FILED
United States Court of Appeals
Tenth Circuit

August 30, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DEBORAH A. GUY,

Plaintiff - Appellant,

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs,*

Defendant - Appellee.

No. 20-6158
(D.C. No. 5:18-CV-00033-SLP)
(W.D. Okla.)

ORDER AND JUDGMENT**

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Deborah Guy appeals the district court's grant of summary judgment in favor of her employer, the Veterans Affairs Medical Center (VAMC) in Oklahoma City, in her suit alleging unlawful race, sex, and age discrimination and retaliation stemming

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* In accordance with Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Denis McDonough is substituted for Robert Wilkie as the respondent in this action.

** 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

from her reassignment out of the cardiothoracic surgery unit at the hospital. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Guy, an African-American woman born in 1953, was an advanced practice registered nurse (APRN) in the cardiothoracic unit at the VAMC. Her position in the cardiothoracic unit of the hospital afforded her the opportunity to pick up overtime and on-call shifts, which, in turn, earned her additional compensation. Other nurses in the cardiothoracic unit included Jeffrey Barlow and Bethany Barlow.[1] Jeffrey is a white man who was under the age of 40 during the events at issue here. Jeffrey, a registered nurse first assistant (APRN/RNFA) and Bethany, a physician's assistant (PA), possessed credentials enabling them to "first assist" during surgeries, but Guy did not. First assisting includes tasks such as "positioning and draping a patient for surgery, retracting tissue, operating suction equipment, counting surgical materials, closing incisions, and harvesting veins for bypass procedures." Aplt. App. Vol. 2 at 257.

Dr. John Tompkins was the chief of surgery at the VAMC. His duties included the management of mid-level support staff, such as Guy, Jeffrey Barlow, and Bethany Barlow. In January 2015, Dr. Tompkins reassigned Guy out of the cardiothoracic unit and into the orthopedic unit. He sent a memo to Guy memorializing the decision stating, in relevant part: "Based on the needs of Surgery

[1] Although Jeffrey and Bethany Barlow share the same last name, they are not related.

Service, you are being reassigned to the Orthopedic Section. . . . This position will not entail any on-call duties." *Id.* Vol. 1 at 245.

On at least two occasions prior to this reassignment, Guy complained to Dr. Tompkins about the behavior of a surgeon in the cardiothoracic unit, Dr. Donald Stowell, including an occasion in December 2014 where Dr. Stowell yelled at her in front of patients and caused her to cry. This complaint resulted in the issuance of a "disruptive behavior memo" to Dr. Stowell. But, as she acknowledged in her deposition, Guy never told Dr. Tompkins she believed this incident was discriminatory in any way or based on her race, gender, or age.

After exhausting her administrative remedies, Guy sued, alleging the reassignment from the cardiothoracic unit to the orthopedic unit constituted unlawful race and sex discrimination under Title VII of the Civil Rights Act, *see* 42 U.S.C. § 2000e-2(a)(1), and age discrimination under the Age Discrimination in Employment Act (ADEA), *see* 29 U.S.C. § 623(a)(1). She also alleged the reassignment was retaliatory in violation of both Title VII and the ADEA. *See* 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d).

The VAMC moved for summary judgment, and the district court granted the motion. The district court concluded as a matter of law that (1) Guy could not make out a prima facie case of race or gender discrimination under Title VII because she could not establish her reassignment occurred under circumstances giving rise to an inference of discrimination; (2) Guy did not come forward with evidence showing the legitimate, nondiscriminatory reasons the VAMC gave for her reassignment were

pretextual; and (3) Guy's retaliation claim failed because she did not engage in protected activity. This appeal follows.

DISCUSSION

We review the grant of summary judgment de novo. *May v. Segovia*, 929 F.3d 1223, 1234 (10th Cir. 2019). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty.*, 546 F.3d 1299, 1306 (10th Cir. 2008) (internal quotation marks omitted).

We analyze Title VII and ADEA discrimination cases in which the employee attempts to prove discrimination circumstantially using the three-step *McDonnell-Douglas* framework. *See Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 920 (10th Cir. 2004). Under this framework, the plaintiff must first establish a prima facie case of discrimination. *See id.* Then, "the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its action." *Id.* (internal quotation marks omitted). If the employer carries this burden, "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* (internal quotation marks omitted).

At the first step, "[t]o establish a prima facie disparate treatment claim, a plaintiff must present evidence that (1) she belongs to a protected class; (2) she

suffered an adverse employment action; and (3) the adverse action occurred under circumstances giving rise to an inference of discrimination." *Luster v. Vilsack*, 667 F.3d 1089, 1095 (10th Cir. 2011). The burden on the employee to establish a prima facie case is light, *see Bird v. W. Valley City*, 832 F.3d 1188, 1200–01 (10th Cir. 2016), as is the burden on the employer to come back with a legitimate nondiscriminatory reason, *see Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1363 (10th Cir. 1997). If the analysis proceeds to the third step, "[a] plaintiff shows pretext by demonstrating 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 and hence infer that the employer did not act for the asserted nondiscriminatory reasons." *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1167 (10th Cir. 2007) (internal quotation marks omitted).

Guy argues the district court erred in concluding she did not establish her reassignment occurred under circumstances giving rise to an inference of discrimination and in concluding she presented no evidence that the legitimate nondiscriminatory reason the hospital offered for her reassignment was pretextual. More specifically, she argues the district court failed to construe the evidence in the light most favorable to her and impermissibly conflated its analysis of whether she established a prima facie case with its analysis of whether she established pretext. We assume, without deciding, that Guy established a prima facie case for both her

Title VII and ADEA claims.[2] But because we agree with the district court that no genuine issue of material fact existed suggesting the reasons for Guy's reassignment were pretextual, we conclude the district court correctly granted the VAMC's motion for summary judgment on those claims.

1. Pretext

Guy argues she presented sufficient evidence of pretext to withstand summary judgment because the VAMC advanced inconsistent explanations for the reassignment after significant legal proceedings had taken place. "We have previously held that a genuine factual dispute regarding pretext can arise when an employer changes its explanation for an employment decision after significant legal proceedings have occurred." *Bird*, 832 F.3d at 1201 (internal quotation marks omitted). As recorded in the January 2015 memo from Dr. Tompkins, at the time of the reassignment the VAMC stated the reason was "the needs of Surgery Service." Aplt. App. Vol. 1 at 245. Before the district court, the VAMC further explained the cardiothoracic unit underwent a temporary pause in surgeries in June 2014 due to "higher than normal mortality rate, adverse publicity, and a review of [cardiothoracic] surgeries," and that this led to a decrease in the total number of patients in the cardiothoracic section and, therefore, midlevel providers in that section. *Id.* at 38.

[2] The VAMC conceded below, and concedes on appeal, that Guy established a prima facie case of discrimination in connection with her ADEA discrimination claim, but it contested whether she established a prima facie case in connection with her Title VII discrimination and retaliation claims.

Guy admitted these averments in her response to the VAMC's statement of material facts before the district court. *See id.* Vol. 2 at 47. But Guy fails to show, and we fail to discern, how these explanations are in any way inconsistent with the January 2015 memo: The reassignment occurred because of a change in the needs of the Surgery Service—i.e., a decrease in the workload for midlevel providers in her previous section. Because the VAMC did not change its explanation for the reassignment, there is no genuine issue of material fact as to pretext,[3] so the district court correctly granted summary judgment to the VAMC on Guy's claims for sex, race, and age discrimination.

2. Retaliation

To establish a prima facie case of retaliation under either Title VII or the ADEA, Guy needed to show, inter alia, that "she engaged in protected opposition to discrimination." *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 (10th Cir. 2008). To establish protected opposition, "no magic words are required,"

[3] The district court also rejected the possibility that the reassignment was pretextual because the VAMC treated Jeffrey Barlow (a white male under the age of 40) more favorably than Guy in connection with the reassignment or the possibility that Dr. Tompkins' reassignment of her was, in reality the product of influence by Dr. Stowell's discriminatory animus (the so-called "Cat's Paw" theory of liability). Guy does not advance those arguments on appeal and, in fact, expressly disclaims having ever raised them. *See* Aplt. App. Vol. 2 at 56 ("[T]he Secretary's entire argument regarding Jeff Barlow is completely irrelevant and immaterial to this case."); Aplt. Reply Br. at 3 ("Guy never asserted, at any point in the litigation of this case, the Cat's Paw theory."); *id.* at 17 ("Despite the VA's insistence that the similarly situated theory is somehow pertinent to the instant case, it clearly is not."). We will honor that disclaimer, and we confine our pretext analysis accordingly. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) (declining to consider arguments not raised before the district court).

but "the employee must convey to the employer his or her concern that the employer has engaged in a practice made unlawful by [the relevant employment law]." *Id.* at 1203; *see also Petersen v. Utah Dep't of Corr.*, 301 F.3d 1182, 1188 (10th Cir. 2002) ("Title VII does not prohibit all distasteful practices by employers. [A supervisor] could be unconscionably rude and unfair to [an employee] without violating Title VII.").

As evidence of protected activity on appeal, Guy points to her December 2014 complaint about the outburst from Dr. Stowell that resulted in the issuance of a "disruptive behavior memo." But Guy never indicated this behavior was discriminatory in any way or related to her race, sex, or age, so the district court correctly concluded the complaint was not protected activity. She therefore did not make out a prima facie case of retaliation, so the district court correctly granted summary judgment on those claims to the VAMC.

CONCLUSION

We affirm the judgment of the district court.

Entered for the Court

Carolyn B. McHugh
Circuit Judge