FILED
United States Court of Appeals
Tenth Circuit

February 16, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JANELL BRAXTON,

Plaintiff - Appellant,

v.

WALMART INC.,

Defendant - Appellee.

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, KANSAS CITY CHAPTER,

Amicus Curiae.

No. 22-3003
(D.C. No. 2:20-CV-02287-DDC)
(D. Kan.)

ORDER AND JUDGMENT*

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

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Janell Braxton appeals the district court's order granting summary judgment to Walmart, Inc. on her claim alleging unlawful retaliatory termination under Kansas common law. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND[1]

Ms. Braxton worked as a seasonal associate for Walmart at an eCommerce facility in Edgerton, Kansas. She was also a seasonal employee of Jet.com ("Jet"), which was then a wholly-owned Walmart subsidiary. This employment status meant Ms. Braxton was subject both to Walmart's general policies and to specific policies applicable to Jet seasonal associates. Under those policies, (1) "[f]ailure to report any known injury before the end of the shift" is a "[s]tep 1" violation of Walmart safety rules and requires formal, written discipline , *see* Aplt. App. vol. 1 at 284 (Walmart policy), and (2) any Jet seasonal associate whose conduct requires formal, written discipline "should be terminated," *id.* vol. 2 at 28 (Conduct Disciplinary Action Guidelines).

Ms. Braxton worked three consecutive overnight shifts from April 12 to April 15, 2020. During the first of these shifts, she began to feel a throbbing pain in her left wrist that worsened as the shift went on. At the end of that shift, Ms. Braxton told her direct supervisor, Ammie Wilbur, "my wrist's really hurting me." *Id.* vol. 1 at 211. Ms. Braxton informed Ms. Wilbur of the continuing pain in the evening of

[1] The facts recited here are either undisputed or, where disputed, construed in the light most favorable to Ms. Braxton, the non-movant. *See T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty.*, 546 F.3d 1299, 1306 (10th Cir. 2008).

her second shift and, by her third shift, asked Ms. Wilbur for a brace or wrap to help her get through the shift. Ms. Wilbur sent Ms. Braxton to the company safety cubicle, where someone provided her with an ointment to rub on her wrist. About ninety minutes after the visit to the safety cubicle, Ms. Wilbur asked Ms. Braxton if the injury to her wrist occurred at work. Ms. Braxton said it did, so Ms. Wilbur reported this information to operations manager David Whitenack. Mr. Whitenack then came to Ms. Braxton's workstation, asked her if the injury occurred at work, and, when Ms. Braxton confirmed it did, told her to log off and fill out an incident report.

Per Walmart's "Dot Com safety" policy, the company should have given Ms. Braxton an "Associate Incident Report" form, which includes space for her to specify the date and time she first reported the incident. But Mr. Whitenack instead gave her only a blank Jet.com "Statement Form." Ms. Braxton wrote:

> On Monday morning I noticed that my wrist began to ache. It progressed to throbbing pain and by the time I left at 5:00 am it was excruciating. I took a 500mg tylenol & went to sleep. It is swollen & sometimes feels warm to the touch. There is a little bruising. It is hard for me to work fast when putting items in the mailers & it hurts to pick up semi heavy items with that wrist. I can only pick up the totes if they are partially full. It is my left wrist that is injured. I am trying not to use it. The pain progresses throughout the shift.

Id. at 283. Mr. Whitenack then texted Quincy Usry, a Walmart environmental health and safety operations manager, that Ms. Braxton "said she hurt her wrist Sunday (doesn't know how) and didn't tell anyone." *Id.* at 296. After Mr. Whitenack sent Mr. Usry a photograph of Ms. Braxton's written statement, Mr. Usry stated "that

would be a coaching." *Id.* at 297. Mr. Whitenack then showed the written statement to Morgan Medaris, a human resources coordinator at the Edgerton facility. He took Ms. Braxton to Ms. Medaris's office, where he and Ms. Medaris terminated Ms. Braxton's employment.

Ms. Braxton sued Walmart for retaliatory discharge under Kansas common law. She alleged Walmart fired her "because she availed herself of her rights under the workers' compensation laws of Kansas." *Id.* at 18. The district court had diversity jurisdiction because Ms. Braxton is a citizen of Missouri, Walmart is a Delaware corporation with a principal place of business in Arkansas, and the matter in controversy exceeded $75,000. *See* 28 U.S.C. § 1332(a)(1). Ms. Braxton moved for partial summary judgment on liability, and Walmart moved for summary judgment. The district court denied Ms. Braxton's motion and granted Walmart's. This appeal followed.

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).

"In a diversity action, we apply the substantive law of the forum state, including its choice of law rules." *Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo, Inc.*, 431 F.3d 1241, 1255 (10th Cir. 2005), *as amended on reh'g in part* (Apr. 11, 2006). Applying Kansas's choice of law rules, Kansas law governs the dispute because the alleged tort occurred there. *See Brown v. Kleen Kut Mfg. Co.*, 714 P.2d 942, 944 (Kan. 1986) ("We have traditionally applied the rule of *lex loci delicti* to choice of law for tort claims. Under this rule, the law of the state where the tort occurred is applied to the substantive rights of the parties." (citation omitted)).

Under Kansas law, an employer cannot discharge an employee "in retaliation for filing a workers compensation claim, or in anticipation of the employee filing a workers compensation claim." *Bracken v. Dixon Indus., Inc.*, 38 P.3d 679, 682 (Kan. 2002) (citation omitted). Because claims of retaliatory discharge "are rarely proven by direct evidence, the Kansas courts have adopted the *McDonnell Douglas* burden-shifting framework for analyzing retaliatory discharge cases." *Foster v. AlliedSignal, Inc.*, 293 F.3d 1187, 1193 (10th Cir. 2002) (footnote omitted) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Under this framework, (1) the employee must come forward with a prima facie case of discrimination, (2) the employer then has the burden to present a legitimate, nonretaliatory reason for the termination, and (3) "[t]o avoid summary judgment . . . the employee must assert specific facts establishing a triable issue as to whether the employer's reason for discharge is a mere cover-up or pretext for retaliatory discharge." *Bracken*, 38 P.3d at 682.

Applying this framework, the district court concluded that (1) Ms. Braxton had come forward with a prima facie case of retaliatory termination, but (2) Walmart carried its burden to present a legitimate, nonretaliatory reason for the termination—here, Ms. Braxton's violation of the same-shift injury-reporting policy—and (3) Ms. Braxton did not present sufficient evidence establishing a triable issue whether this reason was pretextual. Challenging these conclusions on appeal, Ms. Braxton advances three principal arguments: (1) the district court should not have employed the *McDonnell Douglas* framework at all because she had direct evidence of retaliation, (2) Walmart's same-shift injury-reporting policy conflicts with Kan. Stat. Ann. § 44-520 and therefore cannot be a legitimate basis for termination, and (3) there was sufficient evidence to create a triable issue as to pretext. We consider each argument in turn.

1. Direct Evidence of Discrimination

"[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). "Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Hall v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 476 F.3d 847, 854 (10th Cir. 2007) (internal quotation marks omitted). "A statement that can plausibly be interpreted two different ways—one discriminatory and the other benign— . . . does not constitute direct evidence." *Id.* at 855 (internal quotation marks omitted).

Ms. Braxton argues she presented direct evidence through portions of the deposition testimony of Mr. Whitenack, Mr. Usry, and Ms. Medaris in which each stated that, if Ms. Braxton had not reported her injury, Walmart would not have had occasion to fire her.[2] But this evidence, standing alone, is not direct because it requires the inference that Walmart terminated her employment *because* she reported the injury. In fact, though, each of the three deponents also testified that Walmart terminated her not because she reported her injury, but rather because (they believed)[3] she reported it late—i.e., after the same shift it occurred. *See* Aplt. App.

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[2] Specifically, Ms. Braxton cites the following testimony from Mr. Whitenack:

> Q. So if she would have never told you that she had been hurt at work, would you personally have had a reason to fire Ms. Braxton on April 14th, 2020?
>
> . . .
>
> A. Correct.

Aplt. App. vol. 2 at 173. She also cites the following testimony from Mr. Usry:

> Q. Without the knowledge of Ms. Braxton's injury report, Walmart wouldn't have fired her, correct?
>
> . . .
>
> A. In relation to the reason that she was terminated, no, we would not.

Id. at 221. And she cites the following testimony from Ms. Medaris:

> Q. So but for [Ms.] Braxton's report of a workplace injury to Walmart, Walmart would not have terminated her as it did, correct?
>
> A. Correct.

Id. at 216.

[3] When construed in her favor, the evidence supports the conclusion that Ms. Braxton did, in fact, report the injury to her immediate supervisor, Ms. Wilbur,

vol. 2 at 173 (deposition testimony from Mr. Whitenack: "Q. Did you terminate Ms. Braxton's employment because she reported an injury? A. No. Q. Did you terminate her employment to retaliate against her for having a work injury? A. No. . . . Q. Why did you terminate her employment? A. We terminated her employment for failure to report an injury by the end of shift."); *id.* at 215 (deposition testimony from Mr. Usry: "Q. And Walmart's contention is that had Mrs. Braxton actually reported her injury on April 13th of 2020, it would not have fired her; is that correct? A. If she would have reported it by end of shift, correct."); *id.* at 221 (deposition testimony of Ms. Medaris: "A. She was terminated based on her statement that she reported late."). At most, the testimony of Mr. Whitenack, Mr. Usry, and Ms. Medaris "can plausibly be interpreted two different ways—one discriminatory and the other benign," so it "does not constitute direct evidence." *Hall*, 476 F.3d at 855.

Ms. Braxton argues the district court erred in its construction of the deposition testimony because, as the nonmovant responding to Walmart's motion for summary judgment, she, not Walmart, was entitled to all favorable factual inferences. *See T-Mobile Cent., LLC*, 546 F.3d at 1306. But in so arguing, she necessarily concedes that the evidence she relies upon requires inference, which means it was not "direct."

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before the end of her first shift. But the summary judgment record is devoid of evidence Ms. Wilbur so informed any of the three individuals who made the termination decision (i.e., Mr. Whitenack, Mr. Usry, and Ms. Medaris). This is unsurprising, as Ms. Wilbur did not remember Ms. Braxton reporting pain in her wrist until April 14—at the close of her second shift. In any event, when evaluating the legitimacy of an employer's proffered reason for an employment decision, "we consider the facts as they appeared to the [people] making the decision . . . ." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1119 (10th Cir. 2007).

See Hall, 476 F.3d at 854. So the district court did not err when it proceeded to apply the *McDonell Douglas* burden-shifting framework to Ms. Braxton's retaliation claim.

2. Legality of Walmart's same-shift injury-reporting policy

Turning to the district court's analysis under that framework, Ms. Braxton argues Walmart's same-shift injury-reporting policy conflicts with the public policy established by Kan. Stat. Ann. § 44-520 and therefore cannot constitute a legitimate nonretaliatory basis to fire her. *See* Aplt. Opening Br. at 37 ("The Kansas Supreme Court . . . would most likely hold [Kan. Stat. Ann.] § 44-520 establishes a public policy giving workers the 'right' to report injuries for 20 days. If that is true, Walmart's position that it fired Braxton for reporting an injury one day after it happened is not 'nonretaliatory.'"). Ms. Braxton misconstrues the relevant statute. Kan. Stat. Ann. § 44-520(a)(1) provides:

> Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.

Ms. Braxton argues Walmart's same-shift injury-reporting policy impermissibly shortens the 20-day reporting period in this provision, but the plain terms of Kan. Stat. Ann. § 44-520 do not support this argument. The statute governs a worker's right to initiate proceedings for workers compensation; it does not limit employers' ability to create policies requiring employees to report injuries earlier. Further, the statute contemplates situations in which an employee "no longer works for the employer against whom benefits are being sought," but is still eligible to seek compensation. So an employee fired for violating Walmart's same-shift injury-reporting policy could still file a workers compensation claim. We therefore agree with the district court that Walmart's policy does not conflict with Kan. Stat. Ann. § 44-520 and constitutes a legitimate, nonretaliatory reason for Ms. Braxton's termination.

3. Evidence of Pretext

"To avoid summary judgment after an employer has articulated a legitimate, non-retaliatory reason for the termination, the employee must assert specific facts establishing a triable issue as to whether the employer's reason for discharge is a mere cover-up or pretext for retaliatory discharge." *Foster*, 293 F.3d at 1194 (internal quotation marks omitted). This evidence "must be clear and convincing in nature." *Id.* (internal quotation marks omitted). "Evidence is clear if it is certain, unambiguous, and plain to the understanding, and it is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it." *Id.* (internal quotation marks omitted). In assessing pretext, "[w]e do not ask whether the employer's

reasons were wise, fair or correct; the relevant inquiry is whether the employer honestly believed its reasons and acted in good faith upon them." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118–19 (10th Cir. 2007). "A plaintiff can show pretext by revealing 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[.]" *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (internal quotation marks omitted).

Ms. Braxton asserts she did present such evidence, including the testimony from Mr. Whitenack, Mr. Usry, and Ms. Medaris discussed above and evidence that Walmart did not follow its own policies in connection with Ms. Braxton's injury. She also argues, citing *Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 315 (7th Cir. 2011), that the existence of the same-shift injury-reporting policy itself is evidence of pretext. But the testimony of Mr. Whitenack, Mr. Usry, and Ms. Medaris does not establish or even suggest Walmart's proffered reason for firing Ms. Braxton was pretextual. Although the decisionmakers testified that, had Ms. Braxton not reported a workplace injury at all, they would not have had a reason to fire her, it does not follow that the reason all three decisionmakers gave for the termination—her late reporting of her workplace injury—was pretextual.

Regarding Walmart's alleged deviations from its own policy, "[t]he mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that the employer was motivated by illegal discriminatory intent or that the

substantive reasons given by the employer for its employment decision were pretextual." *Randle v. City of Aurora*, 69 F.3d 441, 454 (10th Cir. 1995) (emphasis omitted). Here, the irregularities Ms. Braxton relies upon—such as Walmart's failure to offer her more medical treatment, report the injury to the state, or supply her with a Walmart "Associate Incident Report" form instead of a "Jet Statement Form"—do not rise to the level of impropriety necessary to call into question its asserted basis for the termination. *Cf. Riggs*, 497 F.3d at 1119 (finding no disturbing procedural irregularity when employer terminated employee without first speaking with her during investigation of misconduct complaint).

Finally, the comparison to *Loudermilk* is inapt. There, the court concluded the policy the employer advanced as a basis for firing the employee "may have been cooked up after the fact" and was "not the sort of neutral rule that would adequately explain a discharge." 636 F.3d at 315. Here, there is no evidence Walmart adopted the same-shift injury-reporting policy on a post-hoc basis. Nor is there any reason to conclude requiring prompt reporting of employee injuries is suspicious or otherwise calibrated to interfere with those employees' rights to seek workers compensation.

So, the district court did not err in concluding Ms. Braxton failed to present sufficient evidence that Walmart's reasons for terminating her employment were pretextual and therefore granting summary judgment to Walmart.[4]

[4] Ms. Braxton also asserts the district court erred in requiring her to come forward with clear and convincing evidence at the summary judgment stage. *See* Aplt. Opening Br. at 40 (asserting the district court "should have used the preponderance of evidence standard"). The clear and convincing evidence standard

CONCLUSION

We affirm the judgment of the district court. We deny Ms. Braxton's "Motion to Certify Question of State Law."

Entered for the Court

Joel M. Carson III
Circuit Judge

stems from *Foster*, *see* 293 F.3d at 1194. We conclude Ms. Braxton's showing of pretext would have been unavailing even under the preponderance of the evidence standard. Accordingly, we need not revisit *Foster*.