Termination for Failure to Sign Discriminatory Discipline: Surviving the Pretext Analysis

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When faced with workplace discipline an employee believes is discriminatory or retaliatory, it is a common human reaction to be wary of acknowledging the discipline with a signature for fear that this will somehow be taken as an admission of wrongdoing. It is perhaps even a more common human reaction to respond with anger, particularly when the discipline is part of an escalating series of discriminatory or retaliatory acts. Unfortunately, as employment attorneys well know, such a reaction may be a violation of the employer's policies in and of itself, or if not, will be portrayed as insubordination. Either way, it often gives the employer just the reason or excuse they have been waiting for to proceed with termination.

As clear as it may appear to the client and his or her attorney that the employer would not have relied upon the insubordination or policy violation as grounds for termination if not for the employee's protected status and/or prior protected complaints, this situation creates particularly thorny issues of proving pretext. First, the timing is on the employer's side, because by its very nature, the plaintiff's response to discipline will most likely be the most proximate event to his or her termination. Second, failure to sign discipline is a somewhat less common disciplinary offense in most workplaces than more prosaic problems like poor performance or lateness, so comparators may be hard to come by. Third, judges seem to easily relate to employers' need to respond to insubordination, and a plaintiff who reacts poorly to discipline may lose appeal in the eyes of the decision maker.

Of course, any employment attorney consulted by a client **before** he or she is presented with disciplinary documents will advise the employee to remain calm and professional and to sign any acknowledgment of receipt so long as it does not actually acknowledge wrongdoing. For the potential client who comes into your office too late, however, it may be difficult to gauge the likelihood of demonstrating that this proffered legitimate reason is pretextual. This article addresses the plaintiff who responds to disciplinary or performance-related documentation he or she feels is discriminatory or retaliatory by refusing to sign, or otherwise reacting in a manner the employer feels is "insubordinate" or unreasonably hostile, and is terminated.

Section I reviews case law in the District of Colorado and Tenth Circuit Court of Appeals, on insubordination generally and the "failure to sign" specifically. Section II reviews helpful case law from other federal jurisdictions. Section III steps away from the case law to suggest an approach to maximize the likelihood of surviving summary judgment in the face of this hurdle.

I. District of Colorado and Tenth Circuit Court of Appeals Case Law

In the Tenth Circuit, the primary appellate case on point is the unpublished panel decision in *Cox v. Lockheed Martin Corp.*[1] As the Tenth Circuit portrayed the facts, Mr. Cox, a longtime African-American employee, was terminated after multiple incidents of insubordination, including refusing to fill out a portion of his annual performance management document for two consecutive years; "w[earing] earphones to avoid hearing his managers' criticisms and . . . refus[ing] to sit down" in a meeting to discuss this refusal; and thrice (over a four month period) refusing to sign or comply with a Performance Improvement Plan ("PIP") based upon his refusals to complete the performance management document, discuss performance issues with managers, or attend scheduled meetings.[2] Mr. Cox asserted that the real reason

for his termination was either his race, or because he gave a statement to Human Resources supporting a Latina coworker's complaint that she and Mr. Cox had been referred to by a coworker as "the bugs."[3]

In any Title VII, ADA, or ADEA case analyzed under the *McDonnel-Douglas* burden shifting framework, once the plaintiff has established a prima facie case and the defendant has put forth a legitimate business reason for the termination, a plaintiff must establish a genuine question of fact regarding pretext by producing evidence that would allow a reasonable juror to find that the defendant's non-discriminatory reason is "unworthy of belief."[4] A plaintiff can do so with "evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence."[5] To make this determination, a court must consider the plaintiff's evidence in its totality.[6]

In *Cox*, the Tenth Circuit focused on the following forms of evidence that the alleged insubordination was a pretext: 1) evidence that company policies did not actually require disciplinary documents to be signed and 2) evidence that Lockheed had not followed its internal investigation policy of allowing the employee to respond in writing to the allegations under investigation.[7] The panel was unimpressed by Mr. Cox's argument that refusal to sign a PIP does not constitute insubordination where a signature is not required by the employer's written policies, concluding that because Mr. Cox also "conveyed that he did not feel bound to follow" the PIP, "there is no question that he was expressing disobedience to his superiors."[8] The court also found that Lockheed's failure to allow Mr. Cox to respond in writing as required by its investigatory policies did not indicate pretext because in practice Lockheed did not follow that portion of the policy for any employees (not just Mr. Cox).[9] The court affirmed summary judgment.

The facts in the district court order below, however, tell a somewhat more nuanced story.[10] Although Judge Brimmer also concluded that Mr. Cox did not have sufficient evidence of pretext to survive summary judgment, his order discusses several categories of evidence not mentioned by the Tenth Circuit. First, the events constituting Mr. Cox's alleged insubordination, and the facts surrounding his participation in and making of protected complaints of discrimination, were closely intertwined. Lockheed's efforts to manage Mr. Cox's performance originally stemmed from his alleged failure to attend mandatory weekly meetings. But according to Mr. Cox, the reason he would not attend these meetings was because of the discriminatory comment referring to he and a Latina coworker as "bugs," which occurred in one such meeting.[11] There were ongoing conversations and investigatory meetings between Mr. Cox and Human Resources throughout the period of the multiple PIPs, in which Mr. Cox again made complaints of discrimination, including that "Lockheed Martin had a culture where nonwhites were not accepted as part of the team no matter how good they were."[12] And finally, Mr. Cox provided evidence that other employees who had failed to sign performance documents had not been terminated as a result.[13]

Because the comparator employees had not engaged in additional forms of insubordination, but had only refused to sign, the district court discounted them as not being similarly situated.[14] The district court recognized that the timing of Mr. Cox's protected complaints, which were intertwined with the attempts to manage his performance that ultimately led to his termination, was sufficient to give rise to a prima facie claim of retaliation, but found no additional evidence sufficient to show pretext.[15]

Besides the *Cox* decision, there are two noteworthy cases in the District of Colorado involving employees purportedly terminated for failing to sign disciplinary or performance documents. In 2005, a magistrate judge granted summary judgment based on a termination for refusing to sign disciplinary documents, along with multiple other insubordinate acts, in *Brooks v. SuperValu*.[16] Ms. Brooks claimed that she was terminated based on her age and sex, but provided little evidence of discrimination.[17] In the six months preceding her termination, Ms. Brooks refused to abide by a verbal directive to stop doing personal craft projects at her desk; refused to sign three disciplinary documents for substantive errors; refused to sign two resultant write-ups for insubordination; refused to sign three "Corrective Action Reports" and a "Corrective Action Plan"; and finally, refused to attend a mandatory meeting with a supervisor about her performance.[18] Ms. Brooks' evidence of pretext was her assertion that she missed the supervisory meeting due to a misunderstanding, which the Magistrate Judge concluded contradicted her deposition testimony and contemporaneous emails,[19] and evidence that she herself had not been terminated for insubordination on prior occasions and that another employee had only been verbally counseled for an instance of insubordination. The magistrate judge found that these instances were not comparable, and the judge granted summary judgment.[20]

In 2007, in *Dusenberry v. Peter Kiewit Sons, Inc.*, Judge Babcock allowed a plaintiff's claim of Title VII sex discrimination and retaliation to survive summary judgment despite the employer's claim of insubordination for failing to sign write-ups issued to her by a supervisor with whom she had ended a romantic relationship.[21] The supervisor was extremely hostile to Ms. Dusenberry at work after she ended the relationship, calling her a "b*tch," a "c*nt," and other expletives.[22] The following day, the supervisor drove erratically after picking Ms. Dusenberry up for work, leading her to leave his vehicle and request a ride from a co-worker. The supervisor then issued a write-up to both employees for being late, which Ms. Dusenberry initially refused to sign, then relented after speaking to a higher-level supervisor.[23] One day later, the supervisor wrote Ms. Dusenberry up again for arriving late, but she contended he had given her a different start time than usual and that she had accordingly arrived on time. When she refused to sign this reprimand and left the work site, she was terminated by the second-level supervisor.[24] In litigation, the employer contended that Ms. Dusenberry was fired for several reasons: refusing to sign the reprimand, lying, being belligerent and being late.[25]

Judge Babcock began by recognizing that Ms. Dusenberry had cast doubt on the veracity of each of these proffered reasons except for the refusal to sign, which she admitted. Although "in general, to defeat summary judgment an employee must show that **each** of an employer's stated reasons is pre-textual,"[26] there are "several circumstances where 'something less than total failure of the employer's defense' may defeat summary judgment."[27] They include cases where:

(1) the reasons are so intertwined that a showing of pretext as to one raises a genuine question whether the remaining reason is valid,

(2) the pretextual character of one explanation is so fishy and suspicious that a jury could find that the employer lacks all credibility,

(3) the employer offers a plethora of reasons and the plaintiff raises substantial doubt about a number of them,

(4) the plaintiff discredits each of the employer's objective explanations, leaving only subjective explanations to justify its decision, or

(5) the employer has changed its explanation under circumstances that suggest dishonesty or bad faith.[28]

Judge Babcock concluded that Ms. Dusenberry's evidence satisfied these criteria. First, the reprimand and the knowingly false allegation of lateness were "logically intertwined, since there would be no reprimand if she were not late."[29] Second, defendants' explanations lacked credibility, for example because of "the absence of any contemporaneous reference to Dusenberry lying and [the second level supervisor]'s repeated references to a company policy requiring signing reprimands when no such policy is in the record."[30] Thus, Judge Babcock "conclude[d] that Dusenberry has raised sufficient doubts about defendants' stated reasons for terminating her to enable a reasonable jury to conclude that these reasons are pretext."[31]

Aside from the cases specifically arising from a failure to sign discipline, the Tenth Circuit has recognized that some responses to discrimination or retaliation may be "reasonable" even if the behavior might otherwise be cause for termination. In *Hertz v. Luzenac Am., Inc.*, the Tenth Circuit found that a plaintiff's angry "outburst" after his supervisor made a joke

about his Judaism was, in and of itself, a protected "protest against perceived discrimination," and, as such, could not constitute a legitimate basis for termination unless it was "unreasonable."[32] The court declined to hold that the outburst was an unreasonable complaint, explaining that "[a]n emotional response to a racial or religious epithet is a most natural human reaction. It would be ironic, if not absurd, to hold that one loses the protection of an antidiscrimination statute if one gets visibly (or audibly) upset about discriminatory conduct."[33] Where a refusal to sign is accompanied by a statement opposing discrimination, it should be a jury question which of the two very closely related acts - the refusal to sign, or the protected statement - actually motivated the subsequent termination.

In the earlier case of *Nulf v. Int'l Paper Co.*, the Tenth Circuit held that an employee may defeat a charge of "insubordination" as a purported "legitimate business reason" by showing that "discriminatory actions of the company induced her insubordination" as an alternative to demonstrating pretext.[34] This case captures a crucial aspect of the pretext analysis: if the employer seemingly intends to provoke the employee's refusal to sign, this in itself is evidence of an illegal motive, and tends to show that the employer was not reacting to the insubordination, but rather, intentionally causing it because of preexisting discriminatory or retaliatory animus.

Many Tenth Circuit and District of Colorado cases show how ordinary evidence of pretext can refute the defendant's reliance on a claim of insubordination. In *Pastran v. K-Mart Corp.*, the Tenth Circuit recognized what the panel in *Cox* did not: that "close temporal proximity" between a protected activity and a termination, combined with some other indicia of pretext, can meet the plaintiff's burden of showing that a termination for alleged insubordinate behavior was pretextual.[35] In that case, the court pointed to evidence that the manager who decided to terminate the plaintiff had been reprimanded for a previous discriminatory failure to promote her, and evidence that managers discussed whether the plaintiff would sue them over the failure to promote during conversations about whether to terminate her. This provided sufficient "circumstantial evidence of retaliatory motive," "[i]n combination with the evidence of temporal proximity," to create an issue of material fact regarding pretext.[36]

In *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the court affirmed the district court's entry of judgment in favor of the employee after trial, deferring to its findings that a supervisor's testimony claiming that an argument with a pregnant employee motivated her termination was simply not credible, and also that based on the trial testimony, the alleged argument "did not amount to insubordination."[37] In *Wulf v. City of Wichita*, the court noted that the fact that no other officer had been fired for a first act of insubordination suggested pretext.[38] And in two recent cases, the District of Colorado simply looked to the totality of the evidence of discriminatory and retaliatory motive to hold that a jury could conclude that these motives were the true reasons behind the termination at issue and the plaintiff's purported insubordination was a mere pretext.[39]

II. Law in Other Federal Jurisdictions

Outside the Tenth Circuit, there are of course many cases granting or affirming summary judgment to defendants who raise the purported legitimate business reason of failure to sign. Some of the more helpful cases mirror the analysis in the Tenth Circuit and District of Colorado cases discussed above.

For example, courts which allow claims to go forward frequently recognize, as Judge Babcock did in *Dusenberry*, that the employer's motive for issuing discriminatory or retaliatory discipline, and the employer's motive in immediately terminating an employee for refusing to sign it, are highly intertwined. In *Johnson v. Andrew Jergens Co.*, the Ninth Circuit overturned a grant of judgment notwithstanding the verdict where the plaintiff was disciplined almost immediately after filing an age discrimination claim, told the company President that he would not be signing the discipline because it was retaliatory, and was told by the President, "this has gone on long enough" and terminated.[40] One district court allowed an ADEA claim to survive summary judgment even where the plaintiff was instructed multiple times by her supervisor to sign written warnings and repeatedly refused despite assurances that a signature was only an acknowledgment. The court noted that a supervisor had made ageist comments during the disciplinary meeting before asking for the plaintiff's signature, and that the issues were therefore closely related.[41] Importantly, the court recognized that the employer's comments not only bring into question its true motivation for the termination, but also raise the question of whether the employee's refusal to sign truly was a legitimate terminable offense, considering that she had just been subject to discriminatory comments and her reaction may have been understandable.[42]

Likewise, in *Lampkin v. Ernie Green Indus., Inc.*, the Northern District of Ohio found disputed issues of material fact in a mixed motive case where the

plaintiff refused to sign a form reassigning him to a lower position upon return from FMLA leave because he believed the reassignment violated the FMLA, and also lost his temper in a meeting on the issue.[43] The court reasoned that "[i]f its decision was based on plaintiff's refusal to sign a personnel action form that was being presented to him as result of an FMLA-violative transfer (as plaintiff contends) [rather than on plaintiff losing his temper], then defendant's motivation is improper."[44] Other district courts have similarly found that where the plaintiff's reasons for failing to sign discipline are understandable, there is a fact question as to whether this is a pretextual reason for termination.[45]

In support of an argument that intentional provocation by the defendant suggests that the defendant was not truly motivated by the plaintiff's predictable reaction, consider the Northern District of Illinois case of *Carter v. Luminant Power Servs. Co.*, which found sufficient evidence of pretext where the plaintiff's termination for failure to sign discipline occurred soon after his protected activity and evidence showed that the letter "was intentionally drafted in a manner such that he would refuse to sign it."[46]

III. Suggested Practices to Maximize Surviving Summary Judgment

Despite these helpful authorities, there is certainly no dearth of case law in which courts seem to accept at face value the employer's assertion that it terminated the plaintiff simply because of an insubordinate reaction. Here are some suggestions, using the above cases as examples, on steering your client's claims past summary judgment.

Keep the plaintiff's action in context

The Tenth Circuit requires district courts to consider the totality of the circumstances when conducting a pretext analysis.[47] It is important not to let the defendant succeed in divorcing the underlying evidence of discrimination or retaliation from the pretext analysis.

It is possible to view the cases above on a continuum according to how much context the court takes into account. Least favorable for employees are cases such as both *Cox* decisions where courts seem to demand that the plaintiff provide evidence that specifically undermines the defendant's claim that failure to sign could be a terminable offense, instead of considering whether the overall evidence of discriminatory or retaliatory motive suggests that the failure to sign was a pretext on these specific facts. In the middle are courts that simply apply an ordinary "totality of the circumstances" pretext analysis as they would to any other purportedly legitimate excuse for termination.

Most favorable for the plaintiff are the cases where the court grasps one of the ways in which this pretextual justification is different from, say, claiming that the plaintiff made a substantive error in her work: First, the content of discipline is often related to the underlying accusations of discrimination and retaliation, which in and of itself indicates that the employer has an illegal animus toward the plaintiff. Second, the plaintiff's reaction to discipline that is demonstrably discriminatory or retaliatory may constitute protected conduct, or at the least, may be understandable enough to cast doubt on whether it provides a legitimate business reason for termination. Providing as much context as possible should help the court move along this continuum to understand why summary judgment is inappropriate.

Consider making a "mixed motive" argument

In Title VII discrimination cases (but not in ADEA or Title VII retaliation cases),[48] instead of the *McDonnell-Douglas* burden-shifting approach discussed above, which focuses on the pretext analysis, a plaintiff may choose to proceed on a "mixed motive" theory of causation. In a "mixed motive" analysis, the plaintiff may survive summary judgment under a lesser standard of causation, simply by demonstrating that the discriminatory or retaliatory motive was one "motivating factor" among several behind her termination.[49]

Although the defendant can then raise a lack of "but for" causation as a defense to damages at trial, the "mixed motive" analysis could make it easier to survive summary judgment and, because of the difficulty of separating the employer's various motives in these cases, might prove a better "fit" for some fact patterns. Indeed, two of the successful cases from other districts reviewed above proceeded on a "mixed motive" theory.[50]

Carefully consider how to "frame" the plaintiff's provocation

More so than other pretextual justifications for termination, this justification is also designed to make the plaintiff look unreasonable and undermine her credibility and perceived virtuousness. As the cases reflect, one way to combat the argument that the plaintiff reacted inappropriately and that her reaction was a terminable offense is to demonstrate that the reaction was provoked intentionally and with discriminatory or retaliatory motive, thus shifting the focus back to the defendant and creating a fact question as to whether the plaintiff's reaction was the true reason for the termination, or whether the employer's underlying bad motives were the cause of **both** the attempt at provocation

and the termination foreseeably flowing therefrom.

Be wary of other evidence of insubordination

As the *Brooks* and *Cox* cases show, a plaintiff who repeatedly does not cooperate with his or her employer, especially in ways that affect substantive job performance, will have a hard time showing that an ultimate termination was pretextual. The more instances the employer can point to, the more difficult it will be to argue that these did not give rise to a separate, legitimate business reason for termination.

IV. Conclusion

A plaintiff's failure to sign a disciplinary or performance document creates a particularly difficult pretext analysis. However, so long as there is sufficient evidence of the underlying discriminatory or retaliatory motive, it should be possible for the effective advocate to draw connections between that motive and the termination and succeed in demonstrating pretext, because of the unusually close interrelationship between the underlying discipline, the decision maker's presentation of the discipline, the employee's reaction, and the ultimate termination. ▲▲▲

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Endnotes:

[1] *Cox v. Lockheed Martin Corp.*, 545 F. App'x 766, 768-69 (10th Cir. 2013) (unpublished). As an unpublished order, *Cox* is not binding on the District of Colorado. *See* Fed. R. App. P. 32.1.

[2] *Cox*, 545 F. App'x at 767-69.

[3] *Id.* at 768, 770.

[4] *Randle v. City of Aurora,* 69 F.3d 441, 451 (10th Cir. 1995).

[5] *Argo v. Blue Cross & Blue Shield of Kan., Inc.,* 452 F.3d 1193, 1203 (10th Cir. 2006).

[6] *Orr v. City of Albuquerque,* 531 F.3d 1210, 1215 (10th Cir. 2008).

[7] *Cox*, 545 F. App'x at 771-72.

[8] *Id.* at 771.

[9] *Id.* at 772-73 (citing *Berry v. T–Mobile USA, Inc.*, 490 F.3d 1211, 1222 (10th Cir. 2007) ("The mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that the substantive reasons given by the employer for its employment decision were pretextual." (quotations omitted); *Conroy v. Vilsack*, 707 F.3d 1163, 1176 (10th Cir. 2013) ("[F]or an inference of pretext to arise on the basis of a procedural irregularity, there must be some evidence that the irregularity directly and uniquely disadvantaged a minority employee." (quotations omitted))).

[10] *Cox v. Lockheed Martin Corp.*, No. 11-CV-01479-PAB-BNB, 2013 WL 140624 (D. Colo. Jan. 11, 2013), *aff'd*, 545 F. App'x 766 (10th Cir. 2013) (unpublished).

[11] *Id.* at *2.

[12] *Id.* at *3.

[13] *Id.* at *9-10.

[14] *Id.* at *10.

[15] *Id.* at *17-19.

[16] *Brooks v. SuperValu*, No. 04-CV-00336 0ES-CBS, 2005 WL 1635446 (D. Colo. July 12, 2005), appeal dismissed for lack of jurisdiction by *Brooks v. SuperValu*, Inc., 189 F. App'x 818 (10th Cir. 2006) (unpublished).

[17] *Id.* at *9-14. The Magistrate Judge concluded that Ms. Brooks had failed to establish a prima facie case of discrimination both because she could not establish that she was qualified for her position due to poor performance, and because she could not show that she was terminated in circumstances supporting an inference of discrimination. *Id.* The Court then considered her evidence of pretext as an alternate ground for summary judgment.

[18] *Id.* at *3, 7-8.

[19] *Id.* at *15-18.

[20] *Id.* at *18-19.

[21] *Dusenberry v. Peter Kiewit Sons, Inc.,* No. 05-CV-02465-LTB-MJW, 2007 WL 1346598 (D. Colo. May 8, 2007).

[22] *Id.* at *1.

[23] *Id.*

[24] *Id.* at *2.

[25] *Id.* at *3-4.

[26] *Id.* at *5 (citing *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000) (emphasis added)); *see also Doyle v. Nordam Grp., Inc.*, 492 F. App'x 846, 850 (10th Cir. 2012) (unpublished) ("'[W]hen the plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lacks credibility' with regard to its remaining reasons. [*Tyler v. RE/MAX Mtn. States, Inc.,* 232 F.3d 808, 814 (10th Cir. 2000)] This is particularly true where the proffered reason was generated only after the adverse action, where the employer may have fabricated evidence relating to its reasons, *see Plotke v. White,* 405 F.3d 1092, 1103–08 (10th Cir. 2005), or where a clearly pretextual reason 'predominates over' the non-pretextual reasons, *Bryant v. Farmers Ins. Exch.,* 432 F.3d 1114, 1126–27 (10th Cir. 2005)."); *Maston v. St. John Health Sys., Inc.*, 296 F. App'x 630, 634 n.1 (10th Cir. 2008) ("As a general matter it is the plaintiff's burden to show that each of the employer's reasons was pretextual. *Tyler v. RE/MAX Mountain States, Inc*., 232 F.3d 808, 814 (10th Cir. 2000). When, however, the multiple grounds are closely intertwined and plaintiff shows that one of them is strongly suspicious, she may prevail. *Id.*"); *Becker v. Securitas Sec. Servs. USA, Inc.*, No. 06-2226-JAR, 2007 WL 1875668, at *10 (D. Kan. June 28, 2007) ("[P]laintiff has cast doubt on whether she was

terminated for failing to respond to the April 1 memo when there is evidence that McCracken had already made the decision to terminate her employment the previous day. Thus, by casting doubt on a particular justification, plaintiff has necessarily called into doubt the other justifications, thereby demonstrating that reason to be pretextual which is enough to avoid summary judgment." (quotations omitted)).

[27] *Dusenberry*, 2007 WL 1346598, at *5 (quoting *Jaramillo v. Colo. Judicial Dept.*, 427 F.3d 1303, 1310 (10th Cir. 2005)).

[28] *Id.* (citing *Jaramillo*, 427 F. 3d at 1310).

[29] *Id.* at *6.

[30] *Id.*

[31] *Id.*

[32] *Hertz v. Luzenac Am.,Inc.,* 370 F.3d 1014, 1021-22 (10th Cir. 2004).

[33] *Id.*; *see also E.E.O.C. v. Dillon Cos., Inc.*, 839 F. Supp. 2d 1141, 1146 (D. Colo. 2011) ("[I]f [Plaintiff]'s actions were provoked by his employer, the employer cannot use the employee's response as justification for termination and yet remain impervious to claims based on the alleged discriminatory conduct."). Even responding physically to harassment can be reasonable depending on the circumstances. *E.g.*, *Folkerson v. Circus Circus Ents., Inc.*, 68 F.3d 480 (9th Cir. 1995).

[34] *Nulf v. Int'l Paper Co.*, 656 F.2d 553, 559 (10th Cir. 1981); *see also Wells v. Atrium Ret. Home*, No. CIV.A. 02-2003-CM, 2003 WL 21384316, at *6 (D. Kan. June 10, 2003) (same); *Leonard v. City of Frankfort Elec. & Water Plant Bd.*, 752 F.2d 189, 195 (6th Cir. 1985), abrogated on other grounds by *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (recognizing "the possibility that the Board seized upon this instance of insubordination to fire Leonard because he was black or the possibility that the actions inducing Leonard's conduct were in themselves discriminatory," and citing *Nulf*).

[35] *Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1206 (10th Cir. 2000) (citing *Medlock v. Ortho Biotech, Inc.,* 164 F.3d 545, 551 (10th Cir. 1999)); *see also Mondaine v. Am. Drug Stores, Inc.*, 408 F. Supp. 2d 1169, 1195-96, 1198-99 (D. Kan. 2006) (denying summary judgment where suspension for failure to sign discipline occurred soon after protected activity, supervisors testified inconsistently about which of them made the decision to suspend plaintiff for failing to sign discipline, and "the decision to suspend plaintiff for refusing to sign . . . was contrary to [the employer's] past practice when plaintiff refused to sign a CAAR and [employer] had no written policy which required that an employee sign").

[36] *Pastran*, 201 F.3d at 1206.

[37] *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1491-92 (10th Cir. 1994).

[38] *Wulf v. City of Wichita*, 883 F.2d 842, 862 (10th Cir.1989).

[39] *Scavetta v. King Soopers, Inc.*, No. 10-CV-02986-WJM-KLM, 2013 WL 316019, at *4, 6 (D. Colo. Jan. 28, 2013) (relying on the totality of the evidence that it was Plaintiff's disability, not her alleged insubordination, that motivated her discharge, including evidence that "Plaintiff's reason for the purported insubordination was tied closely to her disability (which Defendants had knowledge of)—*i.e.,* she was purportedly insubordinate in not providing the immunizations because of her medical disability," and denying summary judgment); *McKenzie v. Atl. Richfield Co.*, 906 F. Supp. 572, 577-78 (D. Colo. 1995) (relying on totality of evidence of retaliatory motive, along with evidence that "an employee at plaintiff's level has never been disciplined for like conduct," to deny summary judgment).

[40] *Johnson v. Andrew Jergens Co.*, 198 F.3d 254 (9th Cir. 1999).

[41] *Black v. Healthcare Servs. Grp., Inc.*, No. CIV.05-01689, 2007 WL 2343859, at *1-5 (W.D. Pa. Aug. 13, 2007).

[42] *Id.* at *4 ("[I]t does not necessarily follow that a jury would conclude that an employer **should automatically fire an employee** for refusing to sign a disciplinary form when, as in the instant matter, the decision maker made discriminatory statements in the very meeting in which the employee was being discharged" (emphasis added)).

[43] *Lampkin v. Ernie Green Indus., Inc.*, No. 3:03CV7729, 2005 WL 757214, at *1-2 (N.D. Ohio Mar. 30, 2005).

[44] *Id.*

[45] *Jones v. Bd. of Trustees of Ark. State Univ.*, No. 3:12CV00024 BSM, 2013 WL 3293989, at *2, *4-5 (E.D. Ark. June 28, 2013) (disputed issues of material fact exist regarding pretext where employee was given permission to take the statement home "for a few days" to review it before signing, then terminated for insubordination the following day); *Garcia v. Garland Indep. Sch. Dist.*, No. 3:11-CV-502-N-BK, 2013 WL 5299264, at *11-12 (N.D. Tex. Sept. 20, 2013) ("Compelling is the fact that Defendant's basis for the insubordination charge stems from Plaintiff's refusal, for arguably legitimate reasons, to sign a form Defendant has not required be signed in the past, and which Defendant had not previously taken any adverse personnel action on account of her failure to sign.").

[46] *Carter v. Luminant Power Servs. Co.*, No. 3:10-CV-1486-L, 2011 WL 6090700, at *21-22 (N.D. Tex. Dec. 6, 2011).

[47] *Orr,* 531 F.3d at 1215.

[48] *See Univ. of Tex. Sw. Med. Ctr. v. Nassar,* —— U.S. ——, 133 S.Ct. 2517, 2526 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). The Tenth Circuit has not yet decided whether a mixed motive analysis remains available in ADA cases.

[49] 42 U.S.C. § 2000e–2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."); *see also* 42 U.S.C. § 2000e–5(g)(2) (providing a defense to damages, but not to liability, declaratory and injunctive relief, or attorney fees and costs, if the employer then shows it would still have taken the same employment action in the absence of the protected status).

[50] *Black*, 2007 WL 2343859; *Lampkin*, 2005 WL 757214.