoning all three rationales in favor of another, more definitive reason: that the employee took the note home, in violation of its policy against removing inmate correspondence from the premises. *See id.* at 887–88. In reversing the district court's grant of summary judgment to the contractor, we determined that a jury could find it significant that the contractor (1) "failed to consistently identify which of [the employee's] acts it terminated her for" and (2) "eventually abandoned all of the[] various violations [it had asserted] . . . in favor of only a single violation." *Id.* at 888. Here, by contrast, the County has always maintained that it terminated Rutledge's employment for his insubordinate refusal to work and dishonesty during the breakroom incident. And it never abandoned that explanation—not when it drafted the final termination notice, not when it terminated Rutledge's employment and gave him that notice, and not at any point since then.

To be sure, during the process of drafting the final termination notice, the County did omit some additional reasons supporting termination that were briefly included in the first draft. But we agree with the district court that the County's "decision to jettison [those] additional reasons for termination *before* [it] terminated [Rutledge]'s employment—while consistently sticking with the central reason that prompted the firing decision in the first place—doesn't suggest dishonesty or bad

faith." App. vol. 7, 220–21; *see also Frappied*, 966 F.3d at 1059 (noting that generally speaking, "[*p*]*ost-hoc* justifications for termination constitute evidence of pretext" (emphasis added)). All it suggests is what Hentschel's comment confirms: that the County ultimately chose not to rely on the additional reasons because the breakroom incident was enough, standing alone, to support termination. No reasonable jury could conclude from this decision that the County's consistently proffered reason was too "weak, implausible, inconsistent, incoherent, or contradictory" to believe. *Litzsinger*, 25 F.4th. at 1293 (quoting *Fassbender*, 890 F.3d at 890).

Rutledge's argument that the County changed its reason for terminating his employment during litigation fares no better. Rutledge contends that Kellison's declaration suggests the decision was ultimately based on Rutledge's behavior during the predisciplinary meeting, not the breakroom incident. Yet far from showing that the County changed its reason for terminating Rutledge's employment after litigation began, the declaration instead supports the County's position that it followed its own disciplinary policy before making the final termination decision. In particular, the County's policy requires a predisciplinary meeting before "taking any definitive disciplinary action" that will "affect[] an employee's position." App. vol. 2, 21. At this meeting, the employee must be given a chance to explain why "the intended discipline should not be imposed." *Id.* at 22. In line with this policy, Kellison's declaration explains that he "was open to changing [his] mind" when he walked into Rutledge's predisciplinary meeting. *Id.* at 166. But after the meeting, the declaration

continues, Kellison decided to proceed with termination because Rutledge "took no accountability for his [breakroom] behavior" and "made allegations during the meeting that were even more far-fetched than the ones he had previously made." *Id.* at 166–67. And contrary to Rutledge's assertion, this is not something Kellison explained for the first time during this litigation: The final termination notice states substantially the same thing, noting that during the meeting, "[Rutledge] continued to state that . . . Cloud approved [his] sitting in the breakroom and [Rutledge] did not take any ownership for [his] behavior." App. vol. 6, 258. In sum, Rutledge fails to identify any inconsistencies in the County's proffered reason that suggest pretext.

III. Unfair Investigations

Rutledge next argues that a jury could infer pretext because the County failed to conduct a fair investigation into the breakroom incident that triggered the termination. Such a failure "may support an inference of pretext." *Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1314 (10th Cir. 2017) (quoting *Smothers*, 740 F.3d at 542). "But an employer may ordinarily 'defeat the inference' of pretext stemming from an allegedly unfair investigation by 'simply asking an employee for his version of events.'" *Id.* (quoting *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 488 (10th Cir. 2006)).

Here, the County twice heard Rutledge's side of the story before Kellison terminated his employment. When Klamm investigated the breakroom incident, she interviewed Rutledge and listened to his account of what happened that morning. And Rutledge had another opportunity to explain his version of events at the

predisciplinary meeting. That the County asked Rutledge for his side of the story defeats any inference of pretext from any alleged unfairness in Klamm's investigation. *See, e.g.*, *id.* (determining that plaintiff's "unfair-investigation argument [wa]s overcome by the simple fact that [the employer] asked [her] for her version of events"); *Est. of Bassatt*, 775 F.3d at 1240 (same); *cf. Smothers*, 740 F.3d at 543 (holding that unfair investigation suggested pretext where employer never heard plaintiff's version of events before terminating his employment).

Rutledge relatedly attempts to show pretext by pointing to alleged flaws in Fortney's investigation into his harassment complaint against McCracken. Specifically, Rutledge highlights that Fortney did not mention McCracken's "tough shit" comment about the ladder in her investigation report, even though she jotted it down in her notes when she interviewed Rutledge. Rutledge also takes issue with Fortney's failure to produce her investigation report until after the termination of his employment, asserting that the delay suggests she wanted to withhold two findings that were favorable to him: (1) that McCracken failed to distribute overtime evenly among employees; and (2) that Rutledge's coworkers could view his scheduled medical appointments because McCracken's Outlook calendar was public.

But even assuming that flaws in an investigation unrelated to the misconduct that triggered termination can support an inference of pretext, we see no connection between these two alleged flaws and any retaliatory or discriminatory purpose. *See Smothers*, 740 F.3d at 539 (explaining that flaws in employer's investigation into "*the offense for which it purportedly fired the plaintiff*" may support inference of

pretext (emphasis added)). Even if McCracken's ladder comment was directed at Rutledge's lifting restrictions and should have been included in the report, the comment was at best the kind of isolated, "stray remark by someone not in a decision-making position" that we have said "does not establish intent to discriminate." *Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995); *see also Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) ("Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions."). And Fortney's findings about McCracken's Outlook calendar and his distribution of overtime say nothing about the County's stated reason for terminating Rutledge's employment—much less about whether that reason is "unworthy of belief." *Litzsinger*, 25 F.4th at 1288. So no reasonable jury could find that Fortney omitted McCracken's comment from her investigation report or delayed producing that report in order to justify terminating Rutledge's employment and to disguise an improper motive in doing so.

IV. Discriminatory Comments

Next, Rutledge attempts to use several comments made by McCracken, Cloud, and Kellison to show pretext.[5] We have recognized that anecdotal evidence of discriminatory conduct may support an inference of pretext if that conduct "might have affected . . . decisions adverse to [the] plaintiff." *Ortiz v. Norton*, 254 F.3d 889,

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[5] Rutledge also asserts that a jury could infer pretext from comments made by Fortney. But we decline to consider this argument because Rutledge did not make it below and does not argue plain error on appeal. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011).

896 (10th Cir. 2001). But we have made clear that such evidence "should only be admitted if 'the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand.'" *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1289 (10th Cir. 2000) (quoting *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 856 (10th Cir. 2000)).

Rutledge first points to several comments that McCracken and Cloud made about his FMLA leave. Recall that according to Rutledge, McCracken sometimes called him "half-timer." App. vol. 1, 219. Rutledge also testified that after McCracken's promotion, (1) McCracken told Rutledge that he "couldn't take" FMLA leave and (2) McCracken and Cloud both told Rutledge that they "want[ed]" him at work "all the time." *Id.* at 207. On appeal, Rutledge concedes that "Cloud and McCracken were not involved in deciding to fire [him]." Aplt. Br. 61. But Rutledge asserts that the supervisors' motives are nevertheless relevant because they "influenced" that decision. *Id.*

We have held that a plaintiff can establish pretext by "presenting evidence that a biased subordinate who lacked decision[-]making power used the formal decision[-]maker as a dupe in a deliberate scheme to bring about an adverse employment action." *Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 515 (10th Cir. 2015). But to succeed under this subordinate-bias theory of liability, a plaintiff must do more than show that the biased subordinate influenced the decision-making process. *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1060 (10th Cir. 2009). Rather, the plaintiff must establish that "the biased subordinate's discriminatory reports,

recommendation, or other actions *caused* the adverse employment action." *Id.* (emphasis added) (quoting *BCI Coca-Cola*, 450 F.3d at 487). The employer can "break the causal chain," however, by directing someone "higher up in the decision-making process to independently investigate the grounds for dismissal." *Singh v. Cordle*, 936 F.3d 1022, 1038 (10th Cir. 2019). Indeed, "simply asking an employee for his or her version of events may defeat the inference" of pretext because "such an inquiry demonstrates that 'the employer has taken care not to rely exclusively on the say-so of the biased subordinate.'" *Thomas*, 803 F.3d at 516–17 (quoting *BCI Coca-Cola*, 450 F.3d at 488). Even "an independent review that takes place *after* the adverse action" can "break the causal chain." *Singh*, 936 F.3d at 1039 (emphasis added).

Here, Rutledge fails to show a causal relationship between his supervisors' alleged comments and the termination of his employment. Although McCracken and Cloud reported the breakroom incident, Klamm independently investigated it. Again, Klamm interviewed Rutledge and heard his side of the story. And after completing her investigation, Klamm presented her findings to Kellison, who then gave Rutledge another chance to provide his version of events at the predisciplinary meeting. Because the County asked Rutledge to share his side of the story, he cannot establish "that the [termination] decision was based on a subordinate's bias." *Pinkerton*, 563 F.3d at 1061.

If that were not enough, Kellison's termination decision was not the end of the matter. In keeping with the County's policy, Rutledge exercised his option to appeal

the decision to an administrative review panel by submitting a dispute-resolution form. And after conducting a hearing, at which Rutledge had the opportunity to call witnesses, the panel affirmed. Rutledge does not argue—and no evidence suggests—"that the [p]anel's review was a sham" or that any allegedly discriminatory or retaliatory motive infected its review. *Thomas*, 803 F.3d at 517; *see also, e.g.*, *id.* (holding that employer's "virtually immediate post-termination review process—which was designed to identify and unwind termination decisions that violated company practices and policies—sufficiently constrained any retaliatory animus that [the immediate supervisor] may have possessed"). Rutledge therefore fails to show that McCracken's or Cloud's alleged comments caused either Kellison's or the panel's decision.

Shifting his focus to the decision-maker, Rutledge next points to two statements from Kellison that, in his view, reveal Kellison acted with a discriminatory and retaliatory motive. Rutledge first notes that in 2015, Kellison reported feeling threatened when Rutledge said that he was "going to put [Kellison] under oath" at a workers' compensation hearing. App. vol 7, 39. But even if we accept Rutledge's characterization of Kellison's report as revealing a discriminatory or retaliatory motive, Rutledge cannot tie it to the termination of his employment. That's because Kellison made the comment three years before the termination, rendering it too temporally remote to suggest pretext. *See Heno*, 208 F.3d at 856 (noting that discriminatory incidents from "several years before the [termination] . . . are 'not sufficiently connected to the employment action in question to demonstrate

pretext'" (quoting *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (10th Cir. 1999))); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1182, 1184 (10th Cir. 2006) (finding comment made nine months before termination too remote to show pretext).

Rutledge next highlights portions of Kellison's deposition testimony in which Kellison agreed that Rutledge "could be delusional" and "[p]aranoid." App. vol. 7, 46. But as the district court pointed out, Kellison's belief that Rutledge might be delusional and paranoid tells us nothing about Kellison's views on "[Rutledge]'s workplace injuries, his resulting disabilities, his FMLA leave, or his workers' compensation claim." *Id.* at 231. Because Kellison's testimony sheds no light on whether Kellison harbored a discriminatory or retaliatory motive, it does not constitute evidence of pretext.

V. Deviation from Disciplinary Policy

Rutledge next argues that the County's failure to follow its progressive discipline policy shows pretext. *See Kendrick*, 220 F.3d at 1230 (noting plaintiff can show pretext "with evidence that the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances"). In support, Rutledge invokes a policy provision stating that the County should generally not terminate employment unless "other forms of discipline have not resolved the issue" or there were "multiple or repeated incidents of misconduct." App. vol. 2, 21. But as Rutledge acknowledges, the County's policy is discretionary. In fact, the policy explicitly allows management to skip disciplinary steps and even "terminate the employment relationship without using other levels of discipline." *Id.*

at 18. When, as here, "'progressive discipline [is] entirely discretionary,' and the employer 'did not ignore any established company policy in its choice of sanction, the failure to implement progressive discipline is not evidence of pretext.'" *Lobato v. N.M. Env't Dep't*, 733 F.3d 1283, 1291 (10th Cir. 2013) (alteration in original) (quoting *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1120 (10th Cir. 2007)). Given the discretionary nature of the County's disciplinary policy, no reasonable jury could find that the County's failure to use progressive discipline shows pretext.

VI. Disparate Treatment

In a final attempt to show pretext, Rutledge argues that the County treated him differently than other employees who also spent time in the breakroom after clocking in. *See Kendrick*, 220 F.3d at 1230 (noting that plaintiff can show pretext by providing evidence that employer "treated [plaintiff] differently from other similarly [ ]situated employees who violated work rules of comparable seriousness"). But Rutledge identifies no similarly situated employees who, like him, not only sat in the breakroom after clocking in but also refused to work when specifically asked to do so and insisted that they had permission to socialize for an hour after clocking in. Given Rutledge's distinct conduct, which the County viewed as both dishonest and insubordinate, Rutledge fails to show any disparate treatment that could establish pretext.

At bottom, Rutledge's proffered pretext evidence, even considered together, would not allow a reasonable jury to find the County's stated reason for terminating his employment "unworthy of credence." *DePaula*, 859 F.3d at 970 (quoting *Tabor*,

703 F.3d at 1218). Rutledge thus fails to create a genuine issue of material fact as to pretext, and the district court properly granted summary judgment to the County.

Conclusion

Because Rutledge produced no evidence that the County's proffered reason for terminating his employment—his dishonesty and insubordination during the breakroom incident—was merely a pretext for discrimination or retaliation, we affirm.

Entered for the Court

Nancy L. Moritz
Circuit Judge