Cortez v. Wal-Mart Stores
460 F.3d 1268 (10th Cir. 2006)

OPINION BY CIRCUIT JUDGE MURPHY:

Plaintiff Robert Cortez sued defendant Sam's Club for discrimination in violation of the Age Discrimination in Employment Act, on account of the company's failure to promote him to the position of general manager. * * * The jury found that Sam's Club had violated the ADEA and awarded damages to Cortez. * * * [W]e affirm.

Cortez worked for Sam's Club from April 28, 1986, to April 29, 2003. On the day he resigned, he was 48 years old and had been an assistant manager of several Sam's Club stores in Texas and New Mexico. The highest level that he reached in the company was the position of co-general manager of a store in Puerto Rico, where he worked from 1996 to 1998. When Cortez returned to the United States from his Puerto Rico assignment, he let it be known generally throughout the company that he wished to be promoted to general manager. * * *

From 1998 until his resignation in 2003, Cortez continued to press for promotions that never materialized. During that same time period, however, at least three other Sam's Club assistant managers were promoted to general manager positions in Texas and New Mexico. Two of those promoted were in their early 30's and the other was in his late 20's. Cortez told several executives in the company that he was concerned that he was being passed over because of his age. However, only one, Stephanie Sallinger, the personnel manager, ever followed up with him. When she did, she was under the apparently mistaken impression that a promotion for Cortez was imminent. * * *

At trial, Cortez argued that although he was qualified for the position of general manager, Sam's Club consistently denied him promotional opportunities in favor of younger employees, many of whom he had helped to train. With respect to his qualifications, Cortez argued that his long years of assistant managerial experience taught him the requisite skills to be a general manager. He also argued that he had already demonstrated his ability to be a general manager in his position as co-general manager of the store in Puerto Rico. In addition, he adduced evidence of his laudable role in opening a new store in Albuquerque in record time for the company.

Cortez also adduced evidence of what he argued was Doubleday's [director of operations] discriminatory motive for not promoting him to the general manager position. He testified that in November 1999 in a conversation with Doubleday and Charles Wright, an assistant manager, Doubleday compared him and Wright to Troy Aikman of the Dallas Cowboys. Doubleday told them that just like Troy Aikman had reached a point in his career when it was time to step aside for a better, younger quarterback, so too was it time for Cortez and Wright to step aside in favor of younger managers. Wright corroborated this story with nearly identical testimony concerning the "Aikman conversation." Doubleday testified, however, that age never factored into his decision when it came to filling the general manager positions.

Sam's Club argued that Cortez was not promoted not because of his age, but because of the active performance "coaching" in his file, in accordance with its "Coaching for Improvement" policy. According to the *Club Manual*, "Coaching for Improvement occurs when an Associate's behavior (job performance or misconduct) fails to meet the Company's expectations." The manual goes on to explain that coaching for job performance is appropriate when an associate's behavior "does not meet the reasonable expectations/standards set for all Associates in the same or similar position." Misconduct is defined as "behavior other than job performance, which falls below stated expectations, or violates Company policy, does or may interfere with safe, orderly, or efficient operations or which creates a hostile or offensive environment for Associates, Customers, and/or Vendors." The Coaching for Improvement section of the *Club Manual* also has a subheading entitled "File Retention/Active Period." That section provides that "Coaching for Improvement documentation must be maintained in the Associate's personnel file for 12 months under an 'active' status. Twelve months after the last Coaching for Improvement session, if the behavior does not reoccur, the Coaching for Improvement documentation becomes 'inactive.'"

Sam's Club adduced evidence that Cortez had received a written coaching on April 2, 2001, within one year of the promotion opportunities at issue, and it argued that under company policy, employees with an active coaching in their file are not eligible for promotion.

This promotion eligibility aspect of the company's coaching policy is not mentioned in the Coaching for Improvement section of the *Club Manual.* Nonetheless, Sam's Club argued that it is a well-known, unwritten policy, and Cortez admitted on cross examination that there was such a policy when he was employed at Sam's Club. Cortez argued, however, that the coaching he received on April 2, 2001, was undeserved.

The written coaching itself, which was admitted into evidence, was issued by Greg Garner, Cortez's general manager. Garner's stated reason for the coaching was as follows:

I am challenging Robert's [Cortez's] overall performance as a merchandise manager. There are certain duties Robert is responsible [sic]. Robert went on vacation and did not plan his business accordingly. Robert did not leave any notes to be carried out. Robert did not complete the alcohol [move] that was asked of him. Robert did not leave specific training plans for his new associates to do. Robert's team leader ended up on vacation at the same time he was on vacation. Robert's overall performance as a manager needs to improve. These issues and opportunities were discussed with Robert in mid-February.

Cortez testified that he challenged this coaching when he received it because it was issued while he was on vacation and he believed that Garner had mischaracterized his performance. Specifically, Cortez testified that he had not completed the alcohol move that Garner mentioned because the store had been waiting for a layout from the home office. With respect to his vacation overlapping with his team leader's, Cortez testified that Garner had approved the team leader's vacation without his knowledge after he had left for vacation. He further testified that he confronted Garner when he returned from vacation and "told him that basically he should be doing the things that are needed to be done in the club while I'm gone in my absence or move another one of the managers over to my area to make sure that the area does not deteriorate."

Cortez also adduced evidence of Sam's Club's unwritten policy of coaching employees "out the door." He testified that Garner would encourage an employee to quit, i.e., coach him out the door, "if he didn't like the associate or the associate did have a performance issue or for any other reason he wanted that associate removed from the club." He testified that he believed Garner was trying to coach him out the door in 2001 because his store was performing badly and Garner did not want to accept full responsibility. * * * Garner testified that the "coaching out the door" policy was directed at employees who consistently failed to meet expectations. Such employees, he testified, are "either going to perform or they're not going to perform, and sometimes we have to coach people out the door because they're not successful in our business." Garner also testified that the decision of whether to coach an employee out the door was not always based on a supervisor's subjective criteria, but could be based on company expectations. He testified that he issued the April 2, 2001, coaching because Cortez went on vacation without leaving any specific instructions and left the alcohol display in an unpresentable condition. * * *

We have traditionally distinguished between employment decisions based on objective criteria, which are generally immune to employer manipulation, and those based on subjective criteria, "which are particularly easy for an employer to invent in an effort to sabotage a plaintiff's prima facie case and mask discrimination." Under this dichotomy, a plaintiff who cannot meet objective hiring or promotion criteria cannot establish a prima facie case of discrimination, and the employer is entitled to judgment as a matter of law. On the other hand, a plaintiff's failure to meet subjective hiring or promotion criteria is not automatically fatal to the plaintiff's prima facie case. In order to show that he is qualified for the position sought, the plaintiff need only establish that . . . he possesses "the objective qualifications necessary to perform the job at issue." The factfinder is free to consider the employer's subjective hiring or promotion criteria in the mix of plaintiff's circumstantial evidence of discrimination, but is not required to accept the employer's version of its motivation.

It is undisputed that Cortez received a written coaching on April 2, 2001, and Cortez admitted that Sam's Club has a policy with respect to promotions whereby employees are not eligible for a promotion within one year of receiving a written coaching. The question, therefore, is whether this no-coaching qualification is a truly objective criterion, such that Cortez's failure to establish it defeated his prima facie case. Sam's Club maintains that its no-coaching qualification is an objective measure that forms part of its promotion criteria. * * * We disagree.

* * * Certainly, as Sam's Club argues, the question of whether an employee has an active coaching in his file can be objectively answered. The problem, however, is that the coaching itself can be premised on almost limitless subjective bases, and in that regard it is only facially objective. Garner's testimony that a coaching is "[n]ot always" based on the subjective opinions of a supervisor, leads to the inevitable conclusion that, at least

sometimes, it is. Moreover, Cortez presented evidence that his coaching was based on Garner's subjective opinion about his performance. Cortez argued at trial that the coaching was undeserved and gave specific reasons why. * * *

[A] plaintiff cannot prove that he was discriminated against simply because an employment decision was based on subjective criteria. As one court aptly put it, however, "just as use of [subjective] criteria does not establish discrimination, cloaking such criteria with an appearance of objectivity does not immunize an employment decision from a claim of discrimination." There are undoubtedly legitimate business reasons for the no-coaching aspect of Sam's Club's promotion policy. Unlike truly objective criteria, however, . . . the nocoaching qualification can be used as a tool for unlawful discrimination. Therefore, we conclude that Cortez's admission that he received a coaching within one year of the promotions at issue was not fatal to his prima facie case. . . . * * *

[W]e must now decide whether the evidence supported the jury's finding of discrimination. . . . * * * At trial, Cortez presented evidence that he had more than ten years of assistant managerial experience at Sam's Club and that he had earned accolades for his leadership in opening a new store in Albuquerque during the same time period that he was seeking a promotion. He was also the co-general manager of a Sam's Club store in Puerto Rico for three years where he shared responsibility with the general manager for the entire store's operations. He also testified that he lost out on promotions even as he was receiving above-average performance ratings. * * * [W]e conclude that the evidence could have convinced a rational jury that Cortez was objectively qualified to be a general manager. This evidence, combined with the relatively young age of the individuals who received the challenged promotions was sufficient to establish a prima facie case of discrimination.

There was also sufficient evidence from which the jury could have inferred that Cortez was not promoted for reasons other than the April 2, 2001, coaching. Although both Cortez and Garner testified to Sam's Club's practice of not promoting individuals with active coachings, the policy appears nowhere in the company manual's detailed description of the "Coaching For Improvement" policy. Moreover, Sam's Club points to no evidence that it ever told Cortez that he was ineligible for promotion even though he approached several company executives about what he perceived was Doubleday's unjustified refusal to promote him. Cortez testified that he believed the coaching was undeserved and was part of a long line of coachings designed to coach him out the door. Finally, both Cortez and Charles Wright testified that Doubleday specifically told them that they needed to step aside so that "younger" managers could take over. Given that Cortez established a prima facie case of discrimination, introduced enough evidence for the jury to reject Sam's Club's explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that Sam's Club discriminated against him. * * *

CASE QUESTIONS

1. What was the legal issue in this case? What did the court decide?
2. Why does the court conclude that the active "coaching" in Cortez's file did not render him unqualified for promotion and thus unable to establish a prima facie case?
3. What was the evidence that Cortez was discriminated against?
4. How should employers address performance problems? Is it legitimate to limit the employment opportunities available to employees who have been placed on performance improvement programs?

Training and Development

Training and **development** programs can make employees more productive and help them get ahead in their careers. They are a feature of better jobs in which employers are willing to invest in their human resources. The provision of training and development is largely up to employers, but there are circumstances under which training is legally required or at least highly advisable. Significant legal questions also can arise concerning who receives training and payment for that training. Training and development opportunities are likely to be at the center of more legal disputes in the future as less stable employment relationships place a premium on acquiring skills that make employees marketable and employers attempt to ensure that they receive a return on their training investments.