FILED
United States Court of Appeals
Tenth Circuit

April 12, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

YADIRA HURST,

Plaintiff - Appellant,

v.

DENIS RICHARD MCDONOUGH, in his capacity as Secretary of Veterans Affairs,

Defendant - Appellee.

No. 21-2068
(D.C. No. 1:19-CV-00540-RB-SCY)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BRISCOE**, and **ROSSMAN**, Circuit Judges.

Plaintiff Yadira Hurst sued Denis Richard McDonough, in his capacity as Secretary of the Department of Veterans Affairs ("VA"), alleging that certain employees of the VA had sexually harassed her. The district court granted summary judgment against Ms. Hurst, holding the VA was not Ms. Hurst's employer within the meaning of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17. Ms. Hurst has appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. Facts

The VA operates a national cemetery in Santa Fe, New Mexico ("the Cemetery"), and it contracts with maintenance companies ("the Contractors") to provide cleaning services at the Cemetery. Crystal Clear Maintenance, Inc. held the contract until May 31, 2018. Beginning June 1, 2018, RC Tech, Inc. became the new contractor.

The contracts specified the scope of work, including areas to clean, frequency of cleaning, and hours during which the work was to be performed. The Contractors provided all labor and equipment to perform the services, and they were responsible for supervision and training of their employees. The contracts also described standards of conduct for the Contractors' employees. The Contractors were expected to remove their employees from the Cemetery for violating those standards, but if they failed to do so, the contract allowed the VA to "direct the removal of an employee from the premises." Aplt. App. at 256.

Crystal Clear hired and trained Ms. Hurst to perform the services under its contract with the VA. When RC Tech won the contract, Executive Order 13495 required federal service contracts to include a provision directing a new contractor to give a right of first refusal to employees of the previous contractor. Exec. Order 13495, 74 Fed. Reg. 6103 (Jan. 30, 2009), *revoked by* Exec. Order 13897, 84 Fed. Reg. 59709 (Oct. 31, 2019). Pursuant to that provision, RC Tech offered Ms. Hurst the same position at the Cemetery she had held with Crystal Clear, and she accepted. Already familiar with the position, Ms. Hurst required no training from RC Tech.

Occasionally, Cemetery staff would direct her to prioritize her duties in a different manner or to perform tasks outside her normal routine. RC Tech provided all of Ms. Hurst's wages and benefits and also maintained all of her employment records, including payroll, taxes, and insurance.

In March 2018, Ramon C'de Baca, a VA administrative officer at the Cemetery, texted Ms. Hurst an unsolicited graphic photo. Fearing retaliation, Ms. Hurst never reported this incident to anyone until she filed this lawsuit.

That same month, Ms. Hurst was propositioned by Ray Baca, a VA employee at the Cemetery.[1] In July and August 2018, after RC Tech took over the contract, Mr. Baca sent Ms. Hurst sexually suggestive messages via Facebook. Finally, on August 20, 2018, Mr. Baca blocked Ms. Hurst in a doorway at work and refused to move unless she hugged him. He finally allowed her to pass after she threatened to tell Cemetery Director Jared Howard.

Ms. Hurst later met with Mr. Howard and Mr. C'de Baca to report Mr. Baca's conduct. In response, Mr. Howard instructed her not to take breaks with VA staff.

Ms. Hurst also reported the incidents involving Mr. Baca to RC Tech, which placed Ms. Hurst on paid administrative leave pending an investigation. As part of that investigation, RC Tech asked Ms. Hurst to write a statement about her allegations. Ms. Hurst did so, and RC Tech shared her statement with the VA.

[1] Mr. Baca is unrelated to Mr. C'de Baca.

Mr. Howard's investigation yielded complaints from VA staff members about Ms. Hurst's allegedly unprofessional behavior at the Cemetery. In addition, Mr. Howard claimed to have personally observed Ms. Hurst engaging in loud, profanity-laced conversations while on the grounds of the Cemetery. Based on his conclusion that Ms. Hurst's conduct violated the standards set forth in RC Tech's contract, Mr. Howard invoked the contractual provision allowing the VA to direct removal of Ms. Hurst from the Cemetery. Because RC Tech had no other contracts in New Mexico, RC Tech terminated Ms. Hurst's employment on September 19, 2018.

In 2019, Ms. Hurst filed her lawsuit in federal district court in New Mexico after exhausting her administrative remedies. The VA moved for summary judgment, which the district court granted.

II. Discussion

Ms. Hurst contends the district court erred in holding the VA was not her employer for purposes of Title VII. In particular, she argues on appeal the facts of her case are distinguishable from the facts of *Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214 (10th Cir. 2014), in which we set forth the test for determining whether a client in a vendor-client relationship is a "joint employer." We agree with the district court that under the joint-employer test, no reasonable jury could find Ms. Hurst was an employee of the VA.

A. Standard of Review

We review summary judgment decisions de novo, "view[ing] the evidence and draw[ing] reasonable inferences therefrom in the light most favorable to the nonmoving party." *Talley v. Time, Inc.*, 923 F.3d 878, 893 (10th Cir. 2019) (internal quotation marks omitted). Summary judgment is required when "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 [also] review de novo legal questions of statutory interpretation," such as "the legal test to determine the definition of 'employee' under Title VII." *Knitter*, 758 F.3d at 1225.

B. The Joint Employer Test

"Under the joint employer test [applicable to Title VII], two entities are considered joint employers if they share or co-determine those matters governing the essential terms and conditions of employment." *Id.* at 1226 (internal quotation marks omitted). The most important factor in this assessment is the right to terminate the employment relationship. *Id.* Additional factors include "the ability to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; day-to-day supervision of employees, including employee discipline; and control of employee records, including payroll, insurance, taxes and the like." *Id.* (ellipses and internal quotations marks omitted).

1. Power to Terminate Employment

Ms. Hurst argues the VA had the power to terminate her employment because under its contract with RC Tech, the VA had the right to request that RC Tech

remove Ms. Hurst from the Cemetery. Ms. Hurst also argues that the VA's request to remove her effectively forced RC Tech to terminate her employment because RC Tech had no other service contracts in the state. In this case, these circumstances are insufficient to establish that the VA had the right to terminate Ms. Hurst's employment.

First, as Ms. Hurst appears to concede, the contract expressly provided only that the VA had the right to request Ms. Hurst's removal from the Cemetery—not the right to terminate her employment altogether.

Second, we held in *Knitter* that even when a request to remove results in the vendor having to terminate the employment, that does not necessarily mean the client had the *contractual* power to terminate. *Id.* at 1228-29 (emphasis added). In *Knitter*, the client requested that its vendor no longer send one of its employees to the client's work site. The vendor complied, which resulted in that employee's termination because the vendor had no other contracts. *Id.* at 1223, 1228-29. We observed the client had said nothing to the vendor about the plaintiff's continued employment with the vendor or her ability to work for other clients. *Id.* at 1229. We further explained the client was unaware the vendor had no other contracts to which the plaintiff could be assigned. *Id.*

The circumstances of Ms. Hurst's case are akin to those in *Knitter*. The VA asked RC Tech to remove Ms. Hurst from the Cemetery, not to fire her. Likewise, Ms. Hurst has pointed to no evidence that anyone at the VA knew RC Tech had no other contracts in New Mexico. In short, the VA's request that RC Tech remove

Ms. Hurst from the premises did not constitute power over Ms. Hurst's "continued . . . employment [at RC Tech] or her ability to work for other [RC Tech] clients." *Id.* at 1229.

Ms. Hurst argues her case is distinguishable from *Knitter* because RC Tech's service contract was with a federal agency.[2] She insists this conferred upon her "federal service employee" status and that the VA's actions resulted in the termination of that status. In support, Ms. Hurst points to the Service Contract Act, 41 U.S.C. §§ 6701-6707, which requires federal contractors and subcontractors to provide their employees a minimum wage and certain benefits. *Id.* § 6703(1)-(2). "The primary purpose of the Service Contract Act is to protect all employees of contractors and subcontractors furnishing services to federal agencies." *Am. Waste Removal Co. v. Donovan*, 748 F.2d 1406, 1410 (10th Cir. 1984). Nothing in the language of the Service Contract Act suggests a contractor's employee becomes a federal employee for Title VII purposes merely because the contractor furnishes services to a federal agency. Nor has Ms. Hurst cited any authority to support her argument. Thus, the district court properly concluded no genuine dispute of fact existed regarding whether RC Tech alone had the power to terminate Ms. Hurst's employment.

[2] Relatedly, Ms. Hurst argues the district court erred in stating that "Ms. Hurst makes no effort to distinguish [her] circumstances from those in *Knitter*." Aplt. App. at 264. In support, she quotes a paragraph from her summary judgment response brief which she says distinguishes *Knitter*—although that paragraph never actually cites to *Knitter*. Our review of the district court's order indicates that the district court carefully considered and rejected the substance of Ms. Hurst's arguments.

Ms. Hurst also argues that the VA had control over RC Tech's hiring of Ms. Hurst. *See Sandoval v. City of Boulder, Colo.*, 388 F.3d 1312, 1324 (10th Cir. 2004) (addressing power to hire and fire together in joint employer analysis). Executive Order 13495 required a successor contractor under a federal contract (here, RC Tech) to provide the predecessor contractor's employees with a right of first refusal of employment. Based on that requirement, the VA provided Ms. Hurst's contact information to RC Tech when it won the contract—which ended the VA's involvement in the hiring process. The decision to hire Ms. Hurst belonged exclusively to RC Tech, which retained the discretion *not* to hire her if it "reasonably believe[d], based on [Ms. Hurst's] past performance, [that she] ha[d] failed to perform suitably on the job." Exec. Order 13495, 74 Fed. Reg. at 6104. The employee's right of first refusal did not confer on the VA the right to control hiring.

2. Additional *Knitter* Factors

None of the other factors weigh in Ms. Hurst's favor. First, it is undisputed that RC Tech paid Ms. Hurst and provided her benefits. The Service Contract Act obligates private federal contractors like RC Tech—not the federal government—to provide a minimum wage and certain benefits to its employees. Although the Service Contract Act established a floor for Ms. Hurst's wages and benefits, RC Tech was free to provide additional benefits and pay. In short, no reasonable jury would conclude the VA shared any control over Ms. Hurst's pay and benefits. *See Knitter*, 758 F.3d at 1229.

Second, the VA's level of supervision of Ms. Hurst "was consistent with a client-vendor relationship, not an employer-employee relationship." *Id.* at 1230. RC Tech's contract with the VA specified that RC Tech was responsible for inspecting its employees' work and for safety and training of its employees.[3] Indeed, Ms. Hurst was originally trained for her job at the Cemetery by her predecessor employer, and she testified she knew the requirements of her job and could carry them out without direction. Although Ms. Hurst insists that the VA directed her duties at the Cemetery, "[s]ome degree of supervision and even discipline is to be expected when a vendor's employee comes on another business's work site." *Id.* The record shows at most that VA staff occasionally directed Ms. Hurst to perform additional tasks or adjust her cleaning priorities. In short, Ms. Hurst has not distinguished her case from *Knitter*.

Third, the VA did not maintain any employment records concerning Ms. Hurst. RC Tech controlled Ms. Hurst's employee records, including payroll, insurance, and taxes—which Ms. Hurst does not dispute.

III. Conclusion

We hold the district court correctly determined the VA was not a joint employer of Ms. Hurst for Title VII purposes. Accordingly, we affirm the grant of

[3] Ms. Hurst argues the VA exercised a great deal more control over the performance of her daily job duties than was the case in *Knitter*, because RC Tech had no one else in the state to supervise her. This ignores the fact that RC Tech hired a private third party to manage its service contract with the VA in New Mexico.

summary judgment in Defendant's favor.

Entered for the Court

Veronica S. Rossman
Circuit Judge