

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 10, 2019

Elisabeth A. Shumaker
Clerk of Court

BRENDA HUBBARD,
Plaintiff - Appellant,

v.

ORAL AND MAXILLOFACIAL
ASSOCIATES, LLC,
Defendant - Appellee.

No. 18-6225
(D.C. No. 5:17-CV-00081-D)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **LUCERO**, **MATHESON**, and **MORITZ**, Circuit Judges.

Brenda Hubbard appeals the district court's adverse summary judgment rulings on her breach of contract and age and gender discrimination claims brought against her former employer, Oral and Maxillofacial Associates, LLC (OMA). We affirm.

I

OMA is a surgical practice owned by physicians who exercise joint control over its business matters. OMA operates out of four offices, and it hired Hubbard

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

under an employment agreement to work as the practice administrator. Under section 2 of the agreement, OMA hired Hubbard for a one-year term “commencing on December 3, 2012 and ending at 5:00 pm on December 2, 2013 . . . unless earlier terminated” by the parties. *Aplt. App.* at 38. Section 2 of the agreement also provides that it would “automatically renew for successive one-year terms unless either party notifies the other in writing at least ninety . . . days in advance of the expiration of the [current term]” that it would not be renewed. *Id.* Under section 7, titled “Termination of Employment,” the agreement details the circumstances in which the agreement could be terminated. *Id.* at 40. Subsection 7.1(c) provides that “[OMA] may terminate this Agreement at any time, without cause and for any reason, by giving notice to the Employee.” *Id.* If OMA invoked subsection 7.1(c), subsection 7.5.2 “entitled [Hubbard] to continue to receive her Base Salary for a period of three . . . months following the date of termination.” *Id.* at 41.

Hubbard was 54 years old when she was hired. Her initial performance evaluation in 2013 identified her strengths as her personality, her willingness to work hard, and her knowledge of human-resources issues. But the evaluation also identified three areas for improvement, including her communication skills, her interactions with other OMA offices, and her preparation for board meetings. The evaluation additionally contained several recommendations for improving her performance. At the end of 2013, Hubbard’s employment agreement automatically renewed for another one-year term.

In April 2014, Hubbard received a disciplinary action after Dr. Vincent Montgomery became frustrated by difficulties he had in contacting her. Although Hubbard denies that she received a disciplinary action, she admitted at her deposition that she received it, *see id.* at 686-87, and the record contains a disciplinary action form stating, “Failure to follow instructions by Partner,” “Employee does not take[] ownership for her own mistakes,” and “After multiple and repeated requests, Brenda did not communicate as requested by a Partner,” *id.* at 221. Also in 2014, six physicians evaluated Hubbard’s performance and each physician graded her competency in eight different categories on a scale of 1 through 5, with 1 representing, “Needs Improvement,” 3 representing “Meets Expectations,” and 5 representing “Exceptional or Excellent.” *Id.* at 230. Hubbard’s total average score was 3.3.

Following this evaluation, OMA retained an outside consulting firm, Impact, LLC, “to help with leadership development,” including improving Hubbard’s performance. *Id.* at 91. OMA also retained Impact to implement an organizational restructuring plan. Among other things, the reorganization plan envisioned that Hubbard’s position would change from practice administrator to practice executive, and her role would shift from handling day-to-day operations at three of OMA’s offices to focusing on strategic planning for the practice as a whole.

In 2015, the physicians requested that Hubbard complete an Individualized Development Plan (IDP). Dissatisfied with her initial submission, they then requested that she submit a revised IDP to Montgomery and Dr. Scott Searcey by a

date certain. When she failed to respond by the requested date, Montgomery requested an explanation. Hubbard replied that she had timely submitted her revised IDP to Impact. She further explained that she didn't provide "all the precise activities of education [they] requested[,] but without specific direction from the [physicians], [she was] not sure of which course to take." *Id.* at 239. Hubbard added that she was "very frustrated with this process" and had "followed through and provided two different IDP's as requested." *Id.* at 240.

Seven physicians provided input on Hubbard's 2015 performance evaluation. Each physician graded her competency in the same eight categories and on the same scale as her 2014 evaluation. Her total average score of 3.1 was slightly lower than her previous year's score. In the evaluation's written portion, Montgomery noted, "My trust in Brenda has decreased over the past year. Getting her to complete her IDP was very difficult and she was resistant to the process and direction given to her by Dr. Searcey, myself, and the Impact Group." *Id.* at 250. Several other physicians provided written comments as well, one of whom stated, "Overall, I expected more at this stage of her time with us. Therefore, I have to give her a lower score than last year. 3.09." *Id.* at 246. Another physician wrote, "She gets the job done, but it could be much cleaner without the drama." *Id.* at 247. As part of her evaluation, OMA requested that Hubbard evaluate her own performance, but her self-evaluation was untimely and incomplete.

In 2016, Hubbard had disputes with Montgomery and Dr. Michael Saumur. Saumur had repeatedly asked Hubbard for access to the employee payroll files

because some physicians were concerned she was recording inaccurate information in the payroll system. Hubbard responded slowly or reluctantly, causing Saumur to believe she might be intentionally misrepresenting the information. In a separate matter, Montgomery asked Hubbard to research the benefits of switching to different software. After some twenty-two days of corresponding with Hubbard and others about the request, Montgomery became frustrated by what he perceived as her refusal to execute his directive.

Meanwhile, several physicians met with Impact's principals to discuss Hubbard's performance. Impact had been coaching Hubbard, but three physicians expressed "great frustration" with her progress. *Id.* at 346. They believed she was resisting OMA's reorganization plan and asked Impact's principals whether she could improve enough to be executive director under the plan. Impact's principals responded that they had attempted to support Hubbard and help her understand the reorganization plan, but she failed to show any improvement. They stated, "[W]e did not believe we could assist her in helping her make any further progress." *Id.* at 360. Given this opinion, OMA's voting physicians unanimously agreed they "were not going to renew her contract." *Id.* at 490. Thus, by letter dated August 25, 2016, OMA notified her that it "decided not to renew [her] employment agreement." *Id.* at 43. Hubbard's employment ended at the conclusion of the operative one-year term—at 5:00 p.m. on December 2, 2016. She was 58 years old at the time and replaced by a younger, less-qualified male who was paid more.

On January 5, 2017, Hubbard filed an EEOC charge complaining of age and gender discrimination. On the same date, she also filed a complaint in state court alleging age and gender discrimination, as well as breach of contract for OMA's failure to pay three months' salary pursuant to subsection 7.5.2 of the agreement.¹ OMA removed the suit to federal court, asserting that Hubbard's age discrimination claim was properly brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a), her gender discrimination claim was properly brought under Title VII, 42 U.S.C. § 2000e-2(a)(1), and the district court should exercise supplemental jurisdiction over her state-law breach-of-contract claim. Hubbard didn't seek a remand, and the case proceeded to summary judgment.

In separate orders, the district court ruled against Hubbard on all three claims. The court denied her motion for partial summary judgment on the breach-of-contract claim and later granted summary judgment to OMA. The court concluded that the undisputed facts showed OMA elected not to renew the agreement and thus the termination provision providing for three months' salary under subsection 7.5.2 was inapplicable. Next, in evaluating the ADEA and Title VII claims, the court detailed the evidence underlying the decision not to renew the agreement, including Hubbard's job performance, OMA's efforts to implement the reorganization plan, and the circumstances that caused the physicians to lose trust in her. Although Hubbard cited evidence that she performed her job well and that some individuals

¹ Hubbard has abandoned other claims for retaliatory discharge and breach of contract based on OMA's alleged failure to pay her for unused vacation time.

within the practice acted unprofessionally, the court concluded she presented no evidence that OMA's reasons for not renewing her contract were insincere or that its decision was motivated by her age. Neither, the court ruled, was there evidence to reasonably infer that OMA's decision was motivated by gender discrimination. Therefore, the court granted summary judgment to OMA, and Hubbard appealed.

II

We review the district court's summary judgment rulings de novo, viewing the record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016). Summary judgment is appropriate "if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). The party opposing summary judgment "cannot rest on ignorance of facts, on speculation, or on suspicion." *Id.* (internal quotation marks omitted). In evaluating the state-law breach-of-contract claim, "we review the district court's interpretation and determination of state law de novo." *Id.* (internal quotation marks omitted).

A. Breach of Contract

Under Oklahoma law, "[i]f language of a contract is clear and free of ambiguity the court is to interpret it as a matter of law, giving effect to the mutual intent of the parties at the time of contracting." *Pitco Prod. Co. v. Chaparral Energy, Inc.*, 63 P.3d 541, 545 (Okla. 2003) (footnote omitted). "A contract must be considered as a whole so as to give effect to all its provisions without narrowly

concentrating upon some clause or language taken out of context.” *Mercury Inv. Co. v. F.W. Woolworth Co.*, 706 P.2d 523, 529 (Okla. 1985).

The employment agreement here is clear and unambiguous. Section 2 of the agreement states that OMA hired Hubbard for a one-year term that would automatically renew for successive one-year terms unless it was either terminated or one party gave timely written notice to the other that it would not automatically renew. Section 7 sets forth the circumstances in which it could be terminated. Subsection 7.1(c) states that “[OMA] may terminate this Agreement at any time, without cause and for any reason, by giving notice to the Employee.” *Aplt. App.* at 40. Subsection 7.5.2 states, “If this Agreement is terminated by [OMA] pursuant to Section 7.1(c), the Employee shall be entitled to continue to receive her Base Salary for a period of three (3) months following the date of termination.” *Id.* at 41. Thus, as the district court correctly observed, the employment agreement specified two different ways it could end: either by nonrenewal or by termination.

The record confirms that Hubbard wasn’t terminated under subsection 7.1(c). Rather, pursuant to section 2, OMA elected not to renew the agreement for another successive one-year term and gave her timely, written notice of its decision by its letter dated August 25, 2016. OMA’s letter to Hubbard states in full, “The Board of Managers of [OMA] has decided not to renew your employment agreement with OMA. Accordingly, unless earlier terminated as provided in the employment agreement, your employment agreement will terminate at 5:00 p.m. on December 2, 2016.” *Id.* at 43. This language clearly states that OMA chose not to renew the

contract. The letter even contemplates the alternative possibility that the agreement still could be terminated under section 7 before the one-year term expired. Although the letter uses the word “terminate” to reference the time at which the contract would end, this doesn’t obscure OMA’s clear intent not to renew the contract. Subsection 7.5.2 was inapplicable, and OMA was entitled to summary judgment.

B. ADEA

“The ADEA provides . . . that ‘it shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.’” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (alterations omitted) (quoting 29 U.S.C. § 623(a)(1)). To survive summary judgment on an ADEA claim, a plaintiff must point to evidence “that age was the ‘but-for’ cause of the employer’s adverse action.” *Id.* at 177.

Under the burden-shifting framework of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-04 (1973), which we apply to ADEA claims, *see DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 968 & n.16 (10th Cir. 2017), Hubbard must make a prima facie case of discrimination, *id.* at 969. If she makes this showing, OMA must proffer a legitimate, non-discriminatory reason for not renewing her contract, upon which the burden of production shifts back to Hubbard to show OMA’s proffered reasons are mere pretext for discrimination, *see id.* at 969-70.

OMA concedes Hubbard made a prima facie case of age discrimination, and it has proffered three legitimate, non-discriminatory reasons for declining to renew her

contract: 1) her performance, 2) her resistance to the reorganization plan, and 3) the physicians' lack of trust in her. We thus proceed to pretext. A plaintiff can show pretext "by revealing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reason, such that a reasonable fact finder could deem the employer's reason unworthy of credence." *Id.* at 970 (internal quotation marks omitted). Evidence that the employer's decision was mistaken or a poor business judgment is insufficient to show its explanation is unworthy of credence. *Id.* at 970-71.

Hubbard contests each of OMA's reasons. First, regarding her performance, she says her total average evaluation scores exceeded 3.0, meaning she met expectations when it came to satisfying her performance standards. Although she is correct to the extent she limits her analysis to her total average scores, her 2015 evaluation, for example, contains individual scores from seven different physicians in eight competency categories. While some physicians rated her above 3.0 in certain categories, other physicians rated her below expectations in the categories of strategic organization and planning; teamwork, cooperation and attitude; communication; performance management; and stress and conflict management. In the categories of communication and strategic organization and planning, the average of Hubbard's scores from all seven physicians fell below 3.0. The physicians' written comments further confirmed they had legitimate concerns with her performance, particularly her communication skills.

Hubbard says these concerns were pretext because Montgomery admitted he attempted to undermine her. At an April 2015 board meeting, he stated:

[T]here were a lot [of] perceptions that I wanted Brenda to be gone. And I told her I don't want her to be gone and I admitted to Brenda that at the end of 90 days, I said, I'm going to man up. I didn't think you were the right person for the job, and that's the only thing that I said.

But after that, if I have engaged in behavior that you thought was undermining or not building you up, all I can – or I apologize. Because I can say I might have. Was it ego, was it pride, was it fear? Yeah, there was a lot. But I want to apologize to you guys.

Aplt. App. at 488-89. Yet even if this statement suggests Montgomery was attempting to undermine her, Hubbard offers no evidence to infer a discriminatory motive based on her age. Nor does she address the other physicians' concerns. Moreover, even after Montgomery made this statement, he expressed ongoing frustration with Hubbard's performance. And when Impact advised that she could not improve her performance, Montgomery and the other voting physicians unanimously agreed not to renew her contract. These circumstances fail to show that OMA's concerns for her performance issues were pretext for age discrimination.

OMA's second proffered reason for declining to renew Hubbard's employment agreement was her resistance to implementing the reorganization plan. Hubbard says this explanation is pretext because there were never any articulated goals of the reorganization plan. But the record is replete with undisputed evidence that the reorganization plan aimed to redefine Hubbard's role to focus on strategic planning for the practice as a whole while relinquishing the day-to-day operations of the individual offices. Indeed, Hubbard "does not dispute that one of the stated purposes

[of the reorganization] was for [her] to be able to spend less time on day-to-day office management in order to allow her to spend more time on strategic planning.” *Id.* at 459. She tacitly admits this was a goal of the reorganization by asserting this objective is inconsistent with the physicians’ concern that she was not visiting the other offices regularly. Relatedly, we note the physicians shared this concern at her initial performance evaluation in 2013, before OMA hired Impact to implement the reorganization plan. To the extent Hubbard insists the reorganization was never fully implemented, that in no way suggests the physicians’ concerns for her resistance to it was pretext for discrimination.

As for OMA’s third rationale for declining to renew her contract—the physicians’ loss of trust—Hubbard says that Saumur’s professed loss of trust is pretext because if she had falsified employee files, she would have faced severe disciplinary action. But her argument is purely speculative, as the record doesn’t establish whether she falsified employee files. The record only reflects that Saumur *believed* she was recording incorrect information because she was slow to give him access to the files. Nevertheless, Hubbard questions Saumur’s sincerity by citing an email he sent to the entire practice praising her good work. The email she references, however, post-dated the physicians’ vote not to renew her contract and notified the practice she was resigning. That email thanked Hubbard for her work during her tenure, but it doesn’t cast doubt on the sincerity of Saumur’s lack of trust. *See Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1170 (10th Cir. 2007) (“The relevant inquiry is not whether the employer’s proffered reasons were wise,

fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs.” (internal quotation marks omitted)).

Nor does Hubbard adequately address Montgomery’s loss of trust. She insists he attempted to undermine her, but after apologizing, he gave specific reasons for why he lost trust in her: OMA’s difficulty in getting Hubbard to complete her IDP, as well as her resistance to the process and direction given to her by the physicians and Impact. Hubbard doesn’t address this explanation. Instead, she suggests Montgomery must have manufactured the dispute about switching to a different software because he possessed the new software all along. The record confirms that Montgomery’s office was testing the new software, but the dispute didn’t result from Hubbard’s failure to procure the software; the dispute resulted from Hubbard’s inadequate response to Montgomery’s request for feedback on the software’s benefits. Thus, the fact that Montgomery possessed the software doesn’t indicate that his loss of trust was insincere.

Additionally, we note, as did the district court, that there is no evidence showing that Hubbard’s age was the “but for” cause of OMA’s decision not to renew her employment agreement. Although she cites evidence that a physician said he didn’t like working with old people, this isolated comment doesn’t establish that Hubbard’s age motivated OMA’s non-renewal decision, and Hubbard makes no attempt to show that it did. She also says younger employees were given preferential treatment but the evidence she points to doesn’t support her position because none of the employees were similarly situated to Hubbard. *See McGowan v. City of Eufala,*

472 F.3d 736, 745 (10th Cir. 2006). Consequently, the district court correctly granted summary judgment to OMA on the ADEA claim.

C. Title VII

“Title VII makes it an ‘unlawful employment practice for an employer to discharge any individual because of such individual’s sex.’” *Bird*, 832 F.3d at 1200 (ellipses omitted) (quoting 42 U.S.C. § 2000e-2(a)(1)). We apply the burden-shifting framework under *McDonnell Douglas* and assume without deciding that Hubbard has established a prima facie case of gender discrimination.² OMA provided legitimate, non-discriminatory reasons for declining to renew Hubbard’s contract, and to the extent she challenges those reasons as pretext for gender discrimination, we affirm the grant of summary judgment for the same reasons discussed above.

Hubbard’s only additional argument in support of her gender-discrimination claim, apparently to show pretext, is that she was succeeded by a younger male who was paid more, had less experience, and didn’t meet the published qualifications for the new position. But Hubbard fails to tether these circumstances to a discriminatory motive not to renew her contract. OMA elected not to renew her agreement before it chose or even searched for a successor, and her successor’s gender, by itself, doesn’t suggest a discriminatory motive. Further, the record indicates that OMA based the higher salary on Impact’s suggestion that OMA could attract a better candidate if it offered an increased compensation package. Perhaps the higher salary, the chosen

² OMA concedes Hubbard has made a prima facie case to the extent she was treated less favorably than her male successor who received a higher salary.

successor, and the decision not to renew Hubbard's contract could be characterized as mistakes or poor business judgments, but they provide no basis from which a jury could reasonably infer a discriminatory animus. The district court therefore correctly granted summary judgment to OMA on Hubbard's Title VII claim.

III

The judgment of the district court is affirmed.

Entered for the Court

Nancy L. Moritz
Circuit Judge