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United States Court of Appeals
Tenth Circuit

September 13, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHELLE BATTINO,

Plaintiff - Appellant,

v.

REDI-CARPET SALES OF UTAH, LLC,

Defendant - Appellee.

No. 20-4081
(D.C. No. 2:19-CV-00048-DB)
(D. Utah)

ORDER AND JUDGMENT*

Before **HARTZ**, **MORITZ**, and **EID**, Circuit Judges.

Michelle Battino appeals the district court's order granting summary judgment to her employer, Redi-Carpet Sales of Utah, LLC (Redi Carpet), on her employment-discrimination claims. For the reasons explained below, we affirm.

Background

Battino worked for several years as an office manager in Redi Carpet's Salt Lake City office. When Battino shared the news of her pregnancy with Redi Carpet in March 2017, Redi Carpet told her she could take up to three months of unpaid leave under the Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601–

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

2654. But, according to Battino, Redi Carpet did not actually want her to take the full three months of leave; instead, Redi Carpet "wanted [her] to take off as little time as possible and come back." App. vol. 1, 104. Battino testified that Rick Spohn, the general manager of the office and her direct supervisor, "pressured [her] not to use three full months of leave"; frequently commented on her pregnancy in a "negative" or "very exasperated" manner, including getting "very . . . riled up about it" and "wav[ing] his arms"; and generally tried to make her feel guilty about taking leave at all. *Id.* at 119–20, 122–23.

Ultimately, Battino and Spohn agreed to a special arrangement. Battino would take a shorter, six-week leave; upon returning to full-time work on December 4, 2017, she could work primarily from home until, tentatively, February 1, 2018, at which point she would return to the office full-time.

As planned, Battino took her six weeks of leave and returned to full-time work, primarily from home, on December 4. But it did not go well. Battino testified that Spohn "blamed [her] for things that happened while [she] was [on leave]" and made statements to this effect to her and to her coworkers every day. *Id.* at 166. And on December 13, Redi Carpet prepared a performance improvement plan (PIP) for Battino. The PIP "confused" Battino, as she had "only been [back] for a couple of days." *Id.* at 90.

On January 5, 2018, Spohn sent Battino an email, copying his own supervisor, Dan Wimer, in which he expressed concern about her ability to manage her workload. Spohn also reminded Battino that she was expected "to be in the office

[five] days per week, [eight hours] a day," starting February 1, 2018. *Id.* at 221. In reply, Battino expressed "surprise" at the email, as it was "the first [she was] hearing" of some of these concerns, and she confirmed that she "fully anticipate[d] being in the office full[-]time come February." *Id.* at 220.

Following this email exchange and on or around January 9 and 10, 2018, Wimer, Spohn, and Battino met to discuss the office's "major operational issues." *Id.* at 232. Based on these issues, Wimer revoked the work-from-home arrangement and required Battino to immediately return to the office full-time. Battino told Wimer and Spohn that she could not do so because she did not have any immediately available childcare. She said she had a babysitter interview scheduled for the following week, and she indicated she could and would be in the office full-time in two weeks, starting February 1. Unwilling to wait, Wimer terminated Battino's employment.

Battino then filed this action, bringing claims against Redi Carpet for discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and for unlawful employment practices and retaliation under the FMLA. The district court granted Redi Carpet's motion for summary judgment on all Battino's claims. Battino appeals.

Analysis

We review a district court's grant of summary judgment de novo. *Fassbender v. Correct Care Sols., LLC*, 890 F.3d 875, 882 (10th Cir. 2018). In doing so, we view all the evidence and "draw[] all reasonable inferences therefrom in the light most favorable to the nonmoving party." *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175

(10th Cir. 2008). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Mere allegations" do not suffice to defeat summary judgment. *Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004).

I. Title VII Discrimination

Battino argues that the district court erred in granting summary judgment to Redi Carpet on her Title VII claims of pregnancy and gender discrimination.[1] "Title VII prohibits employers from terminating an employee"—or taking some other adverse employment action—"because of the employee's sex and, more specifically, because the employee is pregnant." *Fassbender*, 890 F.3d at 882. Here, the parties agree that Battino's termination constitutes an adverse employment action.[2] Battino can prove that this adverse action was the result of discrimination either through direct evidence of discrimination or through circumstantial evidence warranting relief under the *McDonnell Douglas* burden-shifting analysis. *See id.* at 882–84 (citing *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973)).

[1] Battino also alleged gender discrimination in her complaint, asserting that she "was subjected to a hostile work environment based on her gender." App. vol. 1, 9. But on appeal, Battino's gender-discrimination claim—to the extent she continues to separately allege one—appears rooted in pregnancy and protected leave.

[2] Battino argues on appeal that she suffered an additional adverse employment action when Redi Carpet placed her on a PIP. But Battino acknowledges that she did not make this argument below, conceding that she "failed to properly preserve the [PIP] issue in the lower [c]ourt and has forgone this argument." Rep. Br. 9 n.1. We therefore decline to consider any argument based on the PIP.

The district court rejected Battino's claims under either option. It first concluded that Battino failed to show any direct evidence of discrimination. On appeal, Battino suggests in passing that the district court was wrong on this point. But in so doing, she fails to point to a single piece of evidence that, "if believed," proves the existence of discrimination "*without inference or presumption*." *Id.* at 883 (emphasis added) (quoting *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007)); *see also Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1216 (10th Cir. 2013) (explaining that if "the content and context of a statement allow it to be plausibly interpreted in two different ways—one discriminatory and the other benign—the statement does not qualify as direct evidence"). We therefore reject Battino's passing suggestion that the district court erred in finding no direct evidence of discrimination.

The district court also rejected Battino's claims under the *McDonnell Douglas* framework. Under this framework, "the plaintiff first bears the burden of proving a prima facie case of discrimination." *Riggs*, 497 F.3d at 1114. This initial burden is "not onerous." *Tabor*, 703 F.3d at 1216 (quoting *Orr v. City of Albuquerque*, 417 F.3d 1144, 1149 (10th Cir. 2005)). "One way" for the plaintiff to establish a prima facie case "is to show that (1) [he or she] was a member of a protected class (2) who was terminated (3) despite being qualified for [his or] her position, and (4) the job [was not] eliminated." *Fassbender*, 890 F.3d at 884. "If the plaintiff successfully proves a prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Riggs*, 497 F.3d at 1114. And "[o]nce the employer identifies a legitimate reason for its action, the

burden shifts back to the employee to prove that the proffered legitimate reason was a pretext for discrimination." *Id.* at 1114–15.

The district court concluded that Battino failed to establish a prima facie case of discrimination under this framework, and Battino contests that ruling on appeal. As a general matter, individuals who have recently been pregnant or given birth can continue to be members of a protected class. *See, e.g.*, *Martin v. Canon Bus. Sols., Inc.*, No. 11-cv-05565, 2013 WL 4838913, at *8 (D. Colo. Sept. 10, 2013); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1493 (D. Colo. 1997). "It would make little sense," after all, "to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place." *Donaldson v. Am. Banco Corp.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996); *see also Fejes*, 960 F. Supp. at 1493 ("[T]o read Title VII so narrowly would lead to absurd results."). So Battino's membership in a protected class is not prohibited by the fact that she was not pregnant at the time of her termination.

But we pause to note what Battino's discrimination claims do *not* encompass. The primary basis for Battino's discrimination claims appears to be the sudden revocation of her work-from-home arrangement.[3] And on that front, she highlights

[3] We reject Battino's attempt to characterize her work-from-home arrangement as an extension of her leave. Although she sometimes characterizes her six-week leave and her work-from-home arrangement as an overall "FMLA leave . . . package deal" that "should be dealt with together," that is incorrect. Rep. Br. 5. Battino's leave ended when she returned to work full-time on December 4.

Redi Carpet's alleged unwillingness to allow her "the opportunity to seek childcare." Aplt. Br. 18. But as the parties seem to understand, childcare does not fall within Title VII's prohibition of discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Although conditions that are the "*physiological* result of being pregnant [or] bearing a child" are protected under Title VII as medical conditions related to pregnancy or childbirth, Battino has not asserted that she personally required additional leave or a work-from-home arrangement due to such a condition. *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428–30, 429 n.4 (5th Cir. 2013) (emphasis added); *see also Allen-Brown v. D.C.*, 174 F. Supp. 3d 463, 478, 480 (D.D.C. 2016) (explaining that "as a matter of plain language, [Title VII] applies to lactation" because it is "a medical condition . . . []related to pregnancy"). Thus, to the extent that Battino alleges discrimination on the basis that Redi Carpet ended her work-from-home arrangement and terminated her employment without allowing her time to seek childcare, she fails to state a Title VII discrimination claim.

But Battino also advances an argument that appears to fit within Title VII's prohibition of discrimination based on pregnancy and protected leave. Specifically, she asserts that she "was fired for having become pregnant and inconvenienc[ing] Redi Carpet by insisting upon maternity leave," Aplt. Br. 13, and that "[t]he discrimination regarding her pregnancy was ongoing during the pregnancy and after her return," Rep. Br. 15. We accordingly assume that she has stated a prima facie case on this basis and turn to the remainder of the *McDonnell Douglas* analysis,

beginning with Redi Carpet's "legitimate, nondiscriminatory reason for" her termination. *Riggs*, 497 F.3d at 1114.

Redi Carpet's proffered legitimate reason is a simple one. The Salt Lake City office was plagued with problems and needed an in-person office manager. For example, the office was apparently struggling with "major operational issues," including a $9,500 inventory loss, noncompliance with standard procedures, and accounting errors. App. vol. 1, 232. But Battino could not immediately be in the office full-time. And Redi Carpet found Battino's at-home work dissatisfactory. So Redi Carpet terminated her employment.

Thus, for her claims to survive the third step of the *McDonnell Douglas* inquiry, Battino must "show there is a genuine issue of material fact as to whether the proffered reasons are pretextual." *Fassbender*, 890 F.3d at 884 (quoting *Plotke v. White*, 405 F.3d 1092, 1099 (10th Cir. 2005)). That is, Battino must show that Redi Carpet's reason for terminating her employment—she was not adequately performing her job responsibilities from home, Redi Carpet needed her in the office, and she could not immediately meet that need—was mere pretext for discriminating against her for becoming pregnant and taking leave. *See Riggs*, 497 F.3d at 1115.

Battino argues that the events leading to her termination "establish an inference that the reason she was terminated was because of her pregnancy and related leave." Aplt. Br. 19. But even assuming such an inference exists, it does little more than reiterate Battino's prima facie case under the first step; it does not advance a separate argument for pretext or create a genuine issue of material fact as to

whether Redi Carpet's proffered reason was pretextual. Although Battino does assert that she was the target of discriminatory comments about pregnancy and pressure rising "to the level of harassment to take less [leave] time," she does not meaningfully challenge Redi Carpet's assertion that she was not able to adequately perform her job responsibilities while working from home. *Id.* at 27. And she has not pointed to any other indicators of pretext, such as shifting explanations for the termination or procedural irregularities in the termination process. *Cf. Fassbender*, 890 F.3d at 890. Accordingly, Battino fails to prove Redi Carpet's proffered reason was pretextual, and we affirm the district court's grant of summary judgment to Redi Carpet on Battino's Title VII discrimination claims.

II. Title VII Retaliation

Battino next challenges the district court's award of summary judgment to Redi Carpet on her Title VII retaliation claim. "Title VII forbids employers from retaliating against employees for opposing any activity that is unlawful under Title VII." *Fassbender*, 890 F.3d at 890; *see also* 42 U.S.C. § 2000e-3(a). "To state a prima facie case of retaliation, [Battino] must demonstrate that: (1) she engaged in protected opposition to discrimination; (2) [Redi Carpet] took an adverse employment action against her; and (3) there exists a causal connection between the protected activity and the adverse action." *Stover*, 382 F.3d at 1071. The district court concluded that Battino had not shown she engaged in any protected activity and that even if she had, she had not shown a causal connection between the protected activity

and her termination. Thus, the district court granted summary judgment on this claim to Redi Carpet.

On appeal, Battino argues that she "engaged in protected [activity] by becoming pregnant, informing Redi Carpet of her pregnancy, and . . . asking for an accommodation[,] namely, time off in order to have the baby." Aplt. Br. 20. To support characterizing these actions as protected activity, she notes that under the Americans with Disabilities Act (ADA), "[a]sking for an accommodation is clearly protected activity." *Id.* (citing *Foster v. Mountain Coal Co., LLC*, 830 F.3d 1178, 1187 (10th Cir. 2016)).

But Battino asserts her retaliation claim under Title VII, not the ADA. And "Title VII forbids retaliation against an employee because she has 'opposed' any practice made unlawful by Title VII, or because she has 'participated . . . in an investigation, proceeding, or hearing under this subchapter.'" *Stover*, 382 F.3d at 1070 (omission in original) (quoting § 2000e-3(a)). "Protected opposition can range from filing formal charges to voicing informal complaints to superiors." *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1015 (10th Cir. 2004). But Battino does not allege that she engaged in any such activity. Thus, Battino cannot establish a prima facie case, and we affirm the district court's grant of summary judgment to Redi Carpet on Battino's Title VII retaliation claim.

III. FMLA

Last, Battino argues that the district court erred in awarding summary judgment to Redi Carpet on her FMLA claims. The FMLA applies to employees who

work for employers who employ more than 50 employees within 75 miles of the employees' worksite. 29 U.S.C. § 2611(2)(B). Because Redi Carpet does not employ more than 50 employees within 75 miles of its Salt Lake City office,[4] the FMLA does not cover Battino. Battino does not contest this. Instead, Battino argues that Redi Carpet "is estopped from making this argument" because it told her that it provided FMLA leave. Aplt. Br. 22. The district court rejected Battino's equitable-estoppel argument, concluding that she had not shown that she either actually or reasonably relied, to her detriment, on Redi Carpet's FMLA representation.

According to Battino, although we have not "officially appl[ied] the doctrine of equitable estoppel to FMLA cases," we "ha[ve] clearly left the door [open] to do so." *Id.* (citing *Bass v. Potter*, 522 F.3d 1098 (10th Cir. 2008)). In *Bass*, we concluded that the employer did not willfully violate the FMLA. 522 F.3d at 1104. In so doing, we rejected the plaintiff's equitable-estoppel argument, noting that equitable estoppel "requires a showing of 'both actual and reasonable' reliance on [the employer's] allegedly misleading conduct," and even if the plaintiff "demonstrated actual reliance . . . , he failed to show reasonable reliance." *Id.* at 1106 (quoting *Rager v. Dade Behring, Inc.*, 210 F.3d 776, 779 (7th Cir. 2000)).

The Fifth Circuit has more fully considered equitable estoppel in the FMLA context. *See Minard v. ITC Deltacom Commc'ns, Inc.*, 447 F.3d 352, 358–59 (5th Cir. 2006). There, the plaintiff alleged that she took FMLA leave in order to undergo

[4] Redi Carpet's Salt Lake City office typically has ten to 13 employees, and Redi Carpet does not have any other employees within a 75-mile radius.

surgery, "but on the day she was scheduled to return to work, [the employer] terminated her employment rather than restor[e] her to her former or an equivalent position as required by the [FMLA]." *Id.* at 354. And the employee alleged that she relied on her employer's FMLA representation to her detriment because, had she known she was not eligible for FMLA leave, she would have followed an alternative medical course "without undergoing surgery at that particular time." *Id.* at 354, 359. Concluding that detrimental reliance was a genuine issue of material fact precluding summary judgment for the employer, the Fifth Circuit held that when an employer "makes a definite but erroneous representation to [an] employee that [he or] she is an 'eligible employee' and entitled to leave under [the] FMLA[] and has reason to believe that the employee will rely upon it," the employer "may be estopped to assert a defense of non[]coverage, if the employee reasonably relies on that representation and takes action thereon to [his or] her detriment." *Id.* at 359.

For the purpose of considering Battino's argument, we assume that the Fifth Circuit's equitable-estoppel test applies here. Battino contends that Redi Carpet is estopped from asserting her ineligibility because it told her that she was eligible for FMLA coverage. It appears that Battino may have actually and reasonably relied on Redi Carpet's representation, inasmuch as she took some unpaid leave. But she fails to allege any facts suggesting that this was "to her detriment." *Id.* at 359. Instead, it appears that as a result of Redi Carpet's mistaken representation, Battino took several weeks of unpaid leave and returned to her job when that leave ended.

In her appellate briefing, Battino belatedly attempts to assert a detrimental-reliance argument. Specifically, she contends that she relied on Redi Carpet's FMLA representation to negotiate both her unpaid leave *and* her paid work-from-home arrangement and that she then "detrimentally relied on that negotiation . . . by not having childcare arranged until February 1, 2018, the day she was to return to the office full[-]time."[5] Rep. Br. 19. Battino's theory, however, can only be found in the pages of her appellate briefs, not in the record or in her pleadings or briefing below.

Assuming we would apply equitable estoppel in the FMLA context, Battino fails to support her detrimental-reliance argument with any nonconclusory allegations. *Cf. Minard*, 447 F.3d at 358–59 (concluding, based on pleadings and summary-judgment briefing, that genuine disputes of material fact existed on issue of detrimental reliance). As a result, equitable estoppel cannot save Battino's FMLA claims, and we affirm the district court's award of summary judgment to Redi Carpet on those FMLA claims.

Conclusion

To the extent that Battino alleges discrimination on the basis that Redi Carpet ended her work-from-home arrangement and terminated her employment without allowing her time to seek childcare, she fails to state a Title VII discrimination claim. To the extent that she advances an argument that her termination fits within Title

[5] It is unclear whether Battino actually had childcare arranged for February 1, 2018, as Battino only mentioned having an interview for a possible babysitter scheduled.

VII's prohibition of discrimination based on pregnancy and protected leave, we assume that she has stated a prima facie case of discrimination. But we affirm the district court's grant of summary judgment to Redi Carpet on Battino's Title VII discrimination claims because she fails to rebut Redi Carpet's legitimate, nondiscriminatory reason for terminating her employment—that is, she was not able to adequately perform her office-manager duties from home. We also affirm summary judgment on Battino's Title VII retaliation claim, as she fails to assert that she engaged in any protected opposition to any discriminatory practice under Title VII. Thus, she has not established a prima facie case of retaliation.

Regarding her FMLA claims, we conclude that despite Redi Carpet's original representation to the contrary, the FMLA does not apply to Battino. Further, because Battino fails to establish that she relied on that representation to her detriment, Redi Carpet is not equitably estopped from asserting the lack of FMLA coverage in this litigation. We therefore affirm the district court's grant of summary judgment to Redi Carpet on these claims.

Entered for the Court

Nancy L. Moritz
Circuit Judge