FILED
United States Court of Appeals
Tenth Circuit

May 23, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MAIRA ORTIZ,

Plaintiff - Appellant,

v.

BANK OF LABOR,

Defendant - Appellee.

No. 22-3127
(D.C. No. 2:21-CV-02316-JAR)
(D. Kan.)

ORDER AND JUDGMENT*

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

Maira Ortiz appeals the district court's grant of summary judgment to the Bank of Labor on her employment discrimination claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. BACKGROUND

The following facts are undisputed.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

A. Restroom Access

Ortiz worked for the Bank at a small branch in Kansas City connected to a 7-Eleven. The 7-Eleven's restrooms were also the Bank branch employees' restrooms, but Ortiz did not like using those restrooms because the 7-Eleven did not clean them well. She preferred to use the restroom at a McDonald's just across the parking lot. The Bank expressed no concern with this until October 2019, when the branch supervisor, Charlotte Hayes, told Ortiz that the Bank requires two employees to be present in the branch whenever it is open.

This rule created a problem for Ortiz, for two reasons. First, she was pregnant at the time (which Hayes had known since the previous month). Her pregnancy resulted in a more-frequent urge to use the restroom. Second, Ortiz and another employee usually opened the branch at 7:15 AM, but a third employee often did not arrive until 9:45 or 10:00 AM. Thus, every morning she faced a stretch of more than two hours when she could not leave to use the McDonald's restroom. She could still use the 7-Eleven restroom at any time.

B. Chair Use

Also in October 2019, Ortiz's feet started to swell when standing, which she attributed to her pregnancy. To manage the swelling, she began sitting on a small folding chair that fit in her cubicle, except when helping a customer. But Hayes soon took the folding chair away and informed Ortiz of a new rule that the chairs used in the drive-through window area were the only authorized chairs. Ortiz responded that

those chairs would not fit in her cubicle and she could not carry them back and forth from the drive-through window, but Hayes ignored her.

C. Ortiz's Termination After "Force Balancing" the Vault Log

On November 1, 2019, Ortiz and Hayes were on duty together. At one point, Hayes restocked her teller drawer with $25.00 in pennies she obtained from the branch vault, but she forgot to document that withdrawal.

At the end of the shift, Ortiz and another employee counted the cash in the vault to make sure it matched documented additions and subtractions. They found a $25.00 difference between the cash in the vault and the documentation. Ortiz asked (within earshot of Hayes) if anyone had documentation they had failed to submit, but Hayes said nothing and the other employees said "no." Ortiz then used white-out to cover over the starting cash amount on the vault log, and she wrote in a new figure that was $25.00 lower. So modified, the discrepancy disappeared.

Ortiz's modification of the vault log is what the Bank calls "force balancing," *i.e.*, "the act of modifying a Bank record, such as a vault log or teller log, to avoid a cash difference." Aplt. App. at 45, ¶ 13. At least three different Bank policy documents list force balancing as a terminable offense.

Later that same day (apparently after Ortiz's shift had ended), Hayes recognized the $25.00 discrepancy, attributed it to her own failure to document taking money from the vault, and reported it to the branch manager, Mary Moulin. Then, on November 4 (the following Monday), Moulin and Hayes met with Ortiz to discuss the incident. Hayes admitted that her oversight caused the vault log to be out

of balance. Ortiz denied intentionally force balancing the log, and she invoked "pregnancy brain" to explain her actions. *Id.* at 144–45.

The Bank terminated Ortiz on November 18, 2019. That decision was jointly made by Moulin and two members of the Bank's senior leadership. The Bank told Ortiz she was being terminated because she had force balanced the vault log, in violation of multiple Bank policies.

II. DISTRICT COURT PROCEEDINGS

Ortiz filed this lawsuit in July 2021, asserting multiple employment discrimination claims. By summary judgment, she had narrowed her claims to the following: "(1) . . . pregnancy discrimination[1] in violation of Title VII of the Civil Rights Act of 1964 ('Title VII'); and (2) disability discrimination in violation of the Americans with Disabilities Act ('ADA')." *Id.* at 93. As to the ADA claim, however, Ortiz "concede[d] that the judges in the District of Kansas have held that pregnancy by itself is not a disability under the ADA," so she was asserting the claim "to preserve [it] for a possible appeal to the Tenth Circuit." *Id.* at 103–04. She included no argument about this claim. The district court accepted Ortiz's concession and accordingly granted summary judgment in the Bank's favor on the ADA claim.

As to her Title VII theories, Ortiz claimed the bank discriminated against her when: (i) it would not allow her to use the McDonald's restroom until a third

[1] Ortiz actually said "sex or pregnancy discrimination," but her arguments relied entirely on pregnancy.

employee arrived; (ii) it would not allow her to use the folding chair in her cubicle; and (iii) it terminated her, ostensibly for force balancing the vault log. Applying the *McDonnell Douglas* burden-shifting framework, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973), the district court ruled that Ortiz's theories based on restroom access and chair use failed because neither of those count as an adverse employment action. As to her termination, the district court assumed Ortiz could state a prima facie case of pregnancy discrimination, but ruled that Ortiz had not presented enough evidence from which a jury could conclude that the Bank's proffered explanation (violation of Bank policies) was pretextual. The district court therefore granted summary judgment in the Bank's favor on all of Ortiz's Title VII theories.

Having disposed of all extant claims against the Bank, the district court entered final judgment, and this appeal timely followed.

III. ANALYSIS

We review a summary judgment decision de novo, drawing all reasonable inferences in favor of the nonmoving party. *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1145 (10th Cir. 2008).

Ortiz has not continued to pursue her ADA claim on appeal. Therefore, we are not required to ask whether, *e.g.*, her use of an unapproved chair amounted to a request for a reasonable accommodation for swollen feet. We need only examine whether Ortiz has raised a genuine dispute that the Bank discriminated against her based on pregnancy.

A. Adverse Employment Action

To support an employment discrimination claim, Ortiz must put forward evidence of, among other things, "suffer[ing] an adverse employment action." *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 531 (10th Cir. 1998). The core of that concept is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). But we define the concept liberally, "examining the unique factors relevant to the situation at hand." *Sanchez*, 164 F.3d at 532. Adverse employment actions can include "acts that carry a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects." *Annett v. Univ. of Kan.*, 371 F.3d 1233, 1239 (10th Cir. 2004) (internal quotation marks omitted). "Nevertheless, we will not consider a mere inconvenience or an alteration of job responsibilities to be an adverse employment action." *Sanchez*, 164 F.3d at 532 (internal quotation marks omitted).

1. Restroom Access

As to her claims regarding the McDonald's restroom, Ortiz emphasizes what she views as the "unique factors" in her case, *id.*, namely, her pregnancy required more-frequent trips to the restroom. She says that the Bank's policy about leaving the branch created "a significant risk of humiliation," *Annett*, 371 F.3d at 1239 (internal quotation marks omitted), and a risk of physical discomfort (which we did not discuss in *Annett*), and therefore amounted to an adverse employment action.

We do not minimize Ortiz's needs during pregnancy. Nonetheless, on the record Ortiz has presented, we agree with the district court that inability to use her preferred restroom does not rise above "mere inconvenience," *Sanchez*, 164 F.3d at 532 (internal quotation marks omitted). Ortiz also ignores that our case law regarding risk of humiliation requires "a concomitant harm to future employment prospects," *Annett*, 371 F.3d at 1239 (internal quotation marks omitted). She does not point us to anything in the record suggesting this was a likely result. Thus, we affirm the district court's grant of summary judgment against Ortiz on her discrimination claim based on inability to use her preferred restroom.

2. Ability to Use a Chair

The district court viewed Ortiz's claim about the chair in her cubicle as another instance of the Bank depriving her of something she preferred, not total deprivation. To the contrary, Ortiz asserted that Hayes would not allow her to use a chair that fit in her cubicle, and would only allow her to use a chair that she could not carry and that would not fit in her cubicle anyway. Ortiz testified at her deposition that she "had to stand" because of this. Aplt. App. at 129. Thus, Ortiz asserted a claim of total deprivation, not deprivation of a preferred alternative.

Despite the district court's misunderstanding of the claim, we believe the district court reached the correct outcome on the arguments before it. In summary judgment briefing, Ortiz's argument about this element of her claim comprised a single sentence asserting that inability to use a chair was an adverse employment action. *See id.* at 110. She offered no supporting authority, nor even any argument

that it was self-evidently so. We find this particularly important because our own research has not uncovered case law treating this sort of working condition as an adverse employment action (as opposed to denial of a reasonable accommodation in a disability context).

On appeal, Ortiz's argument is no better developed. As with her restroom-access claim, she highlights our language from *Annett* about "acts that carry a significant risk of humiliation," 371 F.3d at 1239 (internal quotation marks omitted), and she inserts a risk of physical discomfort into that analysis, without citation. But she again ignores *Annett*'s requirement of "a concomitant harm to future employment prospects," *id.* (internal quotation marks omitted). We therefore agree with the district court that Ortiz failed to carry her burden to show she suffered an adverse employment action. We affirm the grant of summary judgment against her on this basis.

B. Termination & Pretext

As to Ortiz's termination, the district court went directly to the pretext analysis (the third step of the *McDonnell Douglas* framework) and held that Ortiz failed to present sufficient evidence that the Bank's proffered justification—force balancing the vault log, in violation of multiple Bank policies—was a pretext for discrimination. On appeal, Ortiz argues that she presented three pieces of circumstantial evidence from which a jury could find pretext.

First, she says Hayes was a similarly situated, non-pregnant employee, and Hayes also violated Bank policy (failing to document withdrawing money from the

vault), but Hayes was not terminated. However, Bank policy does not list Hayes's offense as terminable. Ortiz points to a Bank policy stating that "[m]aking or causing false entries to the books or records" is a terminable offense, *see* Aplt. Opening Br. at 23 (internal quotation marks omitted), but Hayes did not make or cause a false entry in the books or records. Her failure to document caused the vault to be out of balance, but she did not attempt to cover over that difference with false record-keeping entries. Ortiz's conduct falls within the latter category. Thus, we agree with the district court that Hayes was not similarly situated.

Second, Ortiz notes that the force-balancing incident occurred on November 1 but the Bank did not terminate her until November 18. She therefore argues that the Bank's delay is inconsistent with the seriousness it purportedly attributed to the offense. In support, she cites deposition testimony from Moulin, the branch manager, who was asked why Ortiz was allowed to continue working between November 1 and November 18. Moulin responded, "I can't answer that." *Id.* at 24 (internal quotation marks omitted). Ortiz does not say what reasonable inferences a jury could draw from that answer. She also ignores Moulin's testimony immediately following, where she identified a Bank employee named Mary Kearns as the person authorized to suspend an employee. But we will set this aside momentarily and return to it after examining her third piece of circumstantial evidence.

That third item of evidence also arises from Moulin's deposition testimony, where she described force balancing as "an intentional act" that is "almost like theft." *Id.* at 8 (emphasis and internal quotation marks omitted). Ortiz says that, based on

this testimony, a jury could conclude the Bank's explanation for her termination was false because she told Moulin her actions were the result of "pregnancy brain," not intentional, and no money was actually missing from the vault. We do not see the connection, however, between Moulin's views about force balancing, Ortiz's description of her own actions, and a reasonable inference that the Bank was lying about its reasons for terminating Ortiz. We agree with the district court that there is nothing here "to suggest that [the Bank] did not view [force balancing] as the true reason for that decision." Aplt. App. at 170.

Thus, Ortiz's only remaining item of evidence is the fact that Moulin did not know why the person with authority to suspend Ortiz did not do so between November 1 and November 18. We hold that this does not raise a genuine issue of pretext. Summary judgment in the Bank's favor was therefore appropriate on this claim.

IV. CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Carolyn B. McHugh
Circuit Judge