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Tenth Circuit Explicates the 'Inference of Discrimination' and 'Pretext' Requirements in Title VII Claims Based on Favoritism

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In *Ibrahim v. Alliance for Sustainable Energy*, 2021 U.S. App. Lexis 11349, — F.3d — (10th Cir. April 20, 2021), the U.S. Court of Appeals for the Tenth Circuit explored what is needed to raise an inference of discrimination and show pretext in a Title VII claim based on an alleged failure to treat an employee similarly to other employees who had engaged in comparable conduct. The circuit court provided roadmaps for both plaintiff's counsel seeking to establish a jury question on so-called "favoritism" claims and defense counsel seeking summary judgment on such claims.

Plaintiff Asserts 'Favoritism' Claims Based on Race, Religion, and Sex

Dr. Erfan Ibrahim, a Muslim man of Pakistani descent, served as an executive at Alliance for Sustainable Energy. *Id.* at *1. Alliance fired him after he made inappropriate comments to two women while he worked for Alliance.

In the first instance, he texted Heather Newell, an administrative assistant, and offered to help her pay for a rental car; a few weeks afterward, he invited her to a movie. *Id.* at *2. She declined, stating that she thought that it would be inappropriate for her to accept either offer. *Id.* She complained to her supervisor, who discussed the incidents with Ibrahim's supervisor, Juan Torres. Ibrahim said the discussion was casual and that Torres simply recommend that Ibrahim be careful due to his authority over Newell, and move on. *Id.*

Two weeks later, Ibrahim attended a reception with members of a delegation visiting from the United Kingdom, and he told a female delegate, Pauline Wood, that he'd gotten a positive vibe from her. *Id.* at *2-3. Later, he asked Wood how she dealt with men in the manufacturing sector who didn't take her seriously "as an attractive, young female." *Id.* at *3. An official at the U.K. consulate later expressed concern to Torres

about Ibrahim's comments. Id. When Torres asked Ibrahim about the conversation with Wood, Ibrahim confirmed his comments and said he saw nothing wrong with them. Id. Torres immediately put Ibrahim on paid administrative leave and then fired him, stating that his comments illustrated a lack of professionalism. Id.

Ibrahim sued under Title VII and alleged he was fired based on his race, gender, and religion. Id. at *1, 3. He contended that Alliance did not fire another similarly situated executive who had also been accused of sexual harassment. Id. at *1. The district court rejected the comparison and granted summary judgment for Alliance on all three claims. Id. Exercising de novo review, the Tenth Circuit reversed the summary judgment on the race-discrimination claim but affirmed the rulings on the other two claims. Id. at 1, 3, 17.

There Was Sufficient Evidence To Raise Jury Questions on Racial Discrimination

The Tenth Circuit first took up the claim of race discrimination. Noting that Ibrahim relied on circumstantial evidence, the circuit court applied the familiar, three-step test from *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Under this test, (1) Ibrahim had to “present a prima facie case of discrimination,” (2) if he did, the burden would shift to Alliance “to provide a legitimate, nondiscriminatory reason for the firing,” and (3) if Alliance did so, the burden would revert to Ibrahim “to show pretext.” *Ibrahim*, 2021 U.S. App. Lexis 11349, at *4. Applying this test, the circuit court ruled that for summary-judgment purposes, Ibrahim presented a prima facie case of race discrimination and also showed that Alliance's proffered nondiscriminatory reason for firing him was pretextual.

Plaintiff Presented a Prima Facie Case of Race Discrimination

The court first ruled that Ibrahim established a prima facie case. This required Ibrahim to show (1) “he belongs to a protected class,” (2) “he suffered an adverse employment action,” and (3) “the circumstances give rise to an inference of discrimination.” Id. Only the third element was disputed. Ibrahim sought to establish an inference of discrimination by showing Alliance's favoritism toward a similarly situated employee, which required that he and the employee “share a supervisor or decision-maker, ... follow the same standards, and engage in comparable conduct.” Id. at *5.

Ibrahim contended that a factfinder could reasonably infer discrimination based on Alliance's better treatment of a white male manager, C.B., who faced sexual-harassment and gender-discrimination complaints by a female subordinate. Id. Alliance investigated and found that C.B. had cursed at a subordinate, exchanged sexual text messages with subordinates, asked a subordinate to run a personal errand during work hours, and showed favoritism in hiring. Id. C.B. was put on administrative leave and had to take management and leadership training, but Alliance let him return to work. Id. at 5. Notably, Alliance accused C.B. of violating the same policies as Ibrahim, and the same three individuals who fired Ibrahim decided to issue only a warning to C.B. Id. at 6. Based on this evidence,

the court concluded a reasonable factfinder could determine that Alliance had treated C.B. more favorably, and thus, that Ibrahim had presented a prima facie case of race discrimination. Id.

Plaintiff Presented Sufficient Evidence of Pretext

The Tenth Circuit court also ruled there was a genuine factual dispute whether Alliance's claimed nondiscriminatory explanation for firing Ibrahim—his inappropriate comments to two women—was pretextual. Ibrahim rebutted Alliance's explanation with the same evidence of Alliance's leniency towards C.B., plus evidence the Alliance's investigation was inadequate. Id.

Alliance contended that a reasonable factfinder couldn't view Ibrahim and C.B. as similarly situated, because (1) they had different jobs, (2) Ibrahim committed a second violation after a warning, and (3) Ibrahim denied his misbehavior while C.B. didn't. Id. at *7. The circuit court disagreed. According to the court, a factfinder could reject the first contention, because Ibrahim and C.B. were both executive managers and violated the same policies. Id. at *8. It could reject the second, because Alliance presented C.B. with draft findings, an opportunity to comment, and a written warning, while both Ibrahim and Torres testified that their meeting about Newell's allegations was friendly and casual and involved no warning. Id. at *9-10. And a factfinder could reject the third contention, because Ibrahim arguably had not repeated the conduct given that Wood did not work for Alliance or report to Ibrahim. Id. at *11-12.

The court also agreed with Ibrahim that Alliance's limited investigation suggested pretext. Id. at *13. The investigation “consisted solely of asking Dr. Ibrahim what he had said to the member of the U.K. delegation.” Id. Ibrahim admitted what he said and was fired. Id. Alliance never explored why Ibrahim considered his comments to be appropriate or how they differed from his texts to Wood. Id. This too differed from its treatment of C.B., who was given a draft written warning and an opportunity to respond. Id. at *14. A factfinder thus could reasonably infer discrimination from this differing treatment. Id.

Plaintiff Presented Insufficient Evidence of Favoritism Based on Religion or Sex

Finally, and in contrast to its ruling on race discrimination, the Tenth Circuit held that Ibrahim had not presented a prima facie case of religious or gender discrimination based on favoritism. Ibrahim failed “to identify the religion of any comparators or show past complaints of religious discrimination.” Id. at *15. Instead, he relied only on Alliance's knowledge of his Muslim faith and his perception that Alliance executives had stereotypes of Muslim employees. Id. But he presented no evidence supporting these negative perceptions. Id. Likewise, Ibrahim presented no evidence showing that a female employee who had engaged in similar behavior had been treated more favorably. Id. at *16. The court therefore affirmed summary judgment on his claims of religious and race discrimination.

Stephen Masciocchi and Jessica Smith are attorneys at Holland & Hart, specializing in complex commercial litigation. Steve assists clients with federal and state appeals and class actions in high-stakes trial and appellate litigation. Jessica has substantial appellate experience and leads the firm's religious institutions and First Amendment practice.

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