FILED
United States Court of Appeals
Tenth Circuit

September 28, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KIMARIO D. ANDERSON,

Plaintiff - Appellant,

v.

HEARTLAND COCA-COLA,

Defendant - Appellee.

No. 23-3018
(D.C. No. 2:21-CV-02530-EFM-KGG)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

Kimario D. Anderson, appearing pro se, appeals the district court's judgment in favor of defendant Heartland Coca-Cola (Heartland) on his claims of discrimination under Title VII of the Civil Rights Act of 1964 and retaliation for whistleblowing under Kansas law. 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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. BACKGROUND

Anderson worked as a delivery driver for Heartland. Under Heartland's Time and Attendance Policy, employees who accrue more than 15 points for violating the policy are subject to termination. By April 9, 2020, Anderson had accrued more than 15 points, so Heartland terminated his employment the next day.

Soon after, Anderson filed a charge of discrimination and retaliation with the Kansas Human Rights Commission (KHRC) and the Equal Employment Opportunity Commission (EEOC). The charge provided few specifics, alleging only that "[p]rior to and including[] December 2019 to April 10, 2020," he had been "subjected to verbal harassment, including jokes and derogatory racial slurs," and "to disparate treatment . . . including but not limited to being treated less favorably, being given worse job duties and being alienated from [his] co-workers." R., Vol. I at 108. He claimed that the mistreatment was due to his race (African American) and his religion (Christian), and that it also was in retaliation for opposing unspecified acts and practices forbidden under Kansas law. The KHRC determined that the available evidence did not support Anderson's claims. Adopting the KHRC's findings, the EEOC issued Anderson a right-to-sue letter.

Anderson then filed the action underlying this appeal. In the operative amended complaint, he asserted Title VII claims of racial and religious discrimination based on disparate treatment, harassment, retaliation, and the termination of his employment. However, the amended complaint was virtually void of supporting factual allegations. He also asserted two whistleblower claims under

Kansas law. The first was based on Heartland's directive that each driver was to purchase a lock and chain to lock up the particular pallet jacks, lifts, and dollies they used for making their deliveries, apparently so that no other employee could use them. The second whistleblower claim was based on allegations that Heartland had two policy handbooks setting out conflicting point systems used to score attendance.

Anderson also filed what the district court construed as a motion for summary judgment. Heartland filed a motion to strike that motion. The court granted the motion to strike because Anderson's motion failed to comply with the District of Kansas's local rules regarding the content of summary judgment motions. In so doing, the court noted that the majority of Anderson's exhibits were his own "unsworn statements," copies of pleadings already filed, printouts from websites, and letters from agencies regarding his administrative charge. *Id.* at 534.

After the court struck Anderson's summary judgment motion, Heartland filed a motion for summary judgment accompanied by evidence supporting numerous facts, including:

- Heartland was not aware of any racially or religiously discriminatory incidents involving Anderson, and Anderson never reported such conduct;
- Anderson accrued over 15 points under the Time and Attendance Policy, and Heartland terminated his employment for that reason;
- During the same time period Anderson complained about, two similarly-situated Caucasian drivers were also terminated for violating the Time and Attendance Policy;
- Heartland had two sequential Time and Attendance Policies; and
- Anderson signed separate, sequential acknowledgments that he received each of those policies.

Anderson responded to the motion by filing two objections. The district court characterized the objections as "formless" and just a "few pages long and full of nonsensical statements, conclusions, and [Anderson's] apparent confusion as to whether this case is a civil or criminal case," none of which addressed Heartland's "arguments or controvert[ed] [Heartland's] listed facts." *Id.* at 590–91. Consequently, the court granted summary judgment to Heartland on the Title VII claims because Anderson had submitted "no evidence whatsoever in support of his position." *Id.* at 595.

Turning to the whistleblower claims, the district court granted summary judgment to Heartland because Anderson failed to show how requiring employees to lock up company equipment or having two sequential attendance policies violated any rule, regulation, or law pertaining to public health, safety, and the general welfare, as required for a whistleblower claim under Kansas law.

II. DISCUSSION

Heartland points out that Anderson's appellate brief fails to meet many of the procedural requirements for an opening brief set out in Fed. R. App. P. 28(a) and 10th Cir. R. 28, including the requirement to cite legal authorities and the record in support of his contentions of error. Heartland therefore suggests that Anderson has failed to preserve any issues for appellate review.

We generally agree with Heartland's assessment of Anderson's appellate brief. Although we afford a liberal construction to the filings of pro se litigants and make "some allowances" for failing "to cite proper legal authority," "confusion of various

legal theories," "poor syntax and sentence construction," and "unfamiliarity with pleading requirements," we still expect them to follow the same procedural rules "that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted). But "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Id.* As we have said, "[t]he first task of an appellant is to explain to us why the district court's decision was wrong." *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015). Thus, perhaps the most important appellate rule of procedure is Rule 28(a)(8), which requires an appellant's opening brief to contain "the argument," which itself must contain "citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8). "Under Rule 28, which applies equally to pro se litigants, a brief must contain more than a generalized assertion of error, with citations to supporting authority." *Garrett*, 425 F.3d at 841 (ellipsis and internal quotation marks omitted).

Even affording a liberal construction to Anderson's appellate brief, it is difficult to discern much more than generalized assertions of error. Despite this, and despite Anderson's lack of citation to any legal authority and other failures to comply with Rule 28(a), we are not inclined to wholly deny review due to the brief's shortcomings. However, we discern only one contention worthy of comment—that the district court overlooked two documents Anderson submitted, which he believes is evidence sufficient to defeat summary judgment.

The first of the two documents is an unsworn narrative statement he attached to his motion for summary judgment. *See* R., Vol. I at 311–32. But as noted, the district court struck that motion for failing to comply with applicable procedural rules, and Anderson has not challenged that ruling. More importantly, in neither of his objections to Heartland's summary judgment motion did he ask the district court to even consider the narrative statement. The district court therefore did not err by ruling on Heartland's summary judgment motion without taking into account the narrative statement because it had earlier struck the statement and Anderson never asked the court to review it as part of ruling on Heartland's motion for summary judgment.

The second of the two documents Anderson claims the district court overlooked is a 118-page proposed supplement to a final pretrial order the court had already filed. This proposed supplement sought to add more than 30 pages of additional material to the pretrial order, which contained approximately 71 pages of Anderson's factual assertions. In an order predating Heartland's motion for summary judgment, the district court determined that the proposed additional matters were "outside the scope of the claims in this case or add unnecessary detail to the [final pretrial] order." Suppl. R., Vol. III at 86. Nonetheless, in his objections to Heartland's summary judgment motion, Anderson asked the district court to consider his proposed supplement to the final pretrial order.

Anderson has not challenged the court's order rejecting the additional matters he sought to add with the proposed supplement. We therefore construe Anderson's

argument to mean that the district court should have considered the 71 pages of factual contentions he set out in the final pretrial order, which were reiterated in the proposed supplement. We will assume Anderson would have been able to present those facts in an admissible form at trial. *See* Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact [at summary judgment] cannot be presented in a form that would be admissible in evidence."). However, as construed, we reject this argument.

Where, as here, a summary-judgment movant carries its initial burden to demonstrate "a lack of evidence for the nonmovant on an essential element of the nonmovant's claim," "the burden shifts to the nonmovant to go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) (internal quotation marks omitted). "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.* "Thus, although our review is de novo, we conduct that review from the perspective of the district court at the time it made its ruling, ordinarily limiting our review to the materials adequately brought to the attention of the district court by the parties." *Id.*

"[T]he requirement that the nonmovant specifically reference facts in its motion materials and the record is of special importance in an employment discrimination case." *Id.* at 672. "Thus, where the burden to present such specific facts by reference to exhibits and the existing record was not adequately met below,

we will not reverse a district court for failing to uncover them itself." *Id.* Although "[t]he district court has discretion to go beyond the referenced portions of these materials," it "is not required to do so." *Id.* And although we have "discretion to more broadly review the record on appeal, we, like the district courts, have a limited and neutral role in the adversarial process, and are wary of becoming advocates who comb the record of previously available evidence and make a party's case for it." *Id.*

In the district court, Anderson failed to refer to any specific portions of the 71 pages of factual allegations set out in the final pretrial order. He therefore did not adequately meet his burden to present specific facts by reference to the record. Accordingly, we cannot conclude that the district court erred by failing to search the allegations in an effort to uncover facts that might have enabled Anderson to meet his burden. And because Anderson repeats this failure on appeal, we decline to comb through the factual allegations in the final pretrial order in an effort to salvage his claims.

Furthermore, as in the district court, Anderson has not identified any rule, regulation, or law pertaining to public health, safety, and the general welfare that Heartland violated, as required to sustain a whistleblower retaliation claim under Kansas law, *see Goodman v. Wesley Med. Ctr., L.L.C.*, 78 P.3d 817, 821-22 (Kan. 2003) (explaining that one element of a Kansas whistleblower retaliation claim is that "[a] reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or

the law pertaining to public health, safety, and the general welfare"). Summary judgment on those claims, therefore, was appropriate.

III. CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Bobby R. Baldock
Circuit Judge