FILED
United States Court of Appeals
Tenth Circuit

July 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TRACIE FRANK,

Plaintiff - Appellant,

v.

HEARTLAND REHABILITATION HOSPITAL, LLC,

Defendant - Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

No. 22-3031
(D.C. No. 2:20-CV-002496-HLT)
(D. Kan.)

ORDER AND JUDGMENT[*]

Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

Tracie Frank appeals the district court's grant of summary judgment in favor of her former employer, Heartland Rehabilitation Hospital, on her Title VII claims. Exercising jurisdiction under 28 U.S.C. § 1291 and for the reasons stated below, we affirm.

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

a.

Tracie Frank began working at Heartland Rehabilitation Hospital in June 2018 as Executive Assistant to Chief Nursing Officer Alicia Sorensen.[1] Sorensen and Frank had different recollections of what responsibilities the job entailed at the time Frank applied for the position and began work. Both agreed Frank had administrative responsibilities, but she eventually took on scheduling and staffing duties as well. The staffing and scheduling took up most of her time and kept her away from her other work.

By April 2019, Sorensen had become concerned with Frank's performance and provided Frank with a "last chance agreement." The last chance agreement detailed several instances when Sorensen felt Frank had not met expectations and areas where she could improve. Along with the last chance agreement, Sorensen sent Frank a performance improvement plan which listed thirteen changes to her responsibilities. The performance improvement plan also required Frank to identify ways she could correct her shortcomings and gave her thirty days to implement the changes. While she believed Sorensen's concerns were "exaggerated," Frank completed the performance improvement plan within the required thirty days. She and Sorensen did not discuss it again. However, that July, Frank told Sorensen she was going "to start

[1] This appeal comes to us at the summary judgment stage. We accordingly view all facts and make all reasonable inferences in the light most favorable to Frank, the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

looking for another position." App'x Vol. I at 213. She did not enjoy the staffing and scheduling portion of her work, and even though Frank felt she was doing a "decent" job, she "wasn't giving 100 percent," "was spread pretty thin with everything else [she] had to do," and felt as though she was not "measuring up." *Id.* at 78, 213. Sorensen supported this decision and permitted Frank to look for a different job. At the time, she did not impose any deadline on Frank's job search.

While at Heartland, Frank's office was right next door to then–Director of Quality Assurance Adriel Robinson (also called "Dre"). On August 16, 2019, Frank, for the first time, reported to Sorensen that Robinson had made several inappropriate comments to her and had made her feel uncomfortable on several occasions. Sorensen told Frank to report the behavior to human resources, and Frank reported it to Human Resources Director Penny Craig. Her complaint against Robinson included approximately eight separate instances of alleged harassment, all of which occurred between April and August 2019. First, when Frank told Robinson about a date she had planned, Robinson told her that it sounded like a "dick appointment," which made her feel uncomfortable. Second, Frank once asked a female coworker if her blouse was too low-cut. Frank believed Robinson overheard the question, and shortly thereafter, he passed her in the hallway, looked obviously at her breasts, and said, "you can't miss those bad boys." *Id.* at 76–77. Third, Robinson, who is African American, asked Frank whether she had received any interest on dating apps from "black dudes." *Id.* at 77. Fourth, in reference to Frank's firefighter boyfriend, Robinson said, "Firefighters are only out for one thing." *Id.* at 235. Fifth, Robinson

once told Frank and another female coworker to get copy paper for him because he had multiple college degrees, implying he was overqualified for the task. Sorensen overheard this and told Robinson the comment was "wildly inappropriate." App'x Vol. II at 56. Sixth, when Frank told Robinson she was going over to her boyfriend's house, Robinson said, "you know what he wants." *Id.* at 129. Seventh, on five to seven occasions, Robinson commented on Frank's outfits while looking her up and down or directly at her chest. Finally, Robinson sometimes stared at Frank in a way that made her uncomfortable.

One business day after hearing the report, Heartland management met with Robinson. He resigned the same day.

b.

The August report was not the first time Heartland heard its employees complain about Robinson's inappropriate behavior. In December 2017, about six months before Frank began work, former Chief Nursing Officer Angela Welch filed an EEOC complaint against Heartland and some of its employees, including Robinson. In her complaint, Welch alleged Robinson had called her "babe" and told her she should wear high heels because she would look "more sexy." *Id.* at 80. She alleged she had reported this behavior to then-CEO John Hughes, who had responded "That's just Dre being Dre" and "he's just being a man." *Id.* Heartland eventually settled with Welch at an EEOC mediation.

Robinson's behavior was brought to Heartland's attention again in September 2018. Nurse T'Cara Williams reported Robinson had made racially derogatory

comments toward her and another male employee. Heartland investigated Williams' claim and in so doing questioned Director of Health and Information Rebecca Colbern and then–Director of Therapy Megan Hall about whether other employees had reported similar behavior from Robinson. Both reported that they had either witnessed or had been told about other such instances. Colbern reported Robinson had made comments about wanting to see women's feet, that other employees felt Robinson "could be annoying and say[] stupid stuff," and that he could be inappropriate. App'x Vol. I at 112–13. Once, Robinson told Colbern "Rebecca, you need to lay off the bread," and "If you eat that you won't fit into your pretty clothes." *Id.* at 113–14. Hall reported Robinson had asked her whether she "straightened [her] hair to see [her] male gynecologist" and had made comments about other employees' ages and pregnancies. Hall also reported that employee Cheryl Morrison told her Robinson "just creeps me out [and] makes me feel weird." *Id.* In response, Hughes and Craig met with Robinson and required him to complete cultural sensitivity training. They told Robinson, "[O]ther infractions will be investigated and could include discipline up to and including termination." *Id.* at 105.

Later, in February 2019, another employee Rebecca Silverman made a complaint against Robinson when, believing she had opened a package intended for him, Robinson got angry and asked her "what if it was a dildo or something?" *Id.* at 133. This comment made Silverman uncomfortable. Craig interviewed both Silverman and Robinson, who denied making the statement. Finding no other witnesses, Heartland put a note in both employees' files and took no further action.

Finally, around the time Frank filed her complaint in August 2019, two nurses reported that Robinson had not helped them when the floor became busy. He told them that they were adults and could figure it out.

c.

Approximately one to two weeks after Frank filed her complaint, Sorensen brought up Frank's job search. She told Frank she had two weeks to quit or be fired because Sorensen could not hold the position open indefinitely. Sorensen would later testify she felt some pressure from the higher-ups to free up the position. Frank secured a new job at a different hospital and submitted her resignation and two-weeks' notice on August 30. She had to wait to begin her new job until a payroll Monday and therefore missed a week's pay.

Frank then obtained a right-to-sue letter from the EEOC and filed this suit against Heartland. She raised two Title VII complaints: first, that she had been subjected to a hostile work environment because of her sex; and second, that Heartland had retaliated against her because she had had been told to quit or be fired shortly after reporting Robinson's sexual harassment.

The district court granted summary judgment in favor of Heartland on both claims. On the hostile work environment claim, it found Frank had not made a prima facie case because she had neither shown the harassment was severe or pervasive nor that Heartland had notice of the harassment and had been negligent in addressing it. On the retaliation claim, the district court found Frank had not made a prima facie case because she had not suffered a materially adverse action, and even if she had,

Heartland had a legitimate, nondiscriminatory reason for issuing the quit or be fired notice. Frank appealed.

II.

"We review the grant of summary judgment de novo applying the same standard as the district court embodied in Rule 56(c)." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). Summary judgment is proper if the moving party demonstrates that there is "no genuine issue as to any material fact" and it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We view all facts and resolve all reasonable inferences in the light most favorable to the non-moving party. *Adler*, 144 F.3d at 670.

a.

Title VII prohibits certain employers from discriminating on the basis of sex, which includes sexual harassment that creates a hostile work environment. *Id.* at 672 (citing 42 U.S.C. § 2000e-2). Harassment for the purposes of a Title VII hostile work environment claim "occurs where sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* (internal quotation marks and alterations omitted). To establish a prima facie case for hostile work environment, the plaintiff must show "(1) [she] was discriminated against because of [her] sex, and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of [her] employment." *Throupe v. U. of Denver*, 988 F.3d 1243, 1251 (10th Cir. 2021).

In addition to establishing pervasive or severe workplace harassment, a plaintiff who alleges harassment by a coworker must show that her employer was aware of the harassment and responded negligently. An employer's "liability [for its employees' sexual harassment] attaches when a plaintiff establishes that [the] employer had actual or constructive notice of the hostile work environment and failed to respond adequately." *Davis v. U.S. Postal Serv.*, 142 F.3d 1334, 1342 (10th Cir. 1998) (internal citations omitted). An employer may have actual notice if the plaintiff herself reported the behavior. The employer may have constructive notice if it would have found out about the harassment by exercising reasonable care. *Hirase-Doi v. U.S. W. Commc'ns, Inc.*, 61 F.3d 777, 783 (10th Cir. 1995), *abrogated on other grounds by Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998), *and Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In this scenario, episodes of harassment against the plaintiff are "so egregious, numerous, and concentrated as to add up to a campaign of harassment" which the employer could not have failed to notice, *Debord v. Mercy Health System of Kansas, Inc.*, 737 F.3d 642, 652 (10th Cir. 2013), or when other employees report harassment, and those incidents are sufficiently related in "similarity and nearness in time" to the harassment the plaintiff experienced, *Tademy v. Union P. Corp.*, 614 F.3d 1132, 1148 (10th Cir. 2008). In evaluating whether the employer had constructive notice based on other employees' reports, we consider the "extent and seriousness of the earlier harassment and the similarity and nearness in time to the later harassment." *Kramer v. Wasatch Cnty. Sheriff's Off.*, 743 F.3d 726, 756 (10th Cir. 2014).

We assume without deciding Frank has shown she was subjected to pervasive harassment because of her sex, but we conclude she has not created a genuine issue of material fact from which a jury could find Heartland had notice of the harassment. Frank acknowledges she did not inform Heartland of Robinson's behavior until August, and so Heartland did not have actual notice of the harassment. And her argument that Heartland had constructive notice because it was aware of other employees' complaints about Robinson falls short.[2] We begin with Welch's December 2017 EEOC complaint. This complaint contained some similar examples of inappropriate behavior, but Heartland addressed the complaint well over a year before Robinson allegedly began harassing Frank. It was not "near in time" to her experiences. Williams' complaint and the allegations that Heartland uncovered in the subsequent investigation indicated rude, insensitive, and inappropriate behavior, but nothing sufficiently related to Frank's claims of sexual harassment. Some of Robinson's comments were racially insensitive and others did not cause offense at all. The employees at whom they were directed reported they thought Robinson was joking with them, not harassing them. Morrison's comment that Robinson "gave her the creeps" is more on the mark but too vague. Heartland investigated but could not corroborate Silverman's complaint about the dildo comment, and it is likewise insufficient to establish a campaign of harassment of which Heartland should have been aware. Finally, Robinson's refusal to help the two nurses perhaps shows he was

[2] We assume for the purposes of this analysis all Frank's evidence concerning these incidents is admissible.

rude to female colleagues but does not show he sexually harassed women. In short, even viewing these events collectively and in a light most favorable to Frank, no reasonable jury could find Heartland should have known Robinson posed a risk of sexually harassing her.

Frank also argues Welch's EEOC complaint placed on Heartland a duty to check in with female employees to make sure Robinson was not bothering them even after Heartland had addressed it with him. We do not agree. We have never imposed an affirmative duty on employers to monitor their employees to make sure they are behaving appropriately unless the employer knows or should have known that the employee poses a risk to others.

For these reasons, we affirm the district court's grant of summary judgment in favor of Heartland on Frank's Title VII hostile work environment claim.

b.

Title VII also prohibits employers from retaliating against employees who oppose any practice that is unlawful under the statute. *Fassbender v. Correct Care Sols., LLC*, 890 F.3d 875, 890 (10th Cir. 2018). Unless a plaintiff has direct evidence that the employer was motivated at least in part by retaliation, her claim is subject to the familiar *McDonnell-Douglas* burden-shifting framework. *Hansen v. SkyWest Airlines*, 844 F.3d 914, 925 (10th Cir. 2016) (citing *McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802–03 (1973)). Under this framework, the plaintiff must first establish the elements of the claim: "(1) she engaged in protected opposition to discrimination; (2) [the employer] took an adverse employment action against her;

and (3) there exists a causal connection between the protected activity and the adverse action." *Fassbender*, 890 F.3d at 890. After she has made out a prima facie case, the burden shifts to the employer to show there was a non-discriminatory reason for the action the employer took. *Hansen*, 844 F.3d at 925.

The burden then shifts back to the plaintiff to show that reason is pretextual. *Id.* The plaintiff may do so by producing "direct evidence refuting the proffered rationale," *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1234 (10th Cir. 2015), or by showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action," *Zisumbo v. Ogden Regl. Med. Ctr.*, 801 F.3d 1185, 1201 (10th Cir. 2015). The evidence must be sufficient for a "reasonable factfinder [to] rationally find [the proffered reasons] unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Id.* "Mere conjecture that the employer's explanation is pretext . . . is insufficient—as a matter of law—to show pretext." *Id.*

We again assume without deciding Frank has made a prima facie claim for retaliation,[3] but we hold she has not met her burden of showing Heartland's proffered

---

[3] The district court found Frank did not suffer an adverse employment action sufficient to support a Title VII retaliation claim because she did not show she had suffered a "significant change in employment status . . . or a decision causing a significant change in benefits." *Frank v. Heartland Rehab. Hosp., LLC*, 220CV02496HLTKGG, 2022 WL 486793, at *8 (D. Kan. Feb. 17, 2022) (quoting *Daniels v. United Parcel Serv.*, *Inc.*, 701 F.3d 620, 635 (10th Cir. 2012)). This is not the standard we use to determine whether the employee suffered an adverse employment action for the purposes of a Title VII retaliation claim. For this, we require the plaintiff to show the employer's actions were "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of

reasons for the quit-or-be-fired notice were pretextual.[4] Heartland carried its burden to show it had legitimate, non-discriminatory reasons for telling Frank she had to "quit or be fired": (1) Frank's poor performance; (2) Frank had already told Sorensen she was looking for a new job; and (3) corporate was pressuring Sorensen to let Frank go and find a new employee. "Poor performance . . . is the quintessential legitimate, nondiscriminatory reason for termination." *Bertsch v. Overstock.com*, 684 F.3d 1023, 1029 (10th Cir. 2012), *abrogated on other grounds as recognized by Throupe*, 988 F.3d 1243.

The burden now shifts back to Frank to show, by a preponderance of the evidence, that Heartland's rationale is merely pretext. *Lounds*, 812 F.3d at 1234. The timing of the notice, mere weeks after she reported the harassment, supports Frank's claim of retaliation. However, while timing can create a prima facie case for retaliation, it must be combined with other evidence to show pretext. *See Zisumbo*,

---

discrimination." *Payan v. United Parcel Serv.*, 905 F.3d 1162, 1172 (10th Cir. 2018) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)); *see also Bertsch v. Overstock.com*, 684 F.3d 1023, 1029 (10th Cir. 2012) (discussing the pre- and post-*Burlington* standards for a materially adverse employment action in the retaliation context). However, because we assume Frank made out a prima facie case, applying the correct standard does not affect the outcome of this appeal.

[4] We note Heartland did not argue in its motion for summary judgment that it had a non-discriminatory reason for issuing Frank the quit-or-be-fired notice. However, Frank addressed the pretext issue in her brief in opposition to the motion for summary judgment, App'x Vol. I at 193, the district court addressed pretext in its opinion and order, *Frank*, 2022 WL 486793, at *8, and Frank has not argued to us that Heartland did not preserve the issue. Therefore, Frank has forfeited any argument that we may not consider whether Heartland had a non-discriminatory reason for issuing the notice. *See United States v. Rodebaugh*, 798 F.3d 1281, 1306 (10th Cir. 2015).

801 F.3d at 1200. Frank offers no other evidence. Instead, she quibbles with the district court's characterization of the evidence. She claims she was not "struggling," the last chance agreement was not an accurate reflection of her performance, and that Sorensen did not bring the last chance agreement up again after Frank completed it. But "[i]t is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of her own relative performance." *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1179 (10th Cir. 2006) (internal alternation omitted). There is ample evidence in the record to support Heartland's assertions that it was unsatisfied with Frank's performance, it found her to be a poor fit for the job, and that Sorensen knew Frank was unhappy at Heartland and was in the process of looking for a new job months before it issued the notice. Finally, Frank claims her report must have been the reason Heartland let her go because Heartland does not have documentation to support Sorensen's claim that corporate was pressuring her to replace Frank. But it is not Heartland's burden to produce such evidence; it is Frank's burden to produce evidence to show "weakness" or "inconsistencies" in Heartland's reasons or to show that the reasons are "unworthy of belief." *See Metzler*, 464 F.3d at 1179 (plaintiff has the burden to offer evidence to contradict employer's assertions that she was fired for her poor attitude and performance). Even considering the evidence in the light most favorable to her, Frank has not created a genuine issue of material fact from which a jury could reasonably conclude Heartland's proffered reasons for terminating her were

pretextual. We therefore affirm the district court's grant of summary judgment in favor of Heartland on the retaliation claim.

III.

For the reasons discussed above, we AFFIRM the decision of the district court.

Entered for the Court

Allison H. Eid
Circuit Judge