Case No. 22-1224

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SHARHEA L. WISE,

Plaintiff – Appellant,

v.

LOUIS DEJOY,
United States Postmaster General,

Defendant – Appellee.

On Appeal from the United States District Court for the District of Colorado (Civ. No. 20-cv-01559, Hon. Regina M. Rodriguez)

REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

In her opening brief, Ms. Wise established that the district court erred in granting USPS summary judgment on both her failure to accommodate and retaliation claims. As to her failure to accommodate claim, Ms. Wise showed that (1) she was disabled, (2) she was otherwise qualified, (3) she requested a plausibly reasonable accommodation, and (4) USPS did not reasonably accommodate her disability. Op. Br. at 21-29.[1] In response, USPS concedes that Ms. Wise met the first three requirements of the prima facie test. Ans. Br. at 19.[2]

As to the disputed fourth prong, USPS makes two arguments. First, it argues that Ms. Wise, not USPS, failed to live up to her accommodation by not reminding her supervisors of her lifting restrictions every time they asked her to do something that would exceed her limits. *Id.* But a reasonable jury could have found that it would have been futile for Ms. Wise to do so, and thus any failure on her part to remind her supervisors does not defeat her claim. The

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[1] Citations to "Op. Br." are to Ms. Wise's opening brief, Appellate ECF No. 23.

[2] Citations to "Ans. Br." are to USPS's answer brief, Appellate ECF No. 28.

remainder of USPS's arguments boil down to factual disputes and factual interpretations that are best left to a jury. For example, USPS argues that Ms. Wise failed to provide any evidence that it did not implement her accommodation, and disputes that the two incidents with her supervisors indicate that USPS failed to accommodate her. *Id.* at 20-21. But a jury could just as easily find that Domingo and Lego repeatedly prevented Ms. Wise from using her accommodation, and thus that USPS failed to accommodate her. *See* part I.

As for her retaliation claim, Ms. Wise established in her opening brief that a reasonable juror could find she was fired in retaliation for her pregnancy accommodation. Op. Br. at 37. Under the *McDonnell-Douglas* burden shifting framework, Ms. Wise established a prima facie case of retaliation because she showed that (1) she engaged in a statutorily protected activity at work when she sought, received, and exercised an accommodation for her pregnancy, (2) she suffered a "materially adverse action" when USPS fired her, and (3) there was a causal connection between her accommodation and her firing. *Id.* at 47-57. In response, USPS concedes the first two elements, and disputes only that Ms. Wise put on sufficient evidence from which a reasonable

juror could find causation under the third element. Ans. Br. at 38.

As to causation, Ms. Wise showed in her opening brief that the record contains evidence of close temporal proximity between her accommodation and firing. Op. Br. at 42-45. Ms. Wise also showed that her supervisors Domingo and Lego ignored her accommodation and yelled at her for utilizing it, from which a reasonable juror could infer that Domingo and Lego had animus against her use of her accommodation, and thus from which a reasonable juror could find a causal link between her accommodation and Domingo and Lego's eventual decision to fire her. *Id.* at 45-46.

This, USPS argues in its answer, is not enough. Ans. Br. at 38-39. First, USPS argues that (1) Ms. Wise cannot show causation because intervening events broke any causal chain established through temporal proximity, and she did not provide any other evidence of causal connection; and (2) USPS had legitimate, nondiscriminatory reasons for firing Ms. Wise, and she did not show that those reasons were pretextual. *Id.* at 45, 48-50. But USPS is wrong. As to causation, Ms. Wise established that her prior negative evaluations were disclaimed by USPS as the reason for firing her, thus her evaluations

could not break the causal connection. Op. Br. at 43-44. As for USPS's purportedly legitimate reason for firing Ms. Wise, a reasonable juror could find based on the evidence in the record that it was mere pretext for Domingo and Lego's retaliation. *See* part II.

The lower court should be reversed.

ARGUMENT

I. A REASONABLE JUROR COULD FIND THAT USPS FAILED TO ACCOMMODATE MS. WISE.

Ms. Wise established in her opening brief that she made out a prima facie failure to accommodate case: (1) she was disabled, (2) she was otherwise qualified to perform her job, (3) she requested a plausibly reasonable accommodation, and (4) USPS did not reasonably accommodate her disability. Op. Br. at 20-32. USPS concedes that Ms. Wise met the first three requirements. Ans. Br. at 19. As to the fourth prong, USPS argues that it complied with its obligations to accommodate Ms. Wise; that it did not have a duty to restart the interactive process; and that it was Ms. Wise, not USPS, who failed to perform part of her accommodation. *Id.* at 32-36.

USPS is wrong. First, a reasonable juror could find that Ms. Wise's supervisors prevented her from using her accommodation or

yelled at her for doing so, and thus that USPS did not reasonably accommodate Ms. Wise. *See* part A. Alternatively, USPS should have known that Ms. Wise's accommodation was not enabling her to perform her job without risking injury, thus triggering its duty to restart the interactive process. *See* part B. Finally, a reasonable juror could find that it would have been futile for Ms. Wise to remind her supervisors of her accommodation. *See* part C.

A. A Reasonable Juror Could Find That Ms. Wise's Supervisors Prevented Her From Using Her Accommodation.

Ms. Wise established in her opening brief that an employer does not reasonably accommodate an individual if it ignores the terms of the accommodation it agreed to,[3] and that Domingo and Lego did just that

[3] It is not entirely clear when and how USPS accommodated Ms. Wise. While USPS approved Ms. Wise's request for light duty restrictions on January 16, 2015, Ms. Wise never received that approval form and appears to have not signed it to accept the offered accommodation. (Light Duty Approval, Ex. M to Pl.'s Partial Mot. Summ. J., ROA at 133.) Domingo indicated that the light duty request was still being processed when Ms. Wise was terminated, but that he and Lego abided by Ms. Wise's medical restrictions in the interim. (Domingo EEOC Invest. Aff., Ex. J to Pl.'s Partial Mot. Summ. J., ROA at 129.) Nevertheless, the district court found that, and both parties have proceeded in this appeal as if, Ms. Wise was provided an accommodation in line with her doctor's twenty-pound weight

when they tried to get Ms. Wise to not exercise her accommodation on at least two occasions. Op. Br. at 23-26. In response, USPS argues only that there is no evidence that Domingo and Lego ignored Ms. Wise's accommodation. Ans. Br. at 23.

That is not true. A reasonable juror could find that Domingo and Lego ignored Ms. Wise's accommodation on at least two occasions, and thus that USPS did not accommodate her. When an employer ignores the terms of an accommodation that it agreed to, the employer has not reasonably accommodated an individual. *Enica v. Principi*, 544 F.3d 328, 343 (1st Cir. 2008) (reversing grant of summary judgment because a reasonable jury could find employer did not reasonably accommodate employee when employer agreed to eliminate certain tasks but continued to require them).

The first time that USPS ignored Ms. Wise's accommodation was when Domingo required Ms. Wise to transport packages that were too heavy, even though she had been given explicit instruction from Domingo that she should leave packages behind if she believed they

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restriction and that allowed Ms. Wise to ask for help when needed. (Order, ROA at 454, 467-68.)

would violate her accommodation. (Wise EEOC Hr'g Test., Ex. O to Pl.'s Mot. Partial Summ. J., ROA at 137.). Lego testified to this fact as well, noting that the USPS fulfilled its obligation to accommodate Ms. Wise even when "she didn't ask for help" by "instructing her [] to avoid the items [that were] . . . too heavy." (Lego EEOC Hr'g Test., Ex. 1 to Def.'s Mot. Summ. J., ROA at 200.) Even though Ms. Wise left packages behind because they exceeded her weight restriction, Domingo nevertheless forced her to return to the station to deliver those packages. A reasonable juror could find that this was evidence that Ms. Wise's restrictions were ignored by USPS, and thus that USPS failed to reasonably accommodate Ms. Wise.

USPS also failed to honor the terms of the accommodation it agreed to when Ms. Wise asked Lego for help pushing her mail gurney and Lego instead yelled at her. When an employer yells at an employee for using an accommodation, a reasonable juror could find that the employer failed to accommodate the employee. *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 803 (7th Cir. 2005) (reversing summary judgment because a reasonable jury could find employer did not reasonably accommodate employee when supervisor "yelled at"

employee for using offered accommodation). Ms. Wise's accommodation allowed her to ask for help. Ans. Br. 28-32. But when Ms. Wise did so—asking Lego for help pushing the mail gurney because it exceeded her twenty-pound weight restriction—Lego did not help her and instead yelled at her. (USPS Investigative Aff., Encl. 3 to Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. Partial Summ. J., ROA at 404-05.) USPS claims that Ms. Wise was only asking for help on *how* to push the mail gurney, not for help because of her accommodation. Ans. Br. at 24. But it is clear that Ms. Wise "asked [Lego] . . . for help to push my gurney" but "he didn't give me help and he yelled at me." (Wise EEOC Hr'g Test, Ex. Q to Pl.'s Mot. Partial Summ. J., ROA at 140-142.) During her deposition, Ms. Wise was asked if she told Lego why she needed help with the gurney and she responded, "'[bec]ause I was pregnant and I gave them my restrictions." (Wise EEOC Hr'g Test., Ex. R to Pl.'s Resp. Def.'s Mot. Summ. J., ROA at 142.) A reasonable juror could look to this incident as evidence that USPS did not honor Ms. Wise's accommodation.

B. In The Alternative, USPS Should Have Known That Ms. Wise's Accommodation Was Not Reasonable And Failed To Restart The Interactive Process.

In the alternative, Ms. Wise established that USPS should have

known that she could not perform an essential function of her job with the accommodation given, triggering its duty to further engage in the interactive process in good faith. Its failure to do so violated its duty to reasonably accommodate Ms. Wise. Op. Br. at 32-36.

1. In response, USPS argues that the evidence in the record does not support the assertion that USPS knew Ms. Wise could not perform an essential function of her job. Ans. Br. at 33. But the record indicates USPS knew of at least two issues that indicated Ms. Wise's accommodation was unreasonable, and thus that triggered USPS's duty to restart the interactive process. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139 (9th Cir. 2001) (employer's failure to restart interactive process "once it was aware that the initial arrangement was not effective, constitutes a violation of its duty").

First, USPS knew that Ms. Wise had no way to determine whether packages exceeded her twenty-pound restriction without first test-lifting them—thus risking both violating her accommodation and harming her pregnancy. (Creek EEOC Hr'g Test., Ex. B to Pl.'s Mot. Partial Summ. J., ROA at 117.) USPS concedes that even management had no way of knowing how much some packages weighed because not

all packages had their weight written on them. Ans. Br. at 6. Thus, a reasonable juror could find that USPS failed to reasonably accommodate her disability by requiring her to test-lift any package to determine whether it was too heavy, when doing so put her health and pregnancy at risk.

Second, USPS knew that the mail gurney weighed at least twenty pounds on its own. (Domingo EEOC Hr'g Test., Ex. U to Pl.'s Mot. Partial Summ. J., ROA at 145 ("The weight of a [mail gurney] . . . is probably more than [twenty] pounds.").) Therefore, USPS knew that each time Ms. Wise had to push the gurney with any amount of mail in it, she would be exceeding her doctor's instruction not to "push anything greater than [twenty] pounds." (OB-GYN Note, Ex. H to Pl.'s Mot. Partial Summ. J, ROA at 127.) USPS argues that because the gurney was on wheels, the force required to push it did not exceed twenty pound-feet of force. Ans. Br. at 25. However, the plain language of Ms. Wise's doctor's note is worded in terms of mass, not force: she is directed not to "lift, pull, or push anything greater than [twenty] pounds." (OB-GYN Note, Ex. H to Pl.'s Mot. Partial Summ. J, ROA at 127.) Thus, a reasonable juror could find that pushing the twenty-

pound gurney would always violate Ms. Wise's accommodation.

USPS knew about both of these issues, and thus was required to restart the interactive process. *Exby-Stolley v. Bd. Cnty. Comm'rs*, 979 F.3d 784, 810 (10th Cir. 2020). Its failure to do so violated its duty to provide Ms. Wise with a reasonable accommodation.

2. As a backup position, USPS asserts that Ms. Wise, not USPS, had the duty to restart the interactive process, and that her failure to do so excused USPS's own failure, relying on *Freadman v. Metropolitan Property & Casualty Insurance Company*, 484 F.3d 91 (1st Cir. 2007). Ans. Br. at 35-36. But as even *Freadman* acknowledges, "[t]here may well be instances in which an employee has made a clear request, the employer has . . . offered an unsatisfactory accommodation, the employee has become too intimidated to continue seeking a satisfactory accommodation, and the employer reasonably should have understood that dynamic" and restarted the interactive process upon its own initiative. *Freadman*, 484 F.3d at 105 (emphasis added).

Here, Ms. Wise testified that she "was scared" to tell USPS that she was exceeding her work restrictions, fearing that she would lose her job as a probationary employee. (Wise Dep., Ex. 9 to Def.'s Resp. to Pl.'s

Mot. Partial Summ. J., ROA at 368.). Coupled with the fact that other terms of her accommodation were flatly ignored by her supervisors, USPS should have reasonably known to restart the interactive process under *Freadman*.

At a minimum, there was a triable issue of fact sufficient to survive summary judgment as to whether USPS had a duty to restart the interactive process. *Brown v. Potter*, 457 F. App'x 668, 671 (9th Cir. 2011) (summary judgment precluded where USPS supervisors had ignored the plaintiff's work restrictions).

C. A Reasonable Juror Could Find It Would Have Been Futile For Ms. Wise To Repeatedly Remind Her Supervisors Of Her Accommodation.

Finally, Ms. Wise established in her opening brief that the district court erred in granting summary judgment to USPS because she had not repeatedly reminded her supervisors of her accommodation. Op. Br. at 27-30. The district court held that by not repeatedly reminding her supervisors of her accommodation, Ms. Wise had failed to engage in the interactive process, and that such a failure defeated her claim that USPS had not reasonably accommodated her disability.

In her opening brief, Ms. Wise established that the district court

was wrong, for two reasons. First, the district court misunderstood the interactive process as being a component of the fourth element of the prima facie case (whether USPS provided a reasonable accommodation), rather than the third element (whether a reasonable accommodation existed). But that is not the law. *Id.* at 27-28 (interactive process is a part of the third element). Second, Ms. Wise also established in her opening brief that she was not required to repeatedly remind her supervisors of her accommodation because a reasonable jury could find that to do so would be futile under *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999), which held that when an employer has signaled that no further accommodation will be made, the employee does not need to make additional, futile requests. *Id.* at 28-32.

In response, USPS tacitly concedes that the district court erred, arguing only that "[e]ven if the district court did comingle the analytical steps," this Court can affirm because Ms. Wise failed to repeatedly remind her supervisors of her accommodation, and it would not have been futile for her to do so. Ans. Br. at 30. As to *Davoll*, USPS argues that it is "inapposite" because there the employer "had a written policy against the accommodation request." *Id.* at 32.

USPS is wrong, both on the law and the facts. As to the law, *Davoll* held that an employee "need not . . . subject himself 'to personal rebuffs' by making a request that will surely be denied" based on an employer's "explicit actions," not just written policies. 194 F.3d at 1133. Other cases are in accord. *See, e.g.*, *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996).

As to the facts, Domingo and Lego's prior actions had made clear that any explicit reminders by Ms. Wise would have been futile. Ms. Wise was told to leave packages behind when they were too heavy, but when she did exactly that she was ordered to return and deliver them. (Wise Dep., Ex. Q to Pl.'s Mot. Partial Summ. J., ROA at 140.) Ms. Wise was told to ask for help when she needed it, but when she did so, she received no help and was yelled at instead. (Wise Dep., Ex. R to Pl.'s Mot. Partial Summ. J., ROA at 141.) A reasonable juror could find that these "explicit actions" signaled Domingo and Lego's hostility towards her accommodation, rendering futile any efforts on Ms. Wise's part to reminder them of her accommodation's requirements.

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Thus, the district court erred in granting USPS summary

judgment on Ms. Wise's failure to accommodate claim.

II. A REASONABLE JUROR COULD FIND THAT USPS FIRED MS. WISE IN RETALIATION FOR HER ACCOMODATION.

Ms. Wise established in her opening brief that a reasonable juror could find that USPS fired Ms. Wise in retaliation for her accommodation. Op. Br. at 37. She showed that she engaged in a protected activity, that she was fired shortly thereafter, and that a reasonable juror could find that her firing was caused by her protected activity based on the close timing, Domingo and Lego's mistreatment of her, and their inconsistent justifications and actions to find retaliatory animus. *Id.* at 37-56.

In response, USPS does not dispute that Ms. Wise engaged in a protected activity and suffered an adverse employment action, nor that her firing shortly followed her accommodation. Ans. Br. at 38. Nevertheless, USPS argues that Ms. Wise cannot rely on that close timing to show that there was a causal connection between her accommodation and her firing, and that she provided no other evidence of causation or pretext. *Id.* at 45, 48-50. But Ms. Wise introduced sufficient evidence from which a reasonable juror could find a causal connection between her accommodation and termination, *see* part II.A,

and that USPS's reason for termination was pretextual, *see* part II.B.

A. Ms. Wise Introduced Sufficient Evidence Of A Causal Connection.

Before the lower court, Ms. Wise put on two types of evidence to show causation: temporal proximity, and mistreatment by her supervisors Domingo and Lego. Op. Br. at 44-46. From this, a reasonable juror could conclude that USPS fired Ms. Wise in retaliation for her accommodation. *Id*.

In response, USPS argues that a reasonable juror could not rely on temporal proximity to find causation because Ms. Wise's prior evaluations and her route departure[4] broke the causal chain between her accommodation and firing. Ans. Br. at 41-43. USPS also claims Ms. Wise provided no evidence of mistreatment by Domingo and Lego from which a reasonable juror could infer causation. *Id.* at 45.

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[4] Throughout its answer, USPS argues that it never cited her "resignation" to justify terminating Ms. Wise. *See*, *e.g.*, Ans. Br. at 45, 48. Ms. Wise used the term "resignation" in the opening brief as shorthand for her decision to leave her route and resign. Op. Br. at 40 ("[T]he district court held . . . [Ms. Wise's] resignation and departure from her route . . . gave USPS legitimate grounds to terminate her."). For clarity, this brief will use the phrase "route departure" rather than "resignation and departure from her route" or "resignation," though all reference the same events.

USPS is wrong on both points. First, Ms. Wise's temporal proximity evidence alone can satisfy the causation element. *See* part II.A.i. Second, a reasonable juror could view Domingo and Lego's behavior as animus against Ms. Wise's accommodation, and thus as additional evidence of causation. *See* part II.A.ii.

i. The temporal proximity between Ms. Wise's accommodation and her firing is sufficient to demonstrate causation.

Proving a prima facie case under the *McDonnell-Douglas* framework is "not onerous." *See Texas Dep't. Cmty. Affs. v. Burdine,* 450 U.S. 248, 253 (1981) (discussing framework in disparate treatment context). Under this framework, a reasonable juror can find causation based on evidence of close temporal proximity alone. *Ramirez v. Okla. Dep't Health*, 41 F.3d 584, 596 (10th Cir. 1994) (six weeks between protected activity and adverse action sufficient for causation). Here, only sixteen days passed between Ms. Wise's accommodation and her firing; as she demonstrated in her opening brief, that is sufficient temporal proximity from which a reasonable juror could find causation. Op. Br. at 43.

In response, USPS argues that temporal proximity is not evidence

of causation because (1) Ms. Wise received negative evaluations prior to her accommodation, and (2) her route departure constituted an "intervening event" that the district court appropriately considered to have broken any causal chain between her accommodation and her firing. USPS is mistaken; neither fact would prevent Ms. Wise from demonstrating causation for purposes of her prima facie case.

1. USPS first argues that Ms. Wise's performance evaluations from before she received her accommodation would prevent a juror from inferring causation from temporal proximity alone. Ans. Br. at 41.[5] But prior negative evaluations cannot break the causal connection implied by temporal proximity when the employer specifically disclaims those evaluations as the reason for firing the employee. *Cooper v. New*

[5] In support of this argument, USPS cites *LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217 (3d Cir. 2007). But that case is distinguishable; there, three months had elapsed between the protected activity and the adverse action, so the Third Circuit required more evidence of causation than temporal proximity alone. *Id.* at 233. The employee cited her strained relationship with her supervisor as further evidence, but that relationship had soured long before her protected activity. *Id.* Because the poor relationship had predated the protected activity, the Third Circuit found that it could not close the gap and establish causation. *Id.* at 234. Here, by contrast, temporal proximity alone is sufficient, bolstered by additional evidence, as discussed below. *See* part II.A.ii.

York State Nurses Ass'n, 847 F. Supp. 2d 437, 449 (E.D.N.Y. 2012). As Ms. Wise established in her opening brief, USPS disclaimed her evaluations as the reason for her firing. Op. Br. at 43-44.

In response, USPS claims it never did so. Ans. Br. 44. But it did, on numerous occasions. For example, in USPS's reply brief in support of its motion for summary judgment below, USPS admitted that it "did not cite the evaluations in the Motion as a reason for the termination." (Def.'s Reply to Pl.'s Resp. to Def.'s Mot. Summ. J., ROA at 414.) And both Domingo and Lego testified before the EEOC that they fired Ms. Wise specifically for the route departure. (Domingo EEOC Hr'g Test., Ex. D to Pl.'s Mot. for Partial Summ. J., ROA at 123 (testifying Ms. Wise was only removed "because of what transpired at westwood," i.e. her route departure); Lego EEOC Hr'g Test., Ex. C to Pl.'s Mot. for Partial Summ. J., ROA at 119 (testifying only Ms. Wise's route departure was "egregious" enough to justify separation). Because USPS disclaimed the prior evaluations as a basis for Ms. Wise's firing, they would not break the causal chain that a juror would infer from the close temporal proximity between her accommodation and firing.

2. USPS's argument that Ms. Wise's route departure broke

causation also fails. As explained in the opening brief, the *McDonnell-Douglas* framework has three distinct steps: first, the employee must meet the minimal burden of establishing the prima facie case that the employer retaliated against her for her accommodation; second, the employer may offer a non-discriminatory justification for firing the employee; and third, the employee must show that the employer's purported justification was mere pretext for retaliation. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Before the district court, USPS offered Ms. Wise's route departure solely as its non-discriminatory justification for firing her at the second step of the framework. (Def.'s Mot. Summ. J., ROA at 187.) The district court, however, considered *sua sponte* that justification as evidence that Ms. Wise could not establish her prima facie case at step one of the framework. As Ms. Wise demonstrated in her opening brief, that was error. Op. Br. at 47-52.

USPS argues the district court appropriately treated Ms. Wise's route departure as an "intervening event" undermining causation, citing *Twigg v. Hawker Beechcraft Corp.,* 659 F.3d 987, 1001-02 (10th Cir. 2011). Ans. Br. at 43. But *Twigg* —which did not even involve the

McDonnell-Douglas framework, *see* 659 F.3d at 999—says nothing about whether a district court errs when it conflates an excuse provided by an employer at step two of the *McDonnell-Douglas* framework with an intervening event breaking causation at step one, without considering the employee's evidence that the excuse was mere pretext for retaliation. *See* part II.B.i.

If the district court had properly considered Ms. Wise's pretext evidence, it would have found that USPS's justification was pretextual. *See* part II.B. And if Ms. Wise's route departure was mere pretext for retaliation, then it would not have broken the causal connection implied by the temporal proximity between Ms. Wise's accommodation and firing. *See* parts II.B.i-ii. Thus, temporal proximity alone was sufficient for a reasonable juror to find causation.

ii. Ms. Wise provided additional evidence to show causation.

Ms. Wise also established in her opening brief that the record contained evidence of previous mistreatment by Ms. Wise's supervisors, suggesting animus, that a reasonable juror could rely on to find a causal connection between her accommodation and firing. Op. Br. at 45; *Gillette v. Unified Gov't Wyandotte Cnty./Kan. City*, No. 13-cv-2540-

TJJ, 2015 WL 4898616 at *21-22 (D. Kan. Aug. 17, 2015) (finding causation based on supervisor yelling at and threatening employee when she reported gender discrimination). Ms. Wise provided evidence that Domingo and Lego subjected her to harsh treatment, yelled at her when she used her accommodation, or tried to get her to abandon it. Op. Br. at 46. A reasonable juror could find Domingo and Lego acted with animus towards Ms. Wise's accommodation, and thus find a causal connection between her accommodation and her firing. *Id.* at 47.

As to this evidence, USPS falls back on its previous argument that Ms. Wise had a duty to remind her supervisors of her accommodation. Ans. Br. at 45, 28-29. However, a juror would look to the specific behavior of the supervisors to determine whether those behaviors implied a causal connection between the employee's accommodation and the adverse action. *Gillette*, 2015 WL 4898616 at *21-22 (examining the supervisor's reaction to the plaintiff's protected activity). Both Domingo and Lego knew Ms. Wise needed an accommodation and they reacted in these instances by either ignoring the accommodation's requirements, yelling at her, or both. Op. Br. at 46. Thus, regardless of whether Ms. Wise had a duty to remind her supervisors of her accommodation to

satisfy her failure to accommodate claim, *supra*, a reasonable juror could still find that Domingo and Lego's actions were evidence of causation under her retaliation claim. *See, e.g.*, *Gillette*, 2015 WL 4898616 at *16, 21-22 (finding plaintiff couldn't prove hostile work environment claim but could prove retaliation with the same evidence).

* * *

Ms. Wise provided sufficient evidence from which a reasonable juror could find a causal connection between her accommodation and her firing. Thus, the district court should be reversed.

B. Ms. Wise Provided Sufficient Evidence Of Pretext.

As noted above, Ms. Wise established in her opening brief that the district court erred in considering USPS's non-discriminatory justification as a part of whether Ms. Wise met her minimal burden to establish a prima facie case of retaliation. Op. Br. at 47-51. In response, USPS acknowledges that the district court comingled the first and second steps by using USPS's step-two proffer to find that Ms. Wise did not establish her prima facie case at step one. Ans. Br. at 46. Instead, USPS argues two points: First, that the district court could consider its step-two evidence in the prima facie case and did not have

to proceed beyond step one. *Id.* at 46-47. Second, in the alternative, USPS argues that it never shifted its explanations for Ms. Wise's termination, that USPS's decision to initially welcome her back holds no relevance, and that her temporal proximity evidence has no value. *Id.* at 48-52.

USPS misses the mark. First, with respect to the *McDonnell-Douglas* framework, the district court's error lies not in what evidence it did consider, but in what evidence it *didn't*: Ms. Wise's pretext evidence. And because that error was harmful, the district court should be reversed. *See* part II.B.i. Second, a reasonable juror could find bad faith in Domingo and Lego's shifting explanations for their treatment of Ms. Wise which would in turn cause the juror to disbelieve USPS's stated non-discriminatory reason for firing her. *See* part II.B.ii.

i. The district court erred by failing to address Ms. Wise's pretext evidence when it treated USPS's step-two justification for firing Ms. Wise as a step-one "intervening event."

When evaluating an employee's prima facie case under step one of the *McDonnell-Douglas* framework, a court errs if it takes an employer's non-discriminatory justification, properly treated under step two, without also considering evidence that the justification was pretext

for retaliation, properly evaluated under step three. Op. Br. at 49-50. Failing to consider evidence of pretext "cut[s] short the analysis" before the entire record is assessed. *Cf. Anderson v. Zubieta*, 180 F.3d 329, 344 (D.C. Cir. 1999) (lower court's mishandling of the prima facie case caused it to improperly overlook the defendant's justification for its eligibility criteria and plaintiff's rebutting pretext evidence).

USPS counters that the district court could freely consider its step two proffered reason for firing Ms. Wise as an "intervening event," defeating Ms. Wise's prima facie claim, without having to analyze whether that proffered reason was mere pretext. Ans. Br. 47. But that gives USPS all of the benefits of the *McDonnell-Douglas* framework (an opportunity to justify its actions under step two) without any of its burdens (having that justification tested by evidence from Ms. Wise). When a court relies on an employer's proffered justification to find that an employee's retaliation claim fails, it must consider the employee's evidence that the justification is mere pretext or else the court has violated *McDonnell-Douglas* itself. Op. Br. at 50. *See, e.g.*, *Li-Wei Kao v. Erie Cmty. Coll.*, No. 11-CV-415, 2015 WL 3823719 at *19-20 (W.D.N.Y. June 19, 2015) (considering pretext evidence to ensure a

reasonable juror couldn't question whether employer's non-discriminatory justification was the motivation for the adverse action, despite finding that justification was an "intervening event" which undermined causation established by temporal proximity).[6]

Here, by contrast, the district court effectively stopped its analysis after accepting USPS's stated justification for firing Ms. Wise without considering Ms. Wise's arguments that USPS's stated reasons were pretext for retaliation. As the next section demonstrates, had the district court adequately considered Ms. Wise's pretext evidence under step three, it would have found that a reasonable juror could have found that USPS's stated reason for firing Ms. Wise was pretext for discrimination. Thus, the district court's failure to consider this evidence was harmful error.

ii. Ms. Wise provided sufficient evidence of pretext.

Under *McDonnell-Douglas*, a plaintiff demonstrates pretext by showing inconsistency, contradiction, or other weaknesses in an

[6] This Court mirrored the same approach in *Twigg* and the unpublished case USPS cited, *Aman*; in both cases, this Court addressed the relevant pretext evidence the plaintiff had to challenge the employer's proffered justification. *Twigg*, 659 F.3d at 1002; *Aman v. Dillon Cos., Inc.*, 645 F. App'x 719, 728 n.6 (10th Cir. 2016).

employer's explanations for its actions such that a reasonable juror could disbelieve them. *See Martin v. Canon Bus. Solutions., Inc.,* No. 11-cv-02565-WJM-KMT, 2013 WL 4838913 at *7 (D. Colo., Sept. 10, 2013) (denying motion for summary judgment on retaliation claim as plaintiff provided sufficient evidence of pretext). In her opening brief, Ms. Wise pointed to evidence of pretext the district court overlooked; namely, how the same supervisors who mistreated her for her accommodation went against USPS's decision to reinstate her, fired her, and then offered inconsistent explanations why. Op. Br. at 53-56. From this evidence, a reasonable juror could find that Domingo and Lego's stated reasons for firing Ms. Wise were pretext.

In response, USPS argues that it never offered inconsistent explanations for Ms. Wise's termination, or in the alternative any inconsistencies were not in bad faith. Ans. Br. at 52. But (1) the record shows clear inconsistent explanations, and (2) the inconsistencies came from supervisors who mistreated Ms. Wise, suggesting bad faith and a retaliatory motive.[7]

[7] Additionally, USPS argues Ms. Wise never contested that she left her route and that temporal proximity has no probative value of

1. USPS argues that it (and its supervisors Domingo and Lego) consistently cited Ms. Wise's "unacceptable work performance" as the basis for her termination. Ans. Br. at 51. But Domingo and Lego were inconsistent as to what "unacceptable work performance" meant. For example, the letter suspending Ms. Wise identified her absences and missed scans as what constituted "unacceptable work performance," while her route departure was deemed only a "failure to follow instructions." (Letter of Suspension, Ex. 4. to Def.'s Mot. Summ. J., ROA at 259-261.) Two days later, Domingo and Lego fired Ms. Wise for "unacceptable work performance" only. (USPS Letter of Separation, Ex. 4 Def.'s Mot. Summ. J, ROA at 262.) But even then, Domingo was not sure what they had meant by "unacceptable work performance." (*Compare* Domingo EEOC Hr'g Test., Ex. D to Pl.'s Mot. for Partial Summ. J., ROA at 123 (testifying Ms. Wise was fired only for her

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pretext due to that route departure. Ans. Br. at 42, 53. As to the route departure, Ms. Wise does not have to prove the reason cited by USPS did not happen, only that that it was not the true motivation behind USPS's decision to terminate her. *Wells v. Colo. Dep't Transp.*, 325 F.3d 1205, 1212 (10th Cir. 2003) (noting that retaliation claim focuses on improper motives). As to temporal proximity, a reasonable juror who disbelieves USPS's proffered reason based on the record can still use temporal proximity as further evidence of causation and pretext. *See Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1213 (10th Cir. 2007).

decision to leave her route and resign) *with* Domingo EEOC Hr'g Test., Ex. 2 to Def.'s Mot. Summ. J., ROA at 228-229 (wavering multiple times on whether Ms. Wise was suspended only for her route departure or as part of a progressive action).)

Further inconsistencies can be found in USPS's briefing below. In its motion for summary judgment, USPS claimed that both Ms. Wise's route departure and her violation of "postal rules" informed its decision to terminate. (Def.'s Mot. Summ. J., ROA at 187.) However, the letter of suspension Domingo and Lego issued to Ms. Wise shows no indication they planned to fire her for these actions; instead it warned only that *further* issues could result in termination. (Letter of Suspension, Ex. 4. to Def.'s Mot. Summ. J., ROA at 259-261.)

A reasonable juror could find pretext based on these inconsistent explanations of whether Ms. Wise was suspended and fired for "postal rules" violations, which USPS said was different from the route departure in its motion for summary judgment.

2. USPS argued that even if it offered inconsistent explanations, there is no evidence those explanations were offered in bad faith, and that the record shows USPS had grounds to terminate Ms. Wise even

after her return. Ans. Br. at 52. But it is the manner of Ms. Wise's termination, coupled with other evidence, that could lead a reasonable juror to find that the reasons given by USPS were pretext.

Ms. Wise only returned to USPS after her route departure with the encouragement and assistance of other USPS employees and higher-ups who did not have to accept her letter rescinding her resignation. Op. Br. at 55. After USPS accepted her back, Domingo and Lego decided to go against USPS's decision and fire her. *Id.* A reasonable juror could compare the actions of the USPS higher-ups—who did not have a history of trying to get Ms. Wise to forgo her accommodation—with the actions of Domingo and Lego—who had—to find that their professed motives for firing Ms. Wise were pretext. *Id.* A reasonable juror could conclude the route departure did not motivate Domingo and Lego, who instead sought to disguise their frustration with having to accommodate Ms. Wise's pregnancy by firing her.

* * *

Ms. Wise provided sufficient evidence from which a reasonable juror could conclude USPS's reasons for her firing were mere pretext.

Thus, the district court's failure to analyze her pretext evidence under step three of the *McDonnell-Douglas* framework was harmful error.

CONCLUSION

For the foregoing reasons, Ms. Wise respectfully requests that this Court reverse the district court.

Respectfully submitted,

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January 25, 2023

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