No. 22-1224

In the United States Court of Appeals
For the Tenth Circuit

Sharhea L. Wise,
Plaintiff-Appellant,

v.

Louis DeJoy,
United States Postal Service Postmaster General
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Colorado
Honorable Regina M. Rodriguez
D.C. No. 20-cv-01559-RMR

Answer Brief of Louis DeJoy

Cole Finegan
United States Attorney

Michael C. Johnson
Assistant U.S. Attorney
1801 California Street
Suite 1600
Denver, CO 80202
Telephone: (303) 454-0100

Attorneys for Appellee

Appellee Does Not Request Oral Argument

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF RELATED CASES iv

CITATION CONVENTION vii

STATEMENT OF JURISDICTION vii

INTRODUCTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND FACTS 2

1. Wise joins USPS as a probationary employee and receives unsatisfactory 30- and 60-day performance reviews. 2

2. USPS grants Wise's request for accommodations for her pregnancy-related disability. 5

3. Wise and Lego have a dispute regarding the proper loading of a gurney. 8

4. Domingo asks Wise to return to the station to pick up packages she left there. 9

5. Wise is given a Letter of Warning regarding unscheduled absences. 10

6. Wise walks off the job without finishing her route, resigns, and then rescinds her resignation. 11

7. Wise is issued a second Letter of Warning, this time for missed scans. 13

8. USPS terminates Wise due to unacceptable work performance. 14

9. Wise files suit, USPS moves for summary judgment, and the district court grants USPS's motion 15

SUMMARY OF ARGUMENT 15

ARGUMENT 17

I. The District Court Properly Concluded that USPS Reasonably Accommodated Wise 17

A. Issue raised and ruled upon 17

B. Standard of review 18

C. Argument 18

1. This Court Should Affirm Summary Judgment for the Postal Service on Wise's Failure-to-Accommodate Claim 18

2. Wise's Arguments to the Contrary are Without Merit. 22

a. The Postal Service did not dissuade Wise from abiding by her accommodations 23

b. USPS accommodated Wise. She had a duty to remind her supervisors of her accommodation yet in the two instances she complains about she did not do so. 28

c. Wise's accommodation was not unreasonable, and USPS was under no obligation to restart the interactive process 32

II. The District Court Properly Concluded that USPS Did Not Fire Wise in Retaliation for Her Accommodation. 36

A. Issue raised and ruled upon 36

B. Standard of review 36

C. Argument 37

1. *This Court Should Affirm Summary Judgment for the Postal Service on Wise's Retaliation Claim* 37

a. The district court properly concluded that Wise failed to present evidence of a causal connection between her request for an accommodation and her ultimate discharge. 37

b. Wise's claim fails because the agency had a legitimate, nonretaliatory reason to discharge her, and there is no evidence of pretext. 39

2. *Wise's Arguments to the Contrary are Without Merit* 41

a. Wise did not provide evidence showing a causal connection. 41

b. Wise did not provide evidence showing the Postal Service's proffered reason for firing her was pretextual. 45

CONCLUSION 53

CERTIFICATE OF COMPLIANCE 54

CERTIFICATE OF SERVICE 55

TABLE OF AUTHORITIES

Federal Cases

Aman v. Dillon Companies, Inc.,
645 F. App'x 719 (10th Cir. 2016) (unpublished) 42, 43, 46

Aubrey v. Koppes,
975 F.3d 995 (10th Cir. 2020) 19, 29

Center For Native Ecosystems v. Cables,
509 F.3d 1310 (10th Cir. 2007) 30

Davoll v. Webb,
194 F.3d 1116 (10th Cir. 1999) 32

Freadman v. Metro. Prop. & Cas. Ins. Co.,
484 F.3d 91 (1st Cir. 2007) 35

Gomes v. Wood,
451 F.3d 1122 (10th Cir. 2006) 30

Gonzales v. Univ. of Colo.,
No. 18-cv-01178-RBJ, 2019 WL 10250757
(D. Colo. Nov. 21, 2019) (unpublished) 43, 44

Gutierrez v. Cobos,
841 F.3d 895 (10th Cir. 2016) 18

In re Smith,
10 F.3d 723 (10th Cir. 1993) 43

Jaramillo v. Colo. Jud. Dep't,
427 F.3d 1303 (10th Cir. 2005) 51, 52

Kilcrease v. Domenico Transportation Co.,
828 F.3d 1214 (10th Cir. 2016) 38

LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n,
503 F.3d 217 (3d Cir. 2007) 41

Litzsinger v. Adams Cnty. Coroner's Office,
25 F.4th 1280 (10th Cir. 2022)..51

Li-Wei Kao v. Erie Cmty. Coll.,
No. 11-CV-415, 2015 WL 3823719
(W.D.N.Y. June 19, 2015) (unpublished)..46

Marcantel v. Michael & Sonja Saltman Family Tr.,
993 F.3d 1212 (10th Cir. 2021) 18, 36

McDonnell Douglas Corp. v. Green,
411 U.S 792 (1973) 37

McFarland v. City & Cnty. of Denver,
744 F. App'x 583 (10th Cir. 2018) (unpublished).....................27, 28

Proctor v. United Parcel Service,
502 F.3d 1200 (10th Cir. 2007) 38, 40

Smith v. Midland Brake Inc., a Div. of Echlin, Inc.,
180 F.3d 1154 (10th Cir. 1999) 26

Stover v. Martinez,
382 F.3d 1064 (10th Cir. 2004) 37, 47

Templeton v. Neodata Services, Inc.,
162 F.3d 617 (10th Cir. 1998) 27

Twigg v. Hawker Beechcraft Corp.,
659 F.3d 987 (10th Cir. 2011) 39, 42, 43, 52

Wilkerson v. Shinseki,
606 F.3d 1256 (10th Cir. 2010) 27

Federal Statutes & Rules

28 U.S.C. § 1291...viii

28 U.S.C. § 1331...viii

29 U.S.C. § 794(a) viii

42 U.S.C. § 2000e-2(a)(1) .... vii-viii

42 U.S.C. § 2000e(k).. vii-viii

42 U.S.C. § 12111 viii

42 U.S.C. § 12112 viii

Fed. R. Civ. P. 56(a) 18, 36

Statement of Related Cases

None.

Citation Convention

This brief cites to the record on appeal by page number. For example, "(ROA at 117 (Page 236:17 to 237:6).)" refers to page 117 of the record on appeal, which itself contains four pages of transcript material in reduced size. The reduced original four transcript pages are numbered on the top right corner of each transcript page. Page numbers for a page of the record on appeal are on the bottom right corner of the page. Thus, "(ROA at 117 (Page 236:17 to 237:6).)" refers to record page 117, and in particular transcript pages 236 and 237 contained on record page 117, specifically transcript page 236 starting at line 17 to transcript page 237 ending at line 6.

Statement of Jurisdiction

Plaintiff-Appellant Sharhea Wise filed a complaint in district court against Defendant-Appellee Louis DeJoy, the Postmaster General for the United States Postal Service (USPS or the Postal Service), asserting claims under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, 42 U.S.C.

§§ 2000e(k) & 2000e-2(a)(1); the Rehabilitation Act, 29 U.S.C. § 794(a); and the Americans with Disabilities Act, 42 U.S.C. §§ 12111(2), 12112(a), and 12112(b)(5)(A). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

The district court granted USPS's motion for summary judgment and entered final judgment on April 1, 2022. (ROA at 471.) Wise requested and received an extension of time to file her notice of appeal (ROA at 3 (docket no. 69)), and on July 25, 2022, timely filed her notice of appeal. (ROA at 479.)

This court has jurisdiction pursuant to 28 U.S.C. § 1291.

Introduction

Sharhea Wise worked as a probationary mail carrier for the Postal Service for three months from November 2014 to January 2015. During that time, she received two negative performance reviews, two letters of warning, and, after she abandoned her mail route, a seven-day, paid suspension. Shortly thereafter, she was terminated. Although Wise was pregnant at the time, the undisputed material facts show the Postal Service accommodated Wise's pregnancy-related disability. Those facts also show Wise was terminated due to unacceptable work performance, rather than in retaliation for Wise's request for an accommodation.

Statement of the Issues

I. Wise agrees that she was required, as part of her pregnancy-related accommodation, to tell a manager or another employee to assist her with lifting, pulling, or pushing more than 20 pounds. She complains of two incidents involving her managers in which she alleges the Postal Service did not accommodate her, but in neither incident did she tell a manager or another employee to assist her due to her weight restriction. Did the Postal Service accommodate Wise?

II. (a) To establish a prima facie case of retaliation, a plaintiff is required to show, among other things, a causal connection between her protected activity and the adverse action. After Wise received an accommodation, she abandoned her postal route without cause or authorization. Did her abandonment of her route provide an independent justification for her termination, and prevent her from showing the necessary causal connection?

(b) Alternatively, did Wise's abandonment of her route, in addition to her other unacceptable work performance, show the Postal Service had legitimate, nonretaliatory reasons to terminate her? Has Wise has failed to show pretext, given that she principally relies again on the incidents involving her two managers, but failed in those incidents to tell a manager or another employee to assist her due to her weight restriction?

STATEMENT OF THE CASE AND FACTS

1. Wise joins USPS as a probationary employee and receives unsatisfactory 30- and 60-day performance reviews.

Wise began working as a probationary City Carrier Assistant ("CCA") for the Postal Service on November 1, 2014, at the Capitol

Hill station in Denver, Colorado. (ROA at 39, ¶ 10.) Wise was a probationary employee during her entire time as a Postal Service employee. (ROA at 68, ¶ 2.) City Carrier is a stressful job with a steep learning curve involving time crunches, weather challenges, and dogs, among other difficulties. (ROA at 205:13-19; 206:22 to 207:2.) About 40% of CCAs do not make it through their probationary period, and they are subject to heightened scrutiny from management. (ROA at 209:9-16; 210:12-15.)

Wise's supervisor at Capitol Hill was Sandra Creek. (ROA at 266.) Creek filled out a 30-day evaluation for Wise on December 1, 2014, in which she rated Wise unsatisfactory in three out of six areas: work quantity, work quality, and work methods. (ROA at 208:18-25; 265.) Creek also noted that Wise needed to improve in scanning. (ROA at 208:18-21.)

Wise was reassigned to the South Denver station at around the same time. (ROA at 68, ¶ 3.) At the South Denver station, Wise's supervisors were Dean Lego, her immediate supervisor, and Ron Domingo, her second-level supervisor. (ROA at 195:24 to 196:13.) When Lego was assigned to South Denver, it was among the bottom

10% of post offices in Denver for performance, and he believed that his task there was to improve performance. To do so, he used tools like discipline, investigative interviews, and official discussions. (ROA at 232:3-11; 233:8 to 234:2.) During the relevant time, the South Denver office had around 20 to 23 carriers. Lego issued discipline to 13 of them, of whom seven were women and six were men. (ROA at 242:18-23; 244:8-10.)

On December 25, 2014, Wise learned that she was pregnant and she told Domingo the next day. (ROA at 264, ¶¶ 12-13.) She did not request any accommodations for her pregnancy at that time.

Wise was given a 60-day evaluation dated December 31, 2014. (ROA at 265.) She received unsatisfactory ratings in the same three areas as her 30-day evaluation—work quantity, work quality, and work methods—and one more unsatisfactory rating for dependability. *Id*. The bulk of that 60 days encompassed the period of time before Wise knew she was pregnant, and the remainder of the time (December 26-30) included time in which she had not requested any accommodation due to her pregnancy.

Wise could not name a similarly-situated probationary employee who was treated more favorably with respect to a 30- or 60-day evaluation. (ROA at 305-06.)

2. USPS grants Wise's request for accommodations for her pregnancy-related disability.

On January 15, 2015, Wise gave Domingo a note from her OBGYN recommending that she not lift, push, or pull more than 20 pounds due to her pregnancy. (ROA at 254; 219:10-19.) The Postal Service did not need anything other than the doctor's note in order to accommodate Wise, and as soon as Domingo received it, the Postal Service recognized those restrictions. (ROA at 377:8-12.)

To implement the accommodation, Domingo and Lego both told Wise that she could leave packages over 20 pounds at the station. (ROA at 221:2-6.) Restrictions for Postal employees against lifting, pushing, or pulling 20 pounds are very common. (ROA at 213:15-25.) If an employee has a lifting, pushing, or pulling restriction, the employee is expected to follow those restrictions himself and tell a member of management if the employee believes that a task exceeds those restrictions. (ROA at 105, ¶32; 213:10-22; 373:23 to 374:7.) A mail carrier with a 20-pound lifting, pushing, and pulling restriction

can still perform the essential functions of her job, (ROA at 102-03, ¶9; 251:8-17), and Domingo has seen mail carriers with such limitations do so. (ROA at 251:8-17.)

Wise bore the responsibility, however, to tell management if she ran into a situation where she felt that her restrictions would be exceeded. (ROA at 197:5-11.) Functionally, there was no way for management to know that a particular task exceeded Wise's restrictions unless she told her supervisors. (ROA at 198:1-3.) Postal management generally would not know the weight of any particular package because packages come from many different sources such as clerks, carriers, and retail customers; management is not focused on evaluating every parcel that goes to every route; and not every parcel has a weight written on the outside of the parcel. (ROA at 117 (Page 236:17 to 237:6).) Wise's managers believed that she knew not to pick up packages that were too heavy for her. (ROA at 204:7-9.) She was told that if there was something she could not do because of her restrictions that she should tell management and they would find a different way to get it done. (ROA at 375:12-20; 376:11-15.)

On January 16, 2015, the day after Wise presented the letter, the Postal Service approved her request for a light-duty assignment and listed the same restrictions as her doctor, i.e., no lifting, pushing, or pulling more than 20 pounds. (ROA at 307; *see also id.* at 272:15-24; 289:16-290:1.) Wise admits that her "accommodation was that she was required to tell a manager or another employee to assist her with heavy packages." (ROA at 103-04, ¶ 18; *see also* 213:10-22.)

Wise typically worked her route alone, and when she was on a route and had to carry something, she chose how much to carry at any one time. (ROA at 366:21 to 367:7; 383:12-21.) If Wise carried more than 20 pounds on her route, it was because she loaded herself with more than 20 pounds. (ROA at 364:16-23.)

Wise never told Domingo or anyone else at the Postal Service that she believed that her lifting, pulling, or pushing restrictions were not being honored. (ROA at 250:11-14; 298:22-25.) Nor has she presented any evidence that management weighed packages for other employees with weight restrictions, or that management provided other employees with weight restrictions with scales or other tools to weigh packages. In fact, she has not presented any

evidence regarding how the Postal Service handled light-duty requests from any other Postal Service employees.

3. Wise and Lego have a dispute regarding the proper loading of a gurney.

One aspect of Wise's duties was loading her truck with mail using a gurney (sometimes also called a cart, hamper, pumpkin, or rolling tub). It is a carrier's responsibility to fill a gurney in a safe manner. (ROA at 200:3-4.) There is no restriction on the number of trips a carrier can make with a gurney to fill her truck, and it is common for carriers to make multiple trips to do so. (ROA at 199:22 to 200:2; 243:7-12.)

Sometime after January 15, 2015, Wise loaded a gurney to move mail to her truck for delivery. (ROA at 280:23-25; 281:11-13; 286:24 to 287:5.) Wise believed that the gurney she loaded on that day required her to push with a force of more than 20 pounds. (ROA at 283:5-8.) She claims she asked Lego for help pushing the gurney, and that he told her she wasn't doing it the right way, yelled at her, and did not help her. (ROA at 280:17-22.)

Wise does not claim that she told Lego that she believed that moving the gurney would require her to violate her 20 pound weight

restriction. (ROA at 298:22-25.) She did not understand what Lego meant when he said that she wasn't doing it the right way, and she did not ask for clarification. (ROA at 282:8-13.)

Domingo testified that if Wise had told him that her gurney needed to be pushed by someone else because of her restrictions, he would have taken care of it. (ROA at 371:20 to 372:7.)

4. Domingo asks Wise to return to the station to pick up packages she left there.

On a particular date after January 15, 2015—Wise cannot remember the specific date (ROA at 274:1-12)—Wise encountered some packages she was scheduled to deliver that she thought were heavy. (ROA at 274:1-16.) Domingo told Wise that if she believed the packages exceeded her 20-pound limit, she should leave them at the station. (ROA at 275:13-20.) Wise did leave at the station the packages she though were heavy. (ROA at 275:13-20.) Sometime later on that same day, Domingo called Wise on the phone while she was out delivering mail and told her to come back to the station and deliver those packages she had left at the station. Wise said "okay," specifically does not recall saying anything else, and specifically does

not recall reminding Domingo of her restrictions. (ROA at 276:18-21; 277:7-13; 278:3-8.) Wise delivered the packages. (ROA at 279:13-17.)

The only times that Wise believes that she asked for help to lift, push, or pull anything that she believed weighed over 20 pounds were the two incidents described above, namely: (1) the incident with Domingo and the packages, and (2) the incident with Lego and the gurney. (ROA at 284:10-19; 285:11-14; 288:9-15.)

5. Wise is given a Letter of Warning regarding unscheduled absences.

Wise was absent from work without prior notice or scheduling on December 18, 2014 (8 hours), January 3, 2015 (8 hours), and January 12, 2015 (5.8 hours). (ROA at 255.) An unscheduled absence is an absence for which the employee has not requested time off in advance. (ROA at 239:3-5.) An unscheduled absence places a burden on other employees who are working because they have to deliver the absent employee's mail, and it also increases costs because of overtime required to cover for the absent employee. (ROA at 240:5 to 241:9.) If an unscheduled absence is later excused, that does not change the fact that the absence was unscheduled; whether

an absence is unscheduled or excused are different concepts. (ROA at 202:5-7.)

On January 21, 2015, the Postal Service issued Wise a Letter of Warning based on her three unscheduled absences. (ROA at 255-56.) The intent of issuing a Letter of Warning to Wise for unscheduled absences was to be corrective, not punitive, and to let Wise know early in her career the seriousness of unexcused absences. (ROA at 203:8-21; 235:20 to 236:3.) Lego has issued Letters of Warning to other employees for unscheduled absences even if the absence was later excused because of a doctor's visit. (ROA at 241:22-25.) Wise does not know of any other CCAs with three or more unscheduled absences who did not receive a Letter of Warning. (ROA at 292:11-14.)

6. Wise walks off the job without finishing her route, resigns, and then rescinds her resignation.

On January 21, 2015, Wise reported to work at the South Denver station expecting to deliver mail. (ROA at 295:1 to 296:5; 384:15 to 395:5.) Despite the cold and snowy weather, Wise arrived at work on that day wearing tennis shoes. (ROA at 385:13-15.) Although Wise's home station was South Denver, at that time CCAs

were sent to other stations on an almost daily basis for a variety of reasons. (ROA at 230:20-23; 231:15-21.) The Postal Service assigned Wise to work at the Westwood station for the day. (ROA at 69, ¶12.)

When Wise arrived at the Westwood station, she was assigned to deliver a route with another carrier. (ROA at 369:14-16.) That carrier lent Wise work boots because she did not have the proper footwear. (ROA at 369:16-18.)

Within about 20 minutes after she left the station for the route, Wise returned to the station. (ROA at 223:14-21; 224:1-8.) Wise did not deliver her route that day. (ROA at 273:10-12.) Once back at the station Wise spoke with the Westwood station's manager, Anita Chavez. (ROA at 223:14-21; 224:1-8.) In the course of her conversation with Chavez, Wise brought up the idea of resignation. (ROA at 225:2-3.) Chavez provided Wise with a resignation form, and Wise wrote on that form that the reason for her resignation was "Personal Reasons (Pregnancy)." (ROA at 263.) Wise rescinded her

resignation the next day, January 22, 2015. (ROA at 226:19 to 227:22.)[1]

About a week later, Domingo issued Wise a Notice of Suspension, which suspended her from work for seven days with pay; the suspension was signed by Lego and Domingo. (ROA at 259-61.) The basis of the suspension, in part, was that Wise did not deliver the route at Westwood on January 21, 2015. (ROA at 228:6-13; 229:11-18. *See also id.* at 259-61.)

Wise does not know of any other CCAs, probationary or otherwise, who failed to deliver their routes as required yet did not receive a suspension. (ROA at 292:11-14.)

7. Wise is issued a second Letter of Warning, this time for missed scans.

On January 22, 2015, Lego issued Wise a Letter of Warning for unacceptable work performance, specifically for failing to scan two pieces of mail that were required to be scanned; Lego signed the Letter of Warning. (ROA at 257-58.) Wise admitted that she did not

[1] The record does not contain any other significant information about Wise's rescission of her resignation.

scan those letters. (ROA at 293:3-10; *see also id*. at 68, ¶9 (Undisputed Fact).)

Wise does not know of any other CCAs who did not scan letters that needed to be scanned who did not receive a Letter of Warning. (ROA at 294:10-13.)

8. USPS terminates Wise due to unacceptable work performance.

Probationary CCAs such as Wise may be removed for just cause, that is, a good reason, and do not have to be given a warning before being removed. (ROA at 211:20 to 212:8; 215:14-23.) On January 30, 2015, Domingo—on behalf of USPS—issued a Letter of Separation to Wise. The letter stated: "The reason for this action is unacceptable work performance." (ROA at 262.)

Domingo made the decision to separate Wise. (ROA at 380:11-13.) Domingo decided to separate Wise because she walked off the job and refused to go back out to deliver the mail. To him, that was an egregious offense. (ROA at 252:23 to 253:2.) Domingo delivered the Letter of Separation to Wise on January 31, 2015. (ROA at 262.)

Wise does not know of another probationary employee in a similar situation who was treated more favorably with respect to a

separation. (ROA at 305-06.) No probationary employee who worked under the same supervisors that Wise served under at South Denver, and who refused to deliver the mail, avoided termination. (ROA at 69, ¶17.)

9. Wise files suit, USPS moves for summary judgment, and the district court grants USPS's motion.

Wise filed an amended employment discrimination complaint in the district court against USPS, raising five "counts." (ROA at 37-51.) Following discovery, Wise moved for partial summary judgment. (ROA at 100-68.) USPS filed its own motion for summary judgment. (ROA at 169-307.) The district court granted USPS's motion and denied Wise's motion. (ROA at 453-70.)

Now on appeal, Wise presses only two of the five counts she raised in her amended complaint. She argues the district court erred in granting USPS's motion on Count II, her retaliation claim, and Count IV, her failure to accommodate claim. *See*, *e.g.*, Opening Brief at 2, 4-5, 19-20.

SUMMARY OF ARGUMENT

1. The Postal Service complied with its obligations to accommodate Wise. She acknowledges that, as part of her

pregnancy-related accommodation, she was required to tell a manager or another employee to assist her with lifting, pulling, or pushing more than 20 pounds. Wise complains about one incident involving Domingo, and one incident involving Lego, in which she alleges the Postal Service did not accommodate her. In neither incident, however, did she tell a manager or another employee to assist her due to her weight restriction.

No evidence shows it would have been futile during those two incidents for Wise to remind her supervisors of her accommodation. Nothing in the record indicates either Domingo or Lego would have required Wise to violate her restriction if she had reminded them of it.

2. The Postal Service did not retaliate against Wise. First, she failed to establish a prima facie case of retaliation. Wise did not present evidence of a causal connection between her request for a pregnancy-related accommodation and her ultimate discharge. After Wise received her accommodation, she abandoned her postal route without cause or authorization. The district court correctly ruled that Wise's abandonment of her route constituted an intervening

event that provided a legitimate basis for USPS's determination to terminate her employment.

Second, even if this court finds Wise established a prima facie case, this court should nevertheless affirm because her abandonment of her route, in addition to her other unacceptable work performance such as her failure to scan two pieces of mail and her three unscheduled absences, shows the Postal Service had legitimate, nonretaliatory reasons to terminate her. Wise was, after all, only a probationary mail carrier. Wise has failed to show that these reasons were pretextual.

This court should affirm the order of the district court.

Argument

I. The District Court Properly Concluded that USPS Reasonably Accommodated Wise.

A. Issue raised and ruled upon

In Count IV of the amended complaint, Wise alleged failure to accommodate. (ROA at 49-50, ¶¶ 56-62.) USPS moved for summary judgment on that count, *id*. at 187-90, and the district court granted USPS's motion. *Id*. at 467-70.

B. Standard of review

This court "review[s] summary judgment de novo, applying the same legal standard as the district court." *Marcantel v. Michael & Sonja Saltman Family Tr.*, 993 F.3d 1212, 1221 (10th Cir. 2021) (quoting *Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016) (citation omitted)). Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). "When applying this standard, we review the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Gutierrez*, 841 F.3d at 900 (quotation omitted).

C. Argument

1. This Court Should Affirm Summary Judgment for the Postal Service on Wise's Failure-to-Accommodate Claim.

USPS complied with its obligations to accommodate Wise. There are generally four elements a plaintiff has to show to establish a prima facie failure-to-accommodate claim: 1) she was disabled, 2) she was otherwise qualified, 3) she requested a plausibly reasonable accommodation, and 4) the employer refused to accommodate her

disability. *Aubrey v. Koppes*, 975 F.3d 995, 1005 (10th Cir. 2020) (citations omitted).

Wise satisfied the first three elements. She was “disabled” due to her pregnancy. She was “otherwise qualified” to perform the duties of her position. She requested a plausibly reasonable accommodation. In particular, she requested to be excused from lifting, pushing, or pulling more than 20 pounds. *See* Op. Br. at 21; ROA at 313, ¶¶ 8, 9. *See also* ROA at 201:16-21. Wise also agrees that her “accommodation was that she was required to tell a manager or another employee to assist her with heavy packages.” (ROA at 103-04, ¶ 18.) Thus, Wise conceded below that her plausibly reasonable accommodation had two components: a requirement that she not lift, push, or pull more than 20 pounds; and a requirement that she tell a manager or another employee to assist her with heavy packages.

Wise did not satisfy the fourth element, however. The undisputed evidence shows that the Postal Service reasonably accommodated her disability. USPS was ready to help with lifting, pushing, or pulling items over 20 pounds upon Wise’s request. That

accommodation would have allowed Wise to accomplish her job, as it has many other CCAs with similar restrictions. (ROA at 251:8-17.) But Wise had the duty to inform a supervisor, or another employee, if she needed help with a heavy package. (ROA at 103-04, ¶18.)

Placing some onus on the carrier to notify management where the accommodation applies makes sense given the independent nature of a carrier's work. For example, as a carrier Wise usually delivered her route on her own. (ROA at 382:7-9.) That meant she was not under direct supervision when she decided what to carry as she delivered mail, and she chose how much to carry at any one time. (ROA at 366:21 to 367:7; 383:12-21.) She also loaded her own gurney at the station to move mail to her postal vehicle. (ROA at 286:24 to 287:5.) She was responsible for filling it in a safe manner. (ROA at 200:3-4.)

Wise failed to provide any evidence to show that the Postal Service did not implement her accommodation. Below, she pointed to only two instances in which she alleges the Postal Service did not accommodate her: the incident involving Domingo and the packages at the station, and the incident involving Lego and the loading of a

gurney. (ROA at 109 (stating she gave "two examples"); 284:10-19; 285:11-14; 288:9-15.) In neither incident did the Postal Service fail to implement Wise's accommodation.

In the first incident, she alleges that Domingo called her back to the office to collect packages that he had earlier told her to leave because she thought they were too heavy. But when Domingo called her, Wise did not remind him of her restrictions or say that lifting the packages would violate her restrictions, she just said "okay" and returned to the station to pick up the packages. (ROA at 276:18-21; 277:7-13; 278:3-8.) She agrees that her "accommodation was that she was required to tell a manager or another employee to assist with heavy packages." (ROA at 103, ¶ 18; 409, ¶ 23.) But when she returned to the station, she did not tell Domingo or any other employee to apply her restrictions before she retrieved the packages.

In the second incident, Wise alleges that Lego yelled at her when she asked for help with a gurney that she had loaded. (ROA at 280:17-22.) Wise did not tell Lego she believed that moving the gurney would require her to violate her 20-pound weight restriction. (ROA at 298:22-25.) Nor did she ask Lego why he yelled at her.

(ROA at 282:8-13.) Notably, Wise herself was the one who loaded the gurney. (ROA at 280:23-25; 281:11-13.) If she had placed fewer items in her gurney she could have moved the gurney more easily and just taken more trips to her truck with the gurney.

The record shows Wise never told anyone at the Postal Service that she believed her restrictions were not being followed. (ROA at 175, ¶ 37.) Her failure to tell the Postal Service during her employment that she did not think it was accommodating her is fatal to her claim. If she thought she might be pulling, pushing, or lifting a load greater than 20 pounds, she was required to tell a manager or another employee and ask for assistance. (ROA at 103, ¶ 18; 409, ¶ 23.) She had to speak up. But she didn't. No evidence suggests the Postal Service did not reasonably accommodate her disability.

2. Wise's Arguments to the Contrary are Without Merit.

Wise raises three arguments in support of her contention that the Postal Service failed to accommodate her. Op.Br. at 22. None of her arguments have merit.

a. The Postal Service did not dissuade Wise from abiding by her accommodations.

Wise claims her supervisors "repeatedly tried to get her to not exercise her accommodations." Op.Br. at 23. She also claims her supervisors ignored her work restrictions and that she was yelled at when she used her accommodations. No evidence in the record supports these claims.

With respect to the incident involving Domingo, Wise claims that when she exercised the accommodation of leaving behind some packages that were too heavy for her, "Domingo called her back to retrieve and deliver them." Op.Br. at 25. Domingo did not, however, suggest, let alone direct, that she violate her accommodation. The record shows that when Domingo called Wise, she did not remind him of her restrictions or say that lifting the packages would violate her restrictions—or even explain why she had left the packages behind. (ROA at 276:18-21; 277:7-13; 278:3-8; 298:22-25.) And she agrees that she was required to tell a manager or another employee to assist with heavy packages. (ROA at 103, ¶ 18; 409, ¶ 23.) She only responded "okay" to Domingo's request.

With respect to the incident involving Lego, Wise complains that "when she did ask for help, she was not provided it and instead was yelled at and made to cry by her supervisor." Op.Br. at 26. The record shows, however, that Wise did not ask for help *because of her weight restriction*, as set forth in her accommodation. Rather, her deposition testimony indicates she asked for help as to how to push the gurney. She testified that Lego yelled at her when she was pushing a gurney. (ROA at 141 (page 37:11-22).) She stated "he just told me I wasn't doing it the right way, and he didn't give me help and he yelled at me…." *Id.* She also testified that Lego told her "how to do it their way." (ROA at 141 (page 39:6-7); 282:4-7.) She was asked at her deposition, "what did you think he was telling you when he said that you weren't doing it the right way," and she responded, "I don't know." She admitted she did not ask him for clarification. (ROA at 141 (page 39:9-13).) Like the incident with Domingo, this occurrence does not show the Postal Service dissuading or punished Wise for requesting an accommodation; rather, it demonstrates her own failure to exercise her accommodation by informing her superiors of the need to do so.

Wise also claims that the gurney by itself—prior to being loaded with mail—weighed 20 pounds, and thus when loaded always exceeded her work restrictions. Op.Br. at 26. In support she relies on the hearing testimony of Domingo, *see id.*, but Domingo did not testify that Wise's position as a CCA required her *to pick up or lift* a gurney off the ground. The device is on wheels. A CCA moves a gurney by rolling it, not by lifting it off the ground.

And Domingo did not testify that pushing or pulling a gurney —even if empty—would exceed Wise's weight restrictions. He was asked, "Isn't it true if the pumpkin was empty it's more than 20 pounds?" and he responded: "The weight of a hamper, of an orange hamper, is probably more than 20 pounds, but the amount of force that's used to push or pull that hamper isn't equal to the weight of the container itself." (ROA at 145 (page 152:8-13).) Domingo's answer makes sense as a matter of simple physics, given that the device is designed to be rolled.

In addition, Wise complains that she was never given a scale to weigh packages, and had no way of knowing how much a package weighed other than lifting it to find out. Op.Br. at 25. Nevertheless,

she does acknowledge that both Domingo and Lego told her to leave packages at the station if she thought they were too heavy. (ROA at 275:13-20; 221:2-6.) The Postal Service did not require the precise weight of any potentially too-heavy package to implement Wise's accommodation, only Wise's belief that something seemed to her to be over her 20-pound restriction.

Wise now appears to be asserting that a different accommodation—an accommodation that included scales—would have been better. Op.Br. at 25. The Postal Service's obligation is to provide a reasonable accommodation, however, not to provide the accommodation the employee thinks is best. *See e.g., Smith v. Midland Brake Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154, 1177 (10th Cir. 1999) ("Stated plainly, under the ADA a qualified individual with a disability is not entitled to the accommodation of her choice, but only to a reasonable accommodation.") (citation omitted). That rule should apply with special force here because Wise never proposed to the Postal Service the accommodation that she apparently asserts now is the only reasonable one, namely, a scale to weigh packages.

Wise's failure to tell the Postal Service during her employment that she did not think the Postal Service's accommodation was adequate—because she was not provided a scale—is also fatal to her claim that she may have wanted a different accommodation. The reasonable accommodation framework requires an interactive process, a flexible give-and-take between the employer and employee to determine, if necessary, what accommodation may work. *Wilkerson v. Shinseki*, 606 F.3d 1256, 1266 (10th Cir. 2010). *See also McFarland v. City & Cnty. of Denver*, 744 F. App'x 583, 586 (10th Cir. 2018) (unpublished) (interactive process part of reasonable accommodation). If there is a breakdown in the interactive process that prevents a reasonable accommodation, and the employee is responsible for it, then the employer is not liable. *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) (upholding summary judgment in employer's favor because the employee failed to provide medical information necessary to the interactive process which precluded her from showing the employer violated its duty to accommodate her). *See also McFarland*, 744 F. App'x at 587 ("An

employer cannot be expected to correct an impediment of which it is not aware.").

This court should come to the same conclusion in this case. After Wise presented her doctor's note to the Postal Service, her supervisors discussed it and provided an accommodation. If she thought that the accommodation did not work (because it put too much onus on her to identify overweight packages, or for any other reason), she had to let the Postal Service know. But she does not recall ever telling anyone at the Postal Service that she believed her restrictions were not being followed. ROA at 298:22-25; *see also id.* at 276:14 to 278:8. Nor did she tell anyone that she needed a scale to properly perform her job. As this court held in *Templeton*, an employer cannot fix a problem it is not aware of, and a plaintiff cannot short circuit the interactive process by going straight to court.

b. USPS accommodated Wise. She had a duty to remind her supervisors of her accommodation yet in the two instances she complains about she did not do so.

Wise argues that the district court erred in imposing on her an ongoing duty to repeatedly remind her supervisors of her accommodation. Op.Br. at 26. She also argues that a reasonable

jury could find that requiring her to repeatedly remind her supervisors would be futile. *Id.* Neither argument has merit.

Wise admitted below that an integral part of her accommodation was the requirement that she tell a manager or another employee if she needed assistance with a heavy package. (ROA at 103-04, ¶ 18.) The district court specifically pointed out in its order granting summary judgment to USPS that "[t]he accommodation at issue is therefore 'that Plaintiff was required to tell a manager or another employee to assist with heavy packages.'" (ROA at 468.) To the extent she may be arguing for the first time on appeal that she had no such duty, that argument is foreclosed by her own sworn testimony.

To satisfy the fourth element of a prima facie case, that the Postal Service "refused to accommodate her disability," *Aubrey*, 975 F.3d at 1005, Wise had to establish: (1) that she was required on a particular occasion to lift, push, or pull more than 20 pounds; and (2) that on that occasion—prior to being required to lift, push, or pull more than 20 pounds—Wise told a manager or another employee to assist her with a heavy package. The undisputed facts demonstrate,

however, that with respect to the two incidents at issue, Wise failed to tell a manager or another employee to assist her with a heavy package. Accordingly, the district court correctly found that Wise did not establish a prima facie case of failure to accommodate.

Wise focuses on the district court's ruling that, due to her failure to engage in the interactive process, she could not establish a prima facie case of failure to accommodate, arguing that the interactive process element properly belongs only in the third step of the failure to accommodate analysis, and not the fourth. Op.Br. at 27. Even if the district court did comingle the analytical steps, this court may affirm on any ground so long as the litigants had a fair opportunity to develop the record, s*ee Center For Native Ecosystems v. Cables*, 509 F.3d 1310, 1324 (10th Cir. 2007), and to address the ground on which this court relies, *see id.; see also Gomes v. Wood*, 451 F.3d 1122, 1133 (10th Cir. 2006).

Here, setting aside the narrow question of where the interactive process plays in the prima facie case analysis, this court should hold that Wise cannot satisfy the fourth element, that USPS refused to accommodate her disability. As shown above in Part I.C.*1*,

a component of Wise's accommodation was her duty to tell a supervisor or another employee if she needed help with a heavy package. She did not do so during the two incidents at issue here, and thus failed to satisfy the fourth element. There can be no dispute that the parties had a fair opportunity to develop the record on whether Wise established a prima facie case of failure to accommodate. Indeed, they both moved for summary judgment on the issue of whether the Postal Service reasonably accommodated Wise. (ROA at 107-10; 187-90.)

Wise also argues that even if she was required to remind her supervisors of her accommodation, her efforts would have been futile. (Op.Br. at 30-32.) But the facts do not support the conclusion that either of her supervisors would have refused to adhere to her accommodation, had she reminded them of it. As to Domingo, there is no dispute that when Domingo called Wise regarding the packages she had left behind, she did not tell him she had done so because she thought they were too heavy. There is thus no evidence showing that, had Domingo been told that's why she left them, he would have required her to come back and deliver them anyway—the very

evidence that would be essential to demonstrating that a reminder would have been futile. And as to Lego as well, there is no evidence showing that she raised the 20-pound restriction in the discussion regarding the proper way to load a gurney. So again, Wise has no evidence that could show that Lego would have required her to violate her restriction, even if she had reminded him of it.

Wise relies on *Davoll v. Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999), but that case is inapposite. In *Davoll*, this court found that the futile-act doctrine applied when an employer had a written policy against the accommodation requested by the employee and the employer told the employee it would not help her obtain the requested accommodation. Here, in contrast, there are no facts suggesting that a reminder from Wise to her supervisors regarding her accommodation would have been futile, and summary judgment was appropriate on that point.

c. Wise's accommodation was not unreasonable, and USPS was under no obligation to restart the interactive process.

Wise claims she could not perform an essential function of her job with the accommodation given and that USPS should have

known this, triggering its duty to further engage in the interactive process. Op.Br. at 32-36. In support she relies on three events: Wise's use of mail carts, the packages incident involving Domingo, and the gurney incident involving Lego. *Id*. None of these events show that Wise could not perform an essential function of her job with the accommodation given. Nor do any of the events show that the Postal Service should have known this, thereby triggering its duty to further engage in the interactive process.

First, the evidence shows Wise could perform the essential functions of her job with the accommodation the Postal Service provided her. She argues she couldn't, asserting that the mail carts weighed 20 pounds when empty. But no evidence in the record indicates that Wise's position as a CCA required her to pick up or lift a cart off the ground. Nor does any evidence show that pushing or pulling a cart when empty is the equivalent of pushing or pulling 20 pounds of weight. (ROA at 145 (page 152:8-13).)

The two incidents she relies on also show she could perform the essential functions of her job with her weight accommodation.

Neither incident shows that Domingo or Lego ignored her work restrictions or only partially addressed her limitation.

As for the incident involving Domingo, Wise cites to page 143 of the record, apparently for the proposition that Domingo "only partially addressed her limitation." Op.Br. at 36. Wise omits the full quote on page 143, in which Domingo stated: "We instructed her to leave packages *which were thought to be over 20 lbs*. The packages were not weighed on a scale, but *if it seemed to be more than 20 lbs., we told her to leave it*. *If a tray of mail was too heavy, she had the option* of splitting the mail into trays of *manageable weight*." (ROA at 143 (emphasis added).) The full quote demonstrates Domingo fully addressed her limitation.

And as for the incident involving Lego, Wise cites to pages 404-05 of the record for the proposition that Lego "yell[ed] at her for not following standard procedures on stacking gurneys when doing so would violate her restrictions." Op.Br. at 36. But there is no mention on pages 404 or 405 of "standard procedures" for "stacking gurneys." At most, page 404 provides as follows: "[W]hen I tried to load my gurney differently and ask for help in pushing the gurney,

Dean Lego would tell me I had to do it 'their way'; not my way." (ROA at 404.) Wise did not, however, tell Lego that she believed that moving the gurney would require her to violate her 20 pound weight restriction. (ROA at 298:22-25.) Wise did not state that Lego explained what he meant when he said Wise had to do it "their way," and Wise did not understand what Lego meant. Nor did she ask him for clarification. (ROA at 282:8-13.) Lego's statement during that incident does not support Wise's claim that he yelled at her for not following standard procedures on stacking gurneys. And pages 404-05 of the record do not indicate that Lego failed to abide by Wise's work restrictions and limitation.

Second, the Postal Service was not on notice that its accommodation for Wise did not adequately enable her to perform her duties. Wise had the obligation to tell the Postal Service if she believed her accommodation was insufficient, but she didn't do so. *See*, *e.g.*, *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91, 105 (1st Cir. 2007) ("We reject plaintiff's proposition that employees who make requests have no obligation to further clarify their needs once

the employer offers an accommodation the employee believes is insufficient.”).

In sum, Wise’s arguments fail to demonstrate that the district court erred in granting summary judgment to the Postal Service.

II. The District Court Properly Concluded that USPS Did Not Fire Wise in Retaliation for Her Accommodation.

A. Issue raised and ruled upon

In Count II of Wise’s amended complaint, she alleged retaliation for requesting a reasonable accommodation. (ROA at 46-47, ¶¶ 44-48.) USPS moved for summary judgment on that count, *id*. at 186-87, and the district court granted USPS’s motion. *Id*. at 464-65.

B. Standard of review

This court “review[s] summary judgment de novo, applying the same legal standard as the district court.” *Marcantel*, 993 F.3d at 1221. Summary judgment is appropriate if “there is no genuine issue as to any material fact” and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a).

C. Argument

1. This Court Should Affirm Summary Judgment for the Postal Service on Wise's Retaliation Claim.

The district court properly granted summary judgment to the Postal Service on Wise's retaliation claim. The court correctly concluded that Wise failed to establish a prima facie case of retaliation. Moreover the Postal Service had legitimate, non-retaliatory reasons for discharging her, and Wise cannot show that those reasons were a pretext for retaliation.

a. The district court properly concluded that Wise failed to present evidence of a causal connection between her request for an accommodation and her ultimate discharge.

Wise rests her claim for retaliation exclusively on indirect evidence. *See*, *e.g.*, Op.Br. at 37. This court thus analyzes her claim under the burden-shifting framework delineated in *McDonnell Douglas Corp. v. Green*, 411 U.S 792, 802-04 (1973). *See Stover v. Martinez,* 382 F.3d 1064, 1070-71 (10th Cir. 2004).

To establish a prima facie claim of retaliation under the *McDonnell Douglas* framework, Wise is required to show: (1) she engaged in a protected activity; (2) she was subject to an adverse

action by an employer either after or contemporaneous with her employee's protected action; and (3) a causal connection between her action and USPS's adverse action. *See Kilcrease v. Domenico Transportation Co.*, 828 F.3d 1214, 1225 (10th Cir. 2016).

There is no dispute that Wise satisfies the first two prongs of the test. Wise cannot, however, show a causal connection between her request for an accommodation and her later termination.

To show causation, a plaintiff must present "evidence of circumstances that justify an inference of retaliatory motive…." *Proctor v. United Parcel Service*, 502 F.3d 1200, 1208 (10th Cir. 2007) (citation omitted). This court has noted that "protected activity closely followed by adverse action" may constitute circumstances justifying an inference of retaliatory motive. *See Proctor*, 502 F.3d at 1208.

As the district court noted, the events at issue here took place within a relatively close temporal proximity.[2] (ROA at 464.) The

---

[2] Wise's entire course of employment at USPS, however, lasted a scant 90 days, so in a sense, everything that happened to her as a Postal Service employee was in close temporal proximity.

court correctly ruled, however, that Wise could not establish causation by temporal proximity. "Evidence of temporal proximity has minimal probative value in a retaliation case where intervening events between the employee's protected conduct and the challenged employment action provide a legitimate basis for the employer's action." *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1001–02 (10th Cir. 2011). The district court correctly ruled that Wise's abandonment of her route on January 21, 2021, constituted an intervening event that "provides[s] a legitimate basis for the employer's action." (ROA at 465, citing *Twigg*, 659 F.3d at 1001–02.) Because that intervening event independently justified her removal, Wise cannot rely on temporal proximity alone to establish an inference of retaliation.

b. Wise's claim fails because the agency had a legitimate, nonretaliatory reason to discharge her, and there is no evidence of pretext.

Even if the district court erred in concluding that Wise could not establish a prima facie case because her refusal to deliver the mail on January 21, 2015, constituted an intervening event, this court should nevertheless affirm on the ground that the Postal

Service presented legitimate, non-retaliatory reasons for Wise's discharge, and Wise cannot show that those reasons were pretextual.

There is no dispute that Wise refused to deliver the mail on January 21, 2015. She does not allege that she requested, as an accommodation, not to deliver the mail on that day, nor does she allege that such an accommodation was needed. There is also no dispute that she violated other postal rules during her probationary period. These are legitimate, nonretaliatory reasons for firing her.

Wise can't establish pretext. To do so, she must present "evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reason." *Proctor*, 502 F.3d at 1209 (quotation omitted). There is no evidence to create a genuine dispute that the Postal Service's reasons for discharging her are pretextual.

2. Wise's Arguments to the Contrary are Without Merit

Wise argues that she provided evidence showing a causal connection. Op,Br. at 40-46. She also argues that she provided evidence showing the Postal Service's proffered reason for her firing was pretextual. *Id*. at 47-57. Neither argument has merit.

a. Wise did not provide evidence showing a causal connection.

Wise argues that temporal proximity and other evidence in this case show a causal connection. Not true.

As for temporal proximity, while the events at issue here did take place within a relatively close period of time, Wise cannot show temporal proximity for several reasons. First, she cannot rely on temporal proximity because she experienced performance issues before she engaged in protected activity. Wise received negative 30-day and 60-day evaluations for her work performance before she requested an accommodation due to her pregnancy. Wise does not dispute that any of the things she was disciplined for actually happened. As a consequence, mere temporal proximity is not sufficient to show a causal connection. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233–34 (3d Cir. 2007) (no

causation where performance issues and personality conflict with superior began before protected activity).

Second, she cannot rely on temporal proximity to show causation for purposes of her prima facie case, because intervening events broke the causal chain. Wise argues the district court erred in considering "intervening events" in determining whether she established causation, contending a court should consider intervening events at "step two" of the analysis, not at "step one." Op.Br. at 42, n.17. *Id.*

To the contrary, in *Aman v. Dillon Companies, Inc.*, 645 F. App'x 719, 727–28 (10th Cir. 2016) (unpublished), this court considered intervening events at step one for purposes of determining whether the plaintiff had shown the necessary causation. This court in *Aman* cited *Twigg* for the proposition that evidence of temporal proximity has minimal probative value in a retaliation case where "intervening events between the employee's protected conduct and the challenged employment action provide a legitimate basis for the employer's action." *Aman*, 645 F. App'x at 727 (citing *Twigg,* 659 F.3d at 1001–02). The plaintiff in *Aman*

alleged he was discharged for retaliatory reasons after he issued complaints relating to his disability and his race. *Id.* But after he raised his complaints, the plaintiff missed numerous days of work without contacting the individuals authorized to excuse his absences, and was discharged. *Id.* at 727-28. This court concluded that, due to these intervening events—which provided a legitimate basis for the plaintiff's discharge—the plaintiff failed to show a causal connection and thus failed to establish a prima facie case. *Id.* at 728.

Absent en banc reconsideration or a superseding contrary decision by the Supreme Court, this court is bound by the precedent of prior panels. *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993). *Aman* thus remains good law establishing that a district court may consider an intervening event—even if it constitutes a legitimate basis for the employer's action—in determining whether a plaintiff has satisfied the causal connection prong of the prima facie case. *See Aman*, 645 F. App'x at 727–28.[3]

---

[3] Wise cites *Gonzales v. Univ. of Colo.*, No. 18-cv-01178-RBJ, 2019 WL 10250757 (D. Colo. Nov. 21, 2019) (unpublished), for the proposition that a court should consider intervening events at step two, not step one. Op.Br. at 42, n.17. The district court in *Gonzales* did not, however, defer consideration of intervening events to step

Third, Wise argues that her earlier negative reviews cannot disqualify her from establishing causation because "USPS specifically disclaimed those performance evaluations as reasons for her termination." Op.Br. at 43-44 (citing the Postal Service's reply in support of its summary judgment motion, ROA at 414). The Postal Service did not disclaim those performance evaluations as reasons for Wise's termination, either at page 414 of the ROA or in any other Postal Service filing in the district court. Rather, the Postal Service specifically stated that it "cited the evaluations (the last of which was on December 31, 2014), to show that Wise's performance problems *pre-dated* her first protected activity on January 15, 2015, when she requested an accommodation." ROA at 414 (emphasis added).

Fourth, she argues the district court erred in finding she could not establish causation because she "resigned (and then rescinded

---

two. 2019 WL 10250757, at *6-*7. Rather, it considered the intervening events at step one, but concluded there was a genuine dispute of material fact regarding the intervening events. *Id.* at *7. Consequently, the court resolved whether the plaintiff satisfied the causation prong of the prima facie case without considering the intervening events. *Id.* In Wise's case, there is no genuine dispute of material fact concerning the intervening event. That is, there is no dispute that Wise refused to carry her route on January 21, 2015.

that resignation), thus giving USPS a legitimate reason for firing her." Op.Br. at 43 (citing Order, ROA at 464-65); *see also* Op.Br. at 44. There was no such error because nowhere on pages 464 or 465 did the district court state that Wise's resignation, and subsequent rescission of her resignation, constituted either an "intervening event" or a legitimate reason for firing her. Indeed, the court did not even mention the resignation in its analysis of the retaliation claim. *See generally* ROA at 464-65.

Fifth, Wise argues she provided other evidence that was sufficient to show a causal connection. Op.Br. at 45-46. She again claims that she received "harsh treatment" from Lego and Domingo, her supervisors. She provided no such evidence below. As already shown in this Answer Brief, no evidence shows that either supervisor refused to adhere to Wise's work restrictions or ignored her accommodation.

b. Wise did not provide evidence showing the Postal Service's proffered reason for firing her was pretextual.

Finally, Wise argues that, for two reasons, the district court erred in finding that intervening events undermined her ability to

show a causal connection. First, she argues the district court erred by considering the Postal Service's "proffered legitimate reason under the causal connection prong." Op.Br. at 47-51. Second, she argues the district court erred because she provided significant evidence of pretext. *Id*. at 52-57. Both arguments fail.

First, as discussed at length above, *Aman* establishes that intervening events can be considered in the step one analysis. So Wise's argument to the contrary must fail. *See Aman*, 645 F. App'x at 727–28. And neither the Postal Service nor the district court pointed to Wise's resignation as either an intervening event or as a legitimate non-retaliatory basis for her termination, and so all of her arguments regarding resignation are similarly moot.

Wise contends the district court deprived her of an opportunity to rebut as pretextual the Postal Service's proffered reason for firing her. Op.Br. at 47, 49-50. Wise was not so deprived, and in fact argued at some length that the Postal Service's proffered reason was pretextual. (ROA at 327-29.)

Citing *Li-Wei Kao v. Erie Cmty. Coll.*, No. 11-CV-415, 2015 WL 3823719 at *19-20 (W.D.N.Y. June 19, 2015) (unpublished), Wise

claims a district court errs when it chooses to treat "step two" evidence of a legitimate reason for firing as "step one" evidence that there was no causal connection, without considering "step three" pretext evidence offered to rebut that legitimate reason. Op.Br. at 49-50. *Li-Wei Kao* does not stand for this proposition. Nowhere in that case does the district court state that "step two" evidence of a legitimate reason can be considered as "step one" evidence—that there was no causal connection—only if the court considers "step three" pretext evidence.

Under the *McDonnell Douglas* three-step framework, a court is not required to proceed to steps two or three if the plaintiff fails to meet her burden at step one. *See Stover,* 382 F.3d at 1070-71 (an employee must first present a prima facie case of retaliation at step one before the court has any need to consider steps two or three). The district court was not required to go to step three because Wise failed to satisfy step one.

Second, Wise claims USPS shifted explanations for the separation; that USPS welcomed her back despite the events of January 21, 2015; and that her accommodation was temporally

proximate to her discharge. Op.Br. at 53-57. The evidence does not support these claims.

Regarding the alleged "shifting explanations," they didn't shift. Wise points to four pieces of evidence: (1) USPS's summary judgment motion (ROA at 187); (2) the Notice of Suspension (ROA at 259-61); (3) the Letter of Separation (ROA at 262); and (4) the Domingo hearing transcript (ROA at 228-29). A closer look at those documents shows the Postal Service did not shift its explanation for her discharge:

In its motion for summary judgment, the Postal Service asserted that "Wise walked off the job and violated postal rules during her probationary period [and that these] are legitimate nondiscriminatory reasons for firing and disciplining her…." (ROA at 187.) Wise asserts the Postal Service at page 187 of the ROA "claimed it fired Wise for her resignation." Op.Br. at 53. The Postal Service did not state at page 187 of the ROA that it fired her for her resignation.

In the Notice of Suspension, the Postal Service asserted that Wise was being charged with Failure to Follow Instructions. The

Notice pointed out that Wise failed to carry her route on January 21, 2015; that she returned to the station and disregarded Supervisor Chavez's instruction to return to the route; and that she then went home. (ROA at 259.) The Notice also pointed out that Wise had been issued on the morning of January 21, 2015, a Letter of Warning due to three unscheduled absences, and that she had been issued on January 23, 2015, a Letter of Warning for failure to scan two pieces of mail. (ROA at 259-61; *see also id.* at 257-58.)

Wise claims the Notice justified her suspension based on her resignation, and claims the Notice described her resignation as a "failure to follow instructions." Op.Br. at 54. To the contrary, the Notice never referred to Wise's resignation, nor did the Notice refer to her resignation as a "failure to follow instructions." (ROA at 259-61.) Moreover, contrary to Wise's claim, the Notice did not justify her suspension based on "absences due to medical complications from her pregnancy." There is no dispute that Wise conceded that her three absences, noted in the Letter of Warning dated January 21, 2015, *see* ROA at 255-56, were unauthorized. (ROA at 291.)

In the Letter of Separation the Postal Service stated that its reason for separating Wise was “unacceptable work performance.” (ROA at 262.) Wise claims the Postal Service defined “unacceptable work performance” as “”failure to properly scan packages.” Op.Br. at 54. Nothing in the record demonstrates that the Postal Service defined “unacceptable work performance” as just “failure to properly scan packages.”[4]

Finally, Domingo’s testimony concerns the Notice of Suspension. Wise claims he testified about her suspension and termination, but he was neither asked about nor did he discuss her termination. (ROA at 228-29.) Wise also claims Domingo testified that the Postal Service suspended and then fired her for her resignation, Op.Br. at 54, but his transcript does not include any testimony about her resignation. (ROA at 228-29.) In addition, she claims Domingo “disregarded the letter’s assertion of her absences as

[4] The Letter of Warning issued to Wise on January 23, 2015, for failure to scan two packages, did identify a failure to scan as “Unacceptable Work Performance,” but the Letter of Warning did not suggest that the Postal Service always viewed “unacceptable work performance” to be limited to nothing more than a failure to scan packages.

a reason." Op.Br. at 54. Domingo did not disregard the January 21, 2015, Letter of Warning for unscheduled absences. He testified that the Notice of Suspension was issued for failure to follow instructions. (ROA at 229:11-18; *see also id*. at 259.) He noted that the reference in the Notice of Suspension to the Letter of Warning for unscheduled absences was "just part of the narrative that [we] use to explain why we're moving with the action *and her awareness of being at work*." (ROA at 229:8-10 (emphasis added).)

The four documents demonstrate that the Postal Service consistently identified its reason for terminating Wise: her unacceptable work performance, including especially her decision to walk off the job on January 21.

Contradictions or inconsistencies in an employer's proffered reason for termination can be evidence of pretext. *Litzsinger v. Adams Cnty. Coroner's Office*, 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.* (quoting *Jaramillo v. Colo. Jud. Dep't*, 427 F.3d 1303, 1311 (10th Cir. 2005)). Rather, "inconsistency evidence is only helpful to a plaintiff if

'the employer has changed its explanation under circumstances that suggest dishonesty or bad faith.' " *Twigg*, 659 F.3d at 1002 (10th Cir. 2011) (quoting *Jaramillo*, 427 F.3d at 1310). Here, the record does not indicate that the Postal Service changed its explanation for terminating Wise at all, much less in bad faith.

Regarding USPS's action of allegedly "welcoming her back" after her resignation, *see* Op.Br. at 55-56, the events Wise describes don't support her claim that her discharge was pretextual. She asserts that USPS allowed her to rescind her resignation, but then terminated her. *Id.* These events don't show pretext. USPS had legitimate, nonretaliatory reasons for issuing the Letters of Warning, the Notice of Suspension, and ultimately the Letter of Separation. Wise does not challenge the underlying facts supporting these four documents. That USPS allowed her to rescind her resignation does not suggest it was required to abstain from suspending or separating her independently from her resignation. Nor does USPS's decision to allow her to rescind the resignation support the conclusion that she was terminated in retaliation for seeking an accommodation.

Finally, regarding Wise's argument that her accommodation was temporally proximate to her discharge, Op.Br. at 56-57, the Postal Service has already shown that the district court correctly found Wise failed to show temporal proximity. She refused to carry her route on January 21, 2015, which acted as an intervening event.

CONCLUSION

The court should affirm the district court's ruling granting summary judgment for USPS on Wise's retaliation and failure to accommodate claims.

DATED this 9th day of January, 2023.

Respectfully submitted,

COLE FINEGAN
United States Attorney

/s/ *Michael C. Johnson*
MICHAEL C. JOHNSON
Assistant United States Attorney

Certificate of Compliance

As required by Fed. R. App. P. 32(a)(7)(B)(i), I certify that the attached brief contains 10,179 words.

Dated: January 9, 2023

/s/ Kayla Keiter
Kayla Keiter
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Kayla Keiter*
KAYLA KEITER
U.S. Attorney's Office