FILED
United States Court of Appeals
Tenth Circuit

June 9, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES A. NOVOTNY,

Plaintiff - Appellant,

v.

OSL RETAIL SERVICES CORPORATION,

Defendant - Appellee.

No. 22-8062
(D.C. No. 2:22-CV-00019-NDF)
(D. Wyo.)

ORDER AND JUDGMENT*

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

In this age discrimination case, James A. Novotny appeals pro se from a district court order that (1) denied his motion for entry of default judgment against his former

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

employer, OSL Retail Services Corporation ("OSL"), and (2) dismissed his amended complaint. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

I. BACKGROUND

OSL, a wireless sales and customer-service provider, hired Mr. Novotny in July 2018 as a "Team Lead" to cover its Sheridan, Gillette, and Cody, Wyoming stores. Suppl. R. at 32. OSL fired him in February 2019, when he was 57 or 58 years old. He alleged that his supervisor, OSL District Manager William Montgomery, told him he "was being terminated" but said "he had no information as to why." R. at 68.

Believing he was terminated because of his age, Mr. Novotny filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Wyoming Department of Workforce Services ("DWS"). OSL denied the charge, asserting that it fired Mr. Novotny "due to a lack of organizational fit." Suppl. R. at 31. In particular, OSL identified (1) low sales performance in the stores under Mr. Novotny's control, and (2) his resistance to Mr. Montgomery's coaching attempts.

DWS examined the evidence obtained during its investigation and found no "reasonable cause to believe discrimination occurred." *Id.* at 35. DWS noted that OSL had discharged similarly-situated employees outside of Mr. Novotny's protected class for the same reasons given by OSL. Further, DWS stated that witnesses reported that Mr. Novotny had low sales performance and a negative attitude, lacked accountability,

[1] Because Mr. Novotny appears pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

and resisted coaching. The EEOC adopted DWS's findings, dismissed Mr. Novotny's charge, and notified him of his right to sue.

In January 2022, Mr. Novotny, proceeding pro se, sued OSL in federal district court, alleging a violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623. In attached affidavits, Mr. Novotny stated he overheard Mr. Montgomery make two age-related comments.[2]

OSL did not respond to Mr. Novotny's complaint, so the district court clerk entered a default under Federal Rule of Civil Procedure 55(a). Mr. Novotny then moved for a default judgment under Rule 55(b)(2). The district court denied the motion without prejudice, noting deficiencies in Mr. Novotny's complaint and the documentation supporting his damages request.

Mr. Novotny filed a renewed motion for default judgment, which included the documents from the DWS administrative proceedings. The district court observed that he failed to rebut OSL's legitimate, nondiscriminatory reasons for firing him and that his allegations were conclusory that OSL's stated reasons were pretextual. The district court thus dismissed his ADEA claim but gave him leave to amend, cautioning that failure to allege a plausible claim would result in a dismissal with prejudice.

[2] According to Mr. Novotny, in August 2018, Mr. Montgomery said that a female trainee was "to[o] old," R. at 18, and in October 2018, Mr. Montgomery said that a recent promotion meant that he got "to take over a geriatrics [sic] district," but he would "have [his] own team in six months," R. at 19-20.

In June 2022, Mr. Novotny filed an amended complaint listing OSL's "reasons for [his] termination" and offering his rebuttal. R. at 68. In support of pretext, he alleged that he "never received any coaching" and that his sales numbers were related to the sparse populations in his assigned cities and were not contrary to any "sales quota." *Id.* Given that OSL had not responded and was again in default, the district court directed Mr. Novotny to file either a status report or a motion for default judgment. Mr. Novotny moved for default judgment, citing his two prior default-judgment motions and his complaints.

The district court denied Mr. Novotny's third default-judgment motion and dismissed his amended complaint with prejudice, concluding that he failed to show that OSL's termination reasons were pretextual. The district court explained that he had (1) admitted he received performance coaching; and (2) failed to rebut OSL's reliance on his stores' low sales.

II. DISCUSSION

A. *Legal Background*

1. Standards of Review

"We review for an abuse of discretion the district court's denial of a motion for default judgment." *Bixler v. Foster*, 596 F.3d 751, 761 (10th Cir. 2010). "A district court abuses its discretion when it renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Vincent v. Nelson*, 51 F.4th 1200, 1213 (10th Cir. 2022) (quotation omitted).

But we review de novo the district court's sua sponte dismissal of Mr. Novotny's pro se amended complaint, whether that dismissal was based on 28 U.S.C. § 1915(e)(2) or Federal Rule of Civil Procedure 12(b)(6). *See Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). A district "court may dismiss sua sponte when it is patently obvious that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend [the] complaint would be futile." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (quotations omitted). Similarly, "a dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile." *Knight v. Mooring Cap. Fund, LLC*, 749 F.3d 1180, 1190 (10th Cir. 2014) (brackets and quotations omitted). "To survive, a complaint must allege facts that, if true, state a claim to relief that is plausible on its face." *Sagome, Inc. v. Cincinnati Ins. Co.*, 56 F.4th 931, 934 (10th Cir. 2023) (quotations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

2. **Default and Default Judgment**

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the [district court] clerk must enter the party's default." Fed. R. Civ. P. 55(a). But "[o]nce default is entered, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." *Bixler*, 596 F.3d at 762 (quotations omitted); *see* Fed. R. Civ. P.

55(b)(2). In other words, "even in default, . . . judgment must be supported by a sufficient basis in the pleadings." *Tripodi v. Welch*, 810 F.3d 761, 765 (10th Cir. 2016). Default judgment is not available where claims are "subject to dismissal under Rule 12(b)(6)." *Bixler*, 596 F.3d at 762. "Default judgments are not favored by courts." *Harvey v. United States*, 685 F.3d 939, 946 (10th Cir. 2012) (brackets and quotations omitted).

3. **Age Discrimination**

The ADEA prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). It protects "individuals who are at least 40 years of age." *Id.* § 631(a). "A plaintiff suing under the ADEA must prove that the challenged employment action was motivated, at least in part, by age." *Markley v. U.S. Bank Nat'l Ass'n*, 59 F.4th 1072, 1080-81 (10th Cir. 2023) (brackets and quotations omitted).

Without direct evidence of discrimination, an ADEA plaintiff may carry this burden under the framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *See Markley*, 59 F.4th at 1081. Under that framework, "[i]f a plaintiff makes out a prima facie case [of age discrimination], the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id.* (quotations omitted). "Once 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.* (quotations omitted).

"[P]retext can be shown by 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 non-discriminatory reasons." *Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 925 (10th Cir. 2004) (quotations omitted).

B. ***Application***

Mr. Novotny advances three grounds of error. None has merit.

First, he complains that OSL's failure to participate in the litigation interfered with his ability to obtain evidence, and he "did not realize that he should have asked the [District] Court for permission to proceed with discovery." Aplt. Br. at 3. As the district court explained, however, Mr. Novotny could have requested a subpoena for documents or an extension of time before filing the third motion for default judgment, but he did neither. "[P]ro se parties [are expected to] follow the same rules of procedure that govern other litigants," and a "court cannot take on the responsibility of serving as the litigant's attorney." *Garrett*, 425 F.3d at 840 (quotations omitted).

Second, Mr. Novotny argues that the district court failed to credit his cat's-paw theory of discrimination. Cat's-paw liability arises when someone other than the actual decisionmaker has a discriminatory motive and affects the decisionmaker's choice to fire the plaintiff. *See Singh v. Cordle*, 936 F.3d 1022, 1038 (10th Cir. 2019). Mr. Novotny's amended complaint contains no allegations to support such a theory. He alleged that Mr. Montgomery—the decisionmaker—possessed discriminatory intent.

Third, Mr. Novotny argues that the "decision to dismiss this case was based on the findings of the [DWS] and not the actual evidence." Aplt. Br. at 3. But he submitted DWS's findings in support of his second default-judgment motion, which he cited in support of his third default-judgment motion. Further, he included OSL's termination reasons in his amended complaint and alleged how he believed they were pretextual.

In sum, the district court neither abused its discretion in denying Mr. Novotny's third motion for default judgment nor erred in dismissing his amended complaint. Even if Mr. Novotny established a prima facie case of age discrimination, OSL offered legitimate, nondiscriminatory reasons for firing him—resistance to coaching and low store sales. Mr. Novotny failed to show those reasons were pretextual. Although he alleged he was never coached, he stated the contrary during the administrative proceedings. *See* Suppl. R. at 32. And a store's low sales could be attributed to a manager's poor job performance irrespective of a city's population size or the existence of a sales quota—the two points Mr. Novotny alleged to show pretext. *See Rivera*, 365 F.3d at 925 (explaining that an employer's justification may be pretextual only if it is "unworthy of credence" (quotations omitted)); *see also Salguero v. City Of Clovis*, 366 F.3d 1168, 1178 (10th Cir. 2004) (requiring more than "conclusory allegations" to show pretext); *United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004) (observing that "developed argumentation" must accompany issues raised on appeal).

III. **CONCLUSION**

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge