

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 8, 2026

Christopher M. Wolpert
Clerk of Court

CARMEN TAFOYA,

Plaintiff - Appellant,

v.

CITY OF FOUNTAIN,

Defendant - Appellee.

No. 25-1381
(D.C. No. 1:24-CV-00884-MDB)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **MATHESON**, and **MORITZ**, Circuit Judges.

The City of Fountain, Colorado (the City), terminated Carmen Tafoya's employment after an internal investigation determined that she violated several City policies. Tafoya sued for age discrimination. The City moved for summary judgment and to strike certain declarations attached to Tafoya's summary-judgment response. The district court granted the motion to strike in part and granted the City's summary-judgment motion. We affirm summary judgment for the City: even considering the stricken declaration, Tafoya fails to show that the City intentionally discriminated against her on the basis of age.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Background

Tafoya joined the City's utilities department in 1971. As a billing specialist, Tafoya had access to information about customers who purchased utilities through the City. She understood that the City's policies required her to use City resources only for business purposes. But when a prospective tenant for her family's rental property provided information related to his utility history with the City, Tafoya used City resources for nonbusiness purposes in an attempt to verify the information.

Specifically, in November 2022, while on medical leave, Tafoya spoke by phone with two colleagues in the utilities department to inquire about the tenant's utility history. Tafoya averred that when she reached one colleague, Dana Daniel, she asked Daniel to "look up and see if [the prospective renter] is living where he says he is." App. vol. 1, 241. Daniel told Tafoya on the phone that the tenant had a past-due bill and that he needed to make a deposit. Daniel followed up with Tafoya over text, writing that the tenant needed to call the utilities department and "go through the new account process." App. vol. 2, 455. Tafoya initially responded to the text with instructions for the prospective tenant regarding his utilities account before clarifying to Daniel that she meant to text the follow-up messages to her son.¹ When Tafoya returned to work the next day, she looked up the prospective tenant's account information, saw that he had separate accounts for "about three different locations,"

¹ The errant messages read, "He needs to go into [the] office[. He] needs to pay [a] bill of [\$]220.86 and a \$250.00 deposit and have them [m]ove out your dad and put in his name[.] They need to run his name and [social security number.]" App. vol. 2, 455.

and shared this information with her husband and son. App. vol. 1, 230.

Brett Robinson, one of Tafoya's supervisors, reported Tafoya's calls to Connie Brisnehan, the City's Human Resources Director, and Troy Johnson, the City Attorney. Robinson's email claimed Tafoya "used her position and attempted to influence another employee to violate rules and regulations with transferring private account information on someone else's behalf and to circumvent her potential tenant from paying a deposit." App. vol. 2, 454. He recounted that he asked Daniel what happened and learned that "[Tafoya] was told [her tenant] will need to go through the deposit process." *Id.*

Assistant City Attorney Kaitlin Parker investigated Tafoya's conduct. Parker interviewed several City employees, including Tafoya, and summarized her findings in a report. According to the report, Tafoya admitted that she accessed the prospective tenant's account information and shared it with her family "in connection with a personal business matter." *Id.* at 355. She also admitted that she called the utilities department while out on leave. Though "[n]either employee" Tafoya contacted, including Daniel, "specifically recalled . . . Tafoya requesting [the prospective renter's] deposit to be waived"—and Tafoya later disclaimed asking for a deposit waiver in her deposition—the report indicated that Tafoya admitted to asking a coworker to look up the tenant's account and "see if the deposit could be waived." *Id.* at 356. Finally, the report concluded that Tafoya violated multiple City policies and recommended she be placed on paid administrative leave.

Dan Blankenship, the City's Utilities Director, reviewed Parker's report and

recommended that the City terminate Tafoya's employment. Scott Trainor, the City Manager and final decision-maker on employee termination, reviewed the report and met with Blankenship, Brisnehan, and Johnson regarding Tafoya's conduct. The three of them walked Trainor through Parker's report. Trainor ultimately decided to terminate Tafoya's employment because Tafoya accessed the renter's information and asked to waive his deposit in violation of City policies. At the time, Tafoya was 72 years old.

Tafoya then sued the City under the Age Discrimination in Employment Act (ADEA). Following discovery, the City moved for summary judgment, and Tafoya responded, attaching new declarations from herself and her former supervisor, Deborah Miller. Miller averred that she wasn't consulted about the termination of Tafoya's employment, attributed an ageist remark to Robinson, and speculated without detail that "younger employees were manipulating the supervisors against some of [the] older employees." *Id.* at 440. The City moved to strike both new declarations. The district court granted the motion to strike as to Miller's declaration and granted summary judgment to the City.

Tafoya appeals.

Analysis

Tafoya primarily challenges the district court's summary-judgment conclusion that a rational factfinder could not find for her on her age-discrimination claim. She also argues that the district court abused its discretion when it struck Miller's declaration. Because we conclude that summary judgment was proper even if the

district court had considered the declaration, we need not resolve whether the district court abused its discretion in striking the declaration.

“We review the grant of summary judgment de novo, using the same standard as the district court.” *Lazy S Ranch Props., LLC v. Valero Terminaling & Distrib. Co.*, 92 F.4th 1189, 1198 (10th Cir. 2024). Summary judgment is appropriate “[i]f there is no genuine issue of material fact[,] and the movant is entitled to judgment as a matter of law.” *Id.* “An issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.” *Id.* (cleaned up) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)). In resolving a summary-judgment appeal, we view “the facts and their reasonable inferences in the light most favorable to the nonmovant.” *Id.*

In this ADEA action, Tafoya “bears the ultimate burden of proving her employer intentionally discriminated against her” on the basis of her age. *Bennett v. Windstream Commc’ns, Inc.*, 792 F.3d 1261, 1266 (10th Cir. 2015). Such claims usually proceed under “the three-step burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).” *Bennett*, 792 F.3d at 1266 (cleaned up). That framework requires a plaintiff to first establish a prima facie case of discrimination, typically by showing, “by a preponderance of the evidence, that” they are “a member of a protected class, . . . suffered an adverse employment action, and the challenged action occurred under circumstances giving rise to an inference of discrimination.” *Id.* Then, the burden shifts to the defendant “to articulate a legitimate, nondiscriminatory reason for its actions.” *Id.* If the defendant satisfies

their burden, the plaintiff must then show that the defendant's explanation was "merely pretextual." *Id.*

Here, the district court determined that Tafoya failed to establish a prima facie case at the first step because she did not show that she was treated less favorably than younger employees, meaning she did not present circumstances giving rise to an inference of discrimination. It also determined that even if Tafoya established a prima facie case, her claim would fail because she could not show that the City's reasons for terminating her employment—Tafoya's violations of City policy—were pretextual.

Tafoya challenges both rulings, but we choose to assume the first two steps of *McDonnell Douglas* are satisfied and focus our analysis on pretext. *See Iweha v. Kansas*, 121 F.4th 1208, 1226 (10th Cir. 2024) (concentrating on pretext). As she did below, Tafoya relies on a cat's-paw theory.² In a cat's-paw situation, "a biased subordinate, who lacks decision[-]making power, uses the formal decision[-]maker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Sellman v. Aviation Training Consulting, LLC*, 155 F.4th 1215, 1222 (10th Cir. 2025) (quoting *Iweha*, 121 F.4th at 1228). So a successful cat's-paw theory allows a

² Tafoya contends, as a threshold matter, that the *McDonnell Douglas* burden-shifting framework should not apply where a plaintiff raises a cat's-paw theory of liability. But as the City points out, and as Tafoya expressly concedes, she did not raise this argument with the district court. She thus forfeited this argument below and has waived it on appeal by failing to substantively argue for plain-error review. *See Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1145 (10th Cir. 2016). We therefore decline to consider it.

plaintiff to establish discrimination “even without evidence that the actual decision[-]maker possessed an unlawful motive.” *Id.* (quoting *Iweha*, 121 F.4th at 1227). At summary judgment, a plaintiff asserting a cat’s-paw theory must show “that there is a genuine issue of material fact” on three elements: “(1) the subordinate took action motivated by discriminatory . . . [intent];³ (2) the subordinate intended the action to cause an adverse employment action; and (3) the subordinate’s action was the but-for cause of the intended adverse employment action.” *Id.* at 1223.

Tafoya argues that Robinson, Brisnehan, Johnson, and Blankenship were biased subordinates who influenced Trainor’s decision to terminate her employment. We begin with Robinson. Tafoya emphasizes that he was the one who reported her to HR in the first place and argues that his bias is shown by his failure to similarly report Daniels for providing information to Tafoya. But Tafoya ignores that Robinson’s report resulted in an independent investigation of the matter, conducted by a city attorney who interviewed Tafoya “and several other City employees.” App. vol. 3, 660. And “[o]ne way an employer can ‘break the causal chain’ between the subordinate’s biased behavior and the adverse employment action is for another person or committee higher up in the decision-making process to independently

³ *Sellman* uses the word “animus,” not the word “intent.” But in *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Supreme Court “made clear that a lack of ‘animosity’ is ‘irrelevant’ to a claim of discrimination.” *Murray v. UBS Sec., LLC*, 601 U.S. 23, 34 (2024) (quoting *Bostock*, 590 U.S. at 633). So we substitute here the more appropriate word. *Cf. Ashaheed v. Currington*, 7 F.4th 1236, 1244 n.3 (10th Cir. 2021) (“Intentional discrimination involves an intent to treat a group differently. Animus is hostility toward a group. Intentional . . . discrimination can but need not include animus or hostility” (cleaned up)).

investigate the grounds for dismissal.” *Singh v. Cordle*, 936 F.3d 1022, 1038 (10th Cir. 2019) (quoting *Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 516 (10th Cir. 2015)). That’s exactly what happened here. So we reject Tafoya’s cat’s-paw theory as to Robinson because Robinson’s conduct was not “the but-for cause” of the decision to terminate Tafoya’s employment.

As to Brisnehan, Johnson, and Blankenship, Tafoya contends that they misled Trainor when they reviewed the investigation report with him. Specifically, she contends that they failed to inform him that (1) the employees Tafoya spoke with by phone did not remember her asking for a deposit waiver, (2) Daniel “may have given” Tafoya confidential information but was not investigated, and (3) Tafoya’s direct supervisor was not consulted regarding termination. Aplt. Br. 34. Putting aside the fact that Tafoya “admitted” to asking for a deposit waiver, App. vol. 2, 356, Tafoya utterly fails to explain how these alleged omissions are evidence of discriminatory intent—the first element of a cat’s-paw theory. *See Sellman*, 155 F.4th at 1223. She nowhere alleges or argues that Trainor relied on Brisnehan, Johnson, and Blankenship’s “walk-through” of the investigation report to the exclusion of the report itself, so it’s not clear that the alleged inconsistency between their walk-through and the report itself had any impact. Next, Tafoya points to no evidence that Brisnehan, Johnson, or Blankenship knew or had reason to believe that Daniel violated the City’s policies. As to Brisnehan and Johnson, there is simply an absence of evidence; as to Blankenship, Tafoya admitted below that he was “not aware of any other employee who breached the confidentiality and other policies like [she] had.”

App. vol. 1, 49. The failure to disclose something these individuals didn't know can't be evidence of discriminatory intent.⁴ And it's simply unclear how failing to disclose that Tafoya's direct supervisor wasn't consulted is evidence of discriminatory intent.⁵

In sum, Tafoya fails to point to any evidence supporting an inference that Brisnehan, Blankenship, or Johnson intended to discriminate against her because of her age, and her arguments about Robinson fail for lack of causation. Her cat's-paw theory of pretext thus falls short, and with it her claim of age discrimination.

Conclusion

Tafoya fails to show that the City's reasons for terminating her employment were pretextual. So we affirm summary judgment in the City's favor.

Entered for the Court

Nancy L. Moritz
Circuit Judge

⁴ Tafoya's argument about Daniel is also a red herring because the two are not comparators. A similarly situated employee is one who, among other things, "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct." *MacKenzie v. City & Cnty. of Denver*, 414 F.3d 1266, 1277 (10th Cir. 2005), *abrogated in part on other grounds by Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166 (10th Cir. 2018). Here, there are crucial differentiating circumstances between Daniel's and Tafoya's conduct: Daniel shared confidential information with Tafoya, a fellow City employee who requested it, but Tafoya requested confidential information for personal gain and shared it with non-City employees. It's also not clear that Daniel even accessed confidential information; in Tafoya's own words, Daniel "may have" accessed confidential information. Aplt. Br. 34.

⁵ Although Tafoya doesn't expressly rely on this aspect of the Miller declaration, we note that its speculation about the attitude of younger City employees toward older City employees is too generic to create a genuine dispute on the facts material to this case.