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United States Court of Appeals
Tenth Circuit

September 2, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARKESHA FUTRELL-SMITH,

Plaintiff - Appellant,

v.

BRINKER INTERNATIONAL, INC.,

Defendant - Appellee.

No. 25-1324
(D.C. No. 1:23-CV-03153-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MURPHY**, and **CARSON**, Circuit Judges.

A plaintiff seeking to establish an inference of racial discrimination through comparator evidence must identify at least one comparator—a person similarly situated in all relevant respects but outside the plaintiff's protected class that received more favorable treatment. Without such a comparator, disparate treatment alone does not establish a prima facie case of discrimination under the first step of the McDonnell Douglas burden-shifting framework.

Plaintiff Markesha Futrell-Smith alleges that Defendant Brinker International, the operator of the Chili's restaurant in this case, discriminated against her based on her race

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

when a manager asked her for payment before service. The district court granted Defendant summary judgment on Plaintiff's 42 U.S.C. §§ 1981 and 2000a discrimination claims because Plaintiff identified no comparator. Plaintiff raises several challenges to the district court's order on appeal. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm.

I.

On April 30, 2022, Plaintiff, a Black woman, visited a Chili's restaurant in Denver, Colorado, with her husband and two children. Natasha Kilwine, an Assistant General Manager, seated them. Plaintiff and her family frequently dined at that location, and Plaintiff had spoken with Kilwine numerous times before that day. Kilwine did not recognize Plaintiff because she had just come from a birthday photoshoot, had her makeup done, and had dyed her hair orange. After Kilwine seated Plaintiff and her family, a server, Maria Chavez, approached Kilwine and told her that she recognized Plaintiff and her husband as a couple who had previously walked out on their bill at least twice.[1]

Before this incident, General Manager Jeffrey Simser had discussed with Kilwine how to handle customers who previously failed to pay. Simser told Kilwine that she

[1] Kilwine also testified that another Chili's server, Maddie Walton, approached her that day about Plaintiff's alleged prior walkouts. Plaintiff maintains, however, that Chavez and not Walton identified her as a prior walkout. For purposes of this appeal, we accept Plaintiff's characterization. The distinction does not affect our analysis. Plaintiff does not dispute that at least one server identified Plaintiff as a prior walkout. And whether Chavez or Walton made the statement, the district court could consider it at summary judgment for the reasons we explain below.

could confront these customers, ask them to leave, or inquire about their ability to pay. Based on that conversation, Kilwine believed she could require upfront payment from customers that she recognized as prior walkouts.

Kilwine approached Plaintiff and told her that employees had identified her as someone who had previously walked out on a bill. Kilwine then asked Plaintiff for a valid form of payment upfront.[2] Plaintiff became upset and followed Kilwine into the kitchen area while yelling and cursing at her. Kilwine told the assigned server that she would serve the table herself, but Plaintiff left before Kilwine could serve her.

Chili's policy did not require customers to provide a valid form of payment upfront, nor did any other employee approach any other customers about their ability to pay that same night. Earlier in 2022, however, Kilwine had questioned one Caucasian man about payment because he had previously walked out on his bill. After the incident with Plaintiff, Kilwine did not have any further interactions with customers about their ability to pay.

Plaintiff complained to Defendant Brinker International, Inc. about the incident. Defendant investigated and concluded that Kilwine had violated company policy.

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[2] The parties disputed at summary judgment whether Kilwine asked Plaintiff which form of payment she would be using or specifically requested prepayment. The district court found the dispute immaterial and adopted the operative language "provide a valid form of payment upfront" because Plaintiff stated in her response to Defendant's motion for summary judgment that Kilwine "required [Plaintiff] provide a valid form of payment upfront before providing service." We agree with the district court that this dispute is immaterial and use the same language.

Defendant issued written warnings to both Kilwine and Simser. As part of its investigation, Defendant also interviewed Maria Chavez.[3]

Plaintiff then filed the present action against Defendant, asserting discrimination claims under 42 U.S.C. § 1981, 42 U.S.C. § 2000a, and Colo. Rev. Stat. § 24-34-601. Under § 1981 (Count I), Plaintiff alleged that Defendant discriminated against her because of her race and denied her the right to make, enforce, and enjoy contracts on the same basis as White citizens when Chili's staff refused to serve her and her family. Under § 2000a (Count II), Plaintiff alleged that Defendant denied her the full and equal enjoyment of the goods, services, benefits, or privileges at Chili's, a place of public accommodation, based solely on her race and color when staff prevented her from purchasing food and dining at the restaurant. Plaintiff asserted the same public accommodation discrimination theory under Colo. Rev. Stat. § 24-34-601 (Count III).

During discovery, Plaintiff attempted to depose Maria Chavez. Defendant and Plaintiff appeared for the deposition, but Chavez did not. Plaintiff then sought the notes from Defendant's interview with Chavez during its internal investigation into Kilwine and Simser. But one of Defendant's employees had not preserved those notes. Plaintiff moved for sanctions based on Defendant's failure to preserve the Chavez notes.

After a hearing on December 2, 2024, the district court found that Defendant "had a duty to preserve" the Chavez interview notes. The district court ruled that Plaintiff

[3] Plaintiff separately filed a Charge of Discrimination with the Colorado Civil Rights Division ("CCRD"). After investigating, the CCRD found cause to conclude that Chili's violated Colo. Rev. Stat. § 24-34-402.

could introduce evidence at trial that the interview notes once existed but no longer did. It also permitted Plaintiff to seek an instruction informing the jury that Defendant should have preserved the notes. But the district court found any resulting prejudice to Plaintiff speculative and therefore rejected Plaintiff's request for more severe sanctions, including exclusion of evidence and an adverse-inference instruction.

Defendant later moved for summary judgment on all three claims. The district court granted summary judgment to Defendant on Plaintiff's §§ 1981 and 2000a claims and declined to exercise supplemental jurisdiction over Plaintiff's remaining state-law claim.

As to Plaintiff's § 1981 claim, the district court concluded that Plaintiff failed to establish a prima facie case of discriminatory intent under step one of the McDonnell Douglas burden-shifting framework. The district court reasoned that Plaintiff had not identified any customer who, after employees suspected that customer of previously walking out on a bill, received service without providing a valid form of payment upfront. The district court also noted that Kilwine similarly questioned the only comparable customer in the record, a Caucasian man suspected of previously walking out, about his ability to pay. The district court concluded that Plaintiff had not presented sufficient circumstantial evidence of intentional discrimination.

The district court reached a similar conclusion on Plaintiff's § 2000a claim. It explained that to establish a prima facie case under § 2000a Plaintiff had to identify at least one similarly situated customer outside her protected class who received more favorable treatment. Because Plaintiff "ha[d] not identified any non-Black customer who, after being suspected of having previously walked out, was permitted to order without an upfront form of payment," the court found that she failed to establish discriminatory intent. Plaintiff appealed.

I.

On appeal, Plaintiff raises three issues. First, she argues that the district court abused its discretion "by granting summary judgment before resolving Plaintiff's pending Motion for Sanctions, which directly challenged the admissibility of evidence central to the summary judgment record." Second, she argues that "the district court committed reversible error under Rule 56 by relying on inadmissible hearsay and double-hearsay statements from non-testifying employees to accept Defendant's asserted nondiscriminatory reason." Third, she argues that "the district court misapplied the McDonnell Douglas framework. We address each argument below.

A.

We begin with Plaintiff's argument that the district court improperly granted summary judgment before resolving her motion for sanctions. The parties agree that we review such a challenge for abuse of discretion. Because both parties agree on that standard, we review for an abuse of discretion. See Helget, 844 F.3d at 1225–27 (reviewing a plaintiff's challenge that district court improperly granted summary judgment before resolving pending motion for spoliation sanctions for abuse of discretion).[4]

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[4] In Helget, the plaintiff similarly argued that the district court improperly granted summary judgment before resolving a motion for spoliation sanctions. Id. at 1225. And

Plaintiff argues that the district court abused its discretion by granting summary judgment before resolving her sanctions motion. She relies principally on Helget and Phillips v. Cohen, 400 F.3d 388 (6th Cir. 2005). Neither case supports her argument. Unlike the district courts in those cases, the district court here resolved both whether sanctions were appropriate and what sanction to impose before it granted summary judgment.

In Helget, the plaintiff's spoliation motion was pending when the district court granted summary judgment. 844 F.3d at 1225. We explained that, "as a matter of best practices," the district court should have resolved the motion "before, or in the process of, deciding summary judgment." Id. at 1227. But we found no abuse of discretion because the plaintiff had not alerted the district court to how the alleged spoliation affected the issues presented at summary judgment. Id.

In Phillips, the district court granted the plaintiff's sanctions motion but deferred deciding what sanction to impose until trial. 400 F.3d at 402. The district court then granted summary judgment before trial without revisiting the sanctions issue. Id. The Sixth Circuit found the district court's grant of summary judgment "problematic," because the summary judgment order resulted in the imposition of no sanction of any

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we compared such a challenge to a request under Rule 56(d), which "serves a noticing function that 'safeguards against an improvident or premature grant of summary judgment.'" Id. at 1226. Significantly, we also review the denial of Rule 56(d) relief for abuse of discretion. Gutierrez v. Cobos, 841 F.3d 895, 908 (10th Cir. 2016) (quoting Trans-Western Petrol., Inc. v. U.S. Gypsum Co., 830 F.3d 1171, 1175 (10th Cir. 2016)).

kind. Id. The Sixth Circuit held that this was an abuse of the district court's discretion. Id.

Here, the district court resolved Plaintiff's sanctions motion at a December 2, 2024, hearing. It found that Defendants "had a duty to preserve" the Chavez interview notes but that any prejudice from their loss was speculative. The district court therefore rejected Plaintiff's requested sanctions, including an adverse-inference instruction, as too severe. It determined that Plaintiff could introduce evidence that the notes once existed but no longer did and could seek an instruction informing the jury that Defendant should have preserved the notes. Only after resolving the sanctions motion did the district court grant Defendant summary judgment on August 13, 2025.[5]

Plaintiff nevertheless argues that the court failed to resolve "sanctions affecting dispositive evidence" "before, or in the process of," deciding summary judgment because it never decided whether Defendant could rely on the evidence implicated by her sanctions request. But the district court's sanctions ruling resolved that question. The

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[5] Indeed, when Plaintiff later argued that the district court never ruled on her sanctions motion, the district court rejected such an argument:

> I disagree with the fundamental premise that the Plaintiff is arguing that I never ruled on the sanctions motion. I did rule on the sanctions motion and had determined that the sanctions that the Plaintiff sought, which was the exclusion of evidence, which was essentially directed verdict, was wholly unwarranted based upon the speculation of what may have been in the evidence that was lost and upon the lack of any showing of bad faith in how the document was lost.

district court declined to exclude any evidence or impose an adverse inference and instead selected other, less severe sanctions. Thus, when the district court later considered summary judgment, no sanction prevented Defendant from relying on the evidence in the record.

The district court reserved ruling on whether it would bar Chavez from testifying at trial. But the district court did not rely on testimony from Chavez when it granted summary judgment. Instead, it relied on Kilwine's testimony that Chavez identified Plaintiff as a prior walkout. As we explain below, Defendant offered Chavez's statement not to prove that Plaintiff had in fact walked out on a prior bill, but to explain why Kilwine confronted Plaintiff and required her to prepay. So whether Chavez could later testify at trial had no bearing on the evidence the district court considered at summary judgment.

Thus, Helget and Phillips do not establish that the district court abused its discretion. The district court considered the spoliation, determined what sanctions to impose, and only then resolved summary judgment. Because Plaintiff identifies no other error in the district court's sanctions ruling, we conclude the district court did not abuse its discretion.

B.

Next, Plaintiff argues that the district court improperly relied on inadmissible hearsay when it granted summary judgment. Defendant relied on Kilwine's deposition testimony recounting what Chavez told her about Plaintiff to establish that she believed

Plaintiff was a walkout. Plaintiff characterizes this evidence as “hearsay ([]Chavez’s out-of-court statements) layered on hearsay (Kilwine’s description of [that] statement[]).”

Defendant responds that Chavez’s statement identifying Plaintiff as a previous walkout was not hearsay because it did not offer the statement to prove that Plaintiff had, in fact, walked out on a bill. Instead, Defendant contends that it offered the statement to explain why Kilwine confronted Plaintiff and required her to provide valid form of payment upfront.

We agree with Defendant. Under Federal Rule of Evidence 801(c)(2), hearsay is an out-of-court statement offered “to prove the truth of the matter asserted.” A statement offered for another purpose, including its effect on the listener, is not hearsay. See Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1434 (10th Cir. 1993) (“Statements offered for the effect on the listener . . . are generally not hearsay.” (citing United States v. Lambinus, 747 F.2d 592, 597 (10th Cir. 1984)). Here, the district court relied on the statement identifying Plaintiff as a prior walkout for its effect on the listener when it granted summary judgment.

At summary judgment, the district court considered the statement to determine why Kilwine treated Plaintiff as she did. Whether Chavez correctly identified Plaintiff as a prior walkout makes no difference to that inquiry. Even if Plaintiff never walked out on a bill, Chavez told Kilwine that she had and Kilwine acted on that information. The statement was therefore relevant to the district court's analysis because of its effect on Kilwine, not because it was true. As a result, the statement was not hearsay.[6]

C.

Finally, we consider Plaintiff's argument that the district court misapplied the McDonnell Douglas framework in granting summary judgment to Defendant on her § 1981 discrimination claims.[7]

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[6] Plaintiff also seems to argue that the district court could not consider Kilwine's deposition testimony recounting the servers' identification of Plaintiff because Kilwine's deposition testimony is hearsay the district court could not rely on at summary judgment. We disagree. Although Kilwine's deposition testimony recounting the servers' identification of Plaintiff, if offered at trial, would be an out-of-court statement offered for the truth of the matter asserted, a party need not submit evidence at summary judgment "in a form that would be admissible at trial." Trevizo v. Adams, 455 F.3d 1155, 1160 (10th Cir. 2006) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). Instead, a party can submit evidence "on the theory that the evidence may ultimately be presented at trial in an admissible form." Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1199 (10th Cir. 2006) (citing Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1122 (10th Cir. 2005)). For example, a court may consider an affidavit at summary judgment even though the affidavit itself may constitute hearsay at trial, because the affiant may testify to the same facts at trial. See id. That same reasoning applies here. Kilwine could have testified to what the servers told her about Plaintiff at trial. So neither alleged "layer" of hearsay prevented the district court from considering Kilwine's deposition statement about the servers' identification of Plaintiff as a previous walkout at summary judgment.

[7] Plaintiff asserted a claim under § 2000a, on which the district court also granted Defendant summary judgment. On appeal, however, Plaintiff does not separately address that claim or explain why it should survive if her § 1981 claim fails. Instead, to the extent she challenges the ruling at all, she appears to treat the two claims the same. Other courts have done the same in similar circumstances. See Lizardo v. Denny's, Inc., 270 F.3d 94, 106 (2d Cir. 2001) ("For the same reasons that the plaintiffs can not [sic] prevail on their § 1981 claims, they can not [sic] do so under § 2000a."). We need not decide whether the two claims require the same analysis. Because Plaintiff develops no independent argument for reversing summary judgment on her § 2000a claim, we affirm

"We review de novo a grant of summary judgment, applying the same standard that governs the district court," Cypert v. Indep. Sch. Dist. No. I-050 of Osage Cnty., 661 F.3d 477, 480 (10th Cir. 2011) (emphasis removed) (quoting Lauck v. Campbell Cnty., 627 F.3d 805, 809 (10th Cir. 2010)), meaning that we view "the evidence in the light most favorable to the appellant," id. (quoting Meiners v. Univ. of Kan., 359 F.3d 1222, 1229 (10th Cir.2004)).

"Section 1981 prohibits racial discrimination in 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" Reynolds v. Sch. Dist. No. 1, Denver, Colo., 69 F.3d 1523, 1532 (10th Cir. 1995) (citation modified) (quoting § 1982(a) & (b)). A prima facie § 1981 claim requires a plaintiff to show that "(1) the plaintiff is a member of a protected class, (2) the defendant had the intent to discriminate on the basis of race, and (3) that the discrimination interfered with a protected activity as defined in § 1981." Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091, 1102 (10th Cir. 2001) (first citing Reynolds, 69 F.3d at 1532; then citing Bellows v. Amoco Oil Co., 118 F.3d 268, 274 (5th Cir. 1997); and then citing Morris v. Office Max, Inc., 89 F.3d 411, 513 (7th Cir. 1996)). The second element, discriminatory intent, is at issue here.

When a plaintiff relies on circumstantial evidence of discriminatory intent, as Plaintiff does here, we apply the McDonnell Douglas burden-shifting framework. See

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that determination for the same reasons we affirm summary judgment on her § 1981 claim.

Durham v. Xerox Corp., 18 F.3d 836, 839 (10th Cir. 1994) (applying McDonnell Douglas framework to § 1981 claim). Under this framework, a plaintiff must first establish a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If the plaintiff does so, the burden shifts to the defendant to articulate a "legitimate, nondiscriminatory" reason for the challenged action. Id. The burden then reverts to the plaintiff to show that the proffered nondiscriminatory reason is pretextual. See id. at 804.

Plaintiff raises three challenges to the district court's application of the McDonnell Douglas framework. First, she argues that the court improperly defined the comparator class by reference to Defendant's disputed justification, collapsing the prima facie and legitimate-reason inquiries. Second, she argues that the court accepted inadmissible hearsay as evidence of a legitimate, nondiscriminatory reason. Third, she argues that the court improperly resolved factual disputes and credibility questions against her at summary judgment contrary to Rule 56 when it determined that Plaintiff failed to show pretext.

First, we agree with the district court that Plaintiff failed to establish a prima facie case of discrimination at the first step of the McDonnell Douglas framework. Second, as we explained above, the district court did not rely on inadmissible hearsay in granting summary judgment. Third, we need not reach Plaintiff's arguments that the district court improperly resolved factual disputes and credibility questions against her. Those arguments concern whether Defendant's stated reason for requiring prepayment was pretextual, a question that arises only at the third step of the McDonnell Douglas framework. Because Plaintiff failed to establish a prima facie case at step one, we do not reach pretext.

Plaintiff argues that she established an inference of discriminatory intent because she and her family were the only Black patrons in the restaurant, Defendant required them to prepay, and Defendant did not require any White customers to do so. But that comparison overlooks a relevant difference between Plaintiff and the other customers. Kilwine suspected Plaintiff of previously walking out on a bill. Nothing in the record suggests that Kilwine or another employee held the same suspicion about the White customers that Plaintiff identifies.

To support an inference of discriminatory intent through comparator evidence under § 1981, the comparators must be similarly situated in all relevant respects other than race. Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1273 (11th Cir. 2004) (first citing Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir. 1998); then citing E & T Realty v. Strickland, 830 F.2d 1107, 1109 (11th Cir. 1987)). Because Plaintiff identifies no non-Black customers that Defendant also suspected of a prior walkout, the other customers were not similarly situated in all relevant respects. Indeed, the record only identifies a White customer that Defendant suspected of a prior walkout and treated the same way as Plaintiff.

Still, Plaintiff argues that requiring such a comparator imports Defendant's asserted nondiscriminatory reason into the prima facie inquiry, improperly collapsing steps one and two of the McDonnell Douglas framework. She relies on EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000).

In Horizon, we held that an employer may not defeat a plaintiff's prima facie case under McDonnell Douglas by relying on an employer-imposed qualification that it also relies on as its nondiscriminatory reason for the employment action. Id. at 1192 (citing Burrus v. United Tele. Co. of Kan., 683 F.2d 339, 342 (10th Cir. 1982)). We explained that "[a] plaintiff's failure to meet employer-imposed objective qualifications that have no relation to the performance of the job at issue is irrelevant at the prima facie stage" because such a failure does not establish an "absolute or relative lack of qualifications." Id. at 1193. We recognized that allowing the employer to rely on such qualifications at the prima facie stage collapses the first two steps of McDonnell Douglas framework and deprives the plaintiff of the opportunity to show that the employer's asserted reason was pretextual. Id. at 1993–94. Thus, we held that the relevant inquiry under the first step of McDonnell Douglas is whether the plaintiff presented credible evidence "that she possesses the objective qualifications necessary to perform the job at issue." Id. at 1194 (first citing Anderson v. Zubieta, 180 F.3d 329, 342 (D.C. Cir. 1999); then citing Williams v. Boorstin, 663 F.2d 109, 117 (D.C. Cir. 1980); and then citing Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir. 1978)).

Plaintiff misinterprets Horizon. It does not require courts to disregard relevant differences between proposed comparators. There, the employer invoked its asserted nondiscriminatory reason to argue that the plaintiff lacked a qualification necessary to establish her prima facie case of employment discrimination, even though that qualification did not bear on whether she could perform the job. Id. at 1192–93. Although the employer could rely on that qualification as a legitimate reason for its decision at step two, it could not use the same qualification to prevent an otherwise qualified plaintiff from reaching that step. Id. Here, however, the prior walkout suspicion bears directly on whether Plaintiff and the other customers were similarly situated. The district court therefore properly considered that distinction in defining the relevant comparator class, and Horizon does not require otherwise.

Because Plaintiff identified no other customer, similarly situated in all relevant respects, outside her protected class who received more favorable treatment, Plaintiff did not establish a prima facie case of discriminatory intent under step one of the McDonnell Douglas burden-shifting framework. We therefore AFFIRM the district court's grant of summary judgment on that ground.

Entered for the Court

Joel M. Carson III
Circuit Judge