# United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
**FILED**
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Lyle W. Cayce
Clerk

No. 23-40404

ELIZABETH CERDA,

*Plaintiff—Appellant*,

*versus*

BLUE CUBE OPERATIONS, L.L.C.,

*Defendant—Appellee*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:21-CV-214

Before WILLETT, WILSON, and RAMIREZ, *Circuit Judges*.

IRMA CARRILLO RAMIREZ, *Circuit Judge*:

Former Blue Cube employee Elizabeth Cerda was fired for earning wages for time she did not work and threatening to expose her co-workers to COVID-19. She sued Blue Cube under the Family and Medical Leave Act (FMLA) and Title VII of the Civil Rights Act (Title VII). The district court granted summary judgment to Blue Cube. We AFFIRM.

## I

Cerda worked for Blue Cube from 2006 until April 21, 2020. Following rotator cuff surgery in 2017, she requested and was granted leave

under the FMLA. She exhausted the twelve weeks' leave to which she was entitled under the FMLA but remained on leave for a total of eighteen months.[1] When she returned to work in late 2018, she told her supervisor, Steven Gibbons, that she was going to visit her ailing father during her 30-minute lunch breaks to "make sure he had his medicines and something to eat." Cerda regularly took longer than 30 minutes to visit her father, however.

Meanwhile, the male employees at Blue Cube began teasing Cerda and making what she maintains were inappropriate comments. They would discuss having sex with their wives and post inappropriate surveys in their workspace. They teased Cerda about another female employee, who they believed to be homosexual and flirting with Cerda, and called Cerda demeaning names such as "shorty," "grandma," and "Ratatouille." One of them blew kisses at her and tickled her palm on one occasion; another would walk up behind his co-workers—male or female—and knee them in the buttocks, yelling "corn dog!" Cerda once walked into a conference room and found several of her male co-workers watching videos on their phones; while they appeared to be discussing classic cars, Cerda believed they were watching pornographic videos. When Cerda changed out of her work uniform and into her regular clothes at work, her co-workers asked her where she was going, and she informed them that she had a dentist appointment. Thereafter, whenever she changed into her regular clothes, her co-workers would comment that she must be going to the dentist. And on one occasion, Gibbons needed to enter the women's locker room, and he made a comment about Cerda being fully clothed.

[1] Because Cerda exhausted her FMLA leave in 2017, she was not eligible for additional FMLA leave until August of 2019.

After Cerda had been visiting her father during her lunch breaks for several months, Gibbons suggested Cerda ask Human Resources about her eligibility for FMLA leave to care for him. Sometime in early 2020, Cerda approached Blue Cube Human Resources manager Michelle Mulligan in a hallway outside of a conference room as Mulligan was leaving another meeting and briefly expressed her desire to explore "possibly getting FMLA for [her] dad." Cerda never discussed the matter with Mulligan again and instead continued to exceed her allotted lunch break without reporting her absences. Her co-workers complained, so Blue Cube initiated an investigation, which revealed Cerda had been paid for at least 99 hours she did not work.

During that investigation, Cerda missed work after she was exposed to COVID-19. When Blue Cube required Cerda to use personal sick days to justify her absence, she threatened to come to work and infect her co-workers the next time she was sick.

Blue Cube terminated Cerda's employment on April 21, 2020. Cerda sued Blue Cube, asserting four claims. She alleged that the time she missed from work to care for her father was FMLA-protected, so by terminating her employment, Blue Cube either (1) interfered with her use of her FMLA benefits or (2) retaliated against her for engaging in FMLA-protected activities. Cerda also asserted (3) a sex discrimination claim because she was punished for extended lunches while her male colleagues were not and (4) an independent sexual harassment claim related to several incidents in which male employees teased her. During the proceedings below, Cerda asked the district court to reconvene Mulligan's deposition on a second day; the district court declined to do so, citing Federal Rule of Civil Procedure 30(d)(1). The parties filed cross-motions for summary judgment, and the district court granted Blue Cube's motion on all four claims. Cerda timely appealed the district court's discovery ruling and judgment.

## II

"We review a district court's grant of summary judgment de novo, applying the same standard on appeal as that applied below." *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 350 (5th Cir. 2014). Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). We must draw all reasonable inferences and construe all evidence in the light most favorable to Cerda as the nonmoving party. *See Rogers*, 755 F.3d at 353.

We affirm the grant of summary judgment to Blue Cube on all claims.

### A

Cerda did not adduce sufficient evidence of each of the elements of her FMLA interference claim to survive summary judgment. To establish a *prima facie* case of FMLA interference, a plaintiff must show "(1) [s]he was an eligible employee; (2) h[er] employer was subject to FMLA requirements; (3) [s]he was entitled to leave; (4) [s]he gave proper notice of h[er] intention to take FMLA leave; and (5) h[er] employer denied h[er] the benefits to which [s]he was entitled under the FMLA." *Caldwell v. KHOU-TV*, 850 F.3d 237, 245 (5th Cir. 2017).

Cerda's FMLA interference claim fails because she did not provide evidence showing she gave Blue Cube adequate notice of her need or intent to take leave—that is, time away from work in addition to her 30-minute lunch breaks. Even when an employee is in all respects eligible for FMLA leave, "the employee must give his employer notice of his *intention to take leave* in order to be entitled to it." *Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 788 (5th Cir. 2017) (emphasis added). When giving notice, an employee need not "expressly invoke[]" the FMLA. *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 762 (5th Cir. 1995). "The critical question is whether the

information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Id.* at 764. But "[w]hile an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant." *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980 (5th Cir. 1998). Additionally, employers may "condition FMLA-protected leave upon an employee's compliance with the employer's usual notice and procedural requirements, absent unusual circumstances[,]" and "[d]iscipline resulting from the employee's failure to do so does not constitute interference" with the employee's FMLA rights. *Acker*, 853 F.3d at 789 (citation omitted).

At oral argument, Cerda acknowledged that the extent of the record evidence arguably establishing that she had provided notice was (1) her testimony regarding the brief conversation with Mulligan as she was leaving the conference room and (2) Gibbons's affidavit establishing that he was aware of the severity of Cerda's father's ailments and the extensive care he required. Cerda also testified, however, that she never actually requested leave of any kind from Blue Cube. She told Gibbons that she could care for her father on her lunch breaks and therefore did not need to take additional time away from work. Indeed, Gibbons was the one who first mentioned the possibility of Cerda obtaining FMLA leave; Cerda did not initiate any conversations regarding her need for leave.

Even drawing all inferences in Cerda's favor, the record shows, at most, that Cerda sought to meet with Mulligan to obtain more information about Cerda's potential FMLA eligibility. She concedes she did not express an intent or desire to take leave. That is insufficient to put Blue Cube on notice that Cerda *intended to take leave* and that that leave qualified for FMLA coverage. *See id.*; *see also Satterfield*, 135 F.3d at 980. Cerda knew how to obtain leave, as she had successfully done so in the past, and she

indisputably did not comply with Blue Cube's internal procedures for requesting FMLA leave here. *See Acker*, 853 F.3d at 789. And even if Cerda adduced sufficient evidence of notice triggering Gibbons's obligation to provide additional FMLA information to her, Gibbons fulfilled that obligation by referring her to Mulligan. *See Greenwell v. State Farm Mut. Auto Ins. Co.*, 486 F.3d 840, 843 (5th Cir. 2007) (holding that the supervisor's invitation for the employee "to clear the absence under FMLA . . . discharged [the employer's] duty to inquire based on the facts provided by an employee"). For these reasons, Cerda's FMLA interference claim fails.

B

Additionally, Cerda's FMLA retaliation and Title VII sex discrimination claims were properly dismissed because she did not identify a genuine dispute of material fact with respect to the issue of pretext.[2] Cerda's FMLA retaliation and sex discrimination claims are both evaluated under a version of the *McDonnell Douglas* burden-shifting framework. *See Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332–33 (5th Cir. 2005) (applying burden-shifting framework to FMLA retaliation claim); *Risher v. Aldridge*, 889 F.2d 592, 596 & n.11 (5th Cir. 1989) (applying burden-shifting framework to sex discrimination claim). At the last step of that analysis, the burden is on Cerda to show that the non-retaliatory, non-discriminatory justifications for her termination provided by Blue Cube were pretextual. *See Risher*, 889 F.2d

[2] Her FMLA retaliation claim fails for another reason: to make a *prima facie* showing of retaliation, Cerda must point to evidence that she engaged in protected activity. *See Watkins v. Tregre*, 997 F.3d 275, 284 (5th Cir. 2021). Because Cerda did not adduce evidence of notice sufficient to give rise to an FMLA interference claim, she likewise failed to show that she engaged in FMLA-protected activity. *See, e.g.*, *Harrelson v. Lufkin Indus., Inc.*, 614 F. App'x 761, 764 (5th Cir. 2015) (per curiam) (holding that an employee's "failure to substantiate his interference claim [was] inconsistent with his retaliation claim").

at 596 n.11. "Pretext can be proven by any evidence that casts doubt on the credence of the employer's proffered justification for the adverse employment action." *Harris v. FedEx Corp. Servs., Inc.*, 92 F.4th 286, 297 (5th Cir. 2024) (citation omitted).

Here, Blue Cube presented evidence that it fired Cerda because she earned wages for time that she did not work and threatened to expose her co-workers to COVID-19. Cerda offers several reasons why Blue Cube's proffered justifications were pretextual, but none are supported by the record. She contends that Mulligan was the one who ultimately decided to terminate her employment and that her decision was based on a flawed investigation. But affidavits in the record show that three directors at Blue Cube made the decision to fire Cerda. Cerda also notes that she was initially told she was being fired only for being paid for hours she did not work; that statement is not fatally inconsistent with a statement that she was fired both for that reason and because she threatened her co-workers, however. Cerda also maintains that other employees—most of whom were male—took extended lunch breaks and were never punished. But Cerda fails to point to evidence that these other co-workers were similarly situated: there is no evidence that those employees took as many extended lunch breaks as Cerda or threatened their co-workers. Because Cerda fails to adduce sufficient evidence of pretext, her FMLA retaliation and sex discrimination claims were properly dismissed.

C

We also conclude that Cerda did not present evidence of each of the elements of her sexual harassment claim. Title VII recognizes two types of sexual harassment claims: *quid pro quo* claims and hostile work environment claims. *Newbury v. City of Windcrest*, 991 F.3d 672, 675–76 (5th Cir. 2021) (citing *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 (5th Cir. 2000)); *see also*

*Simmons v. Lyons*, 746 F.2d 265, 269–70 (5th Cir. 1984) (noting that sexual harassment is a form of employment discrimination violative of Title VII). This case involves only the latter. A *prima facie* hostile work environment claim under Title VII requires proof of the following elements: (1) the plaintiff is a member of a protected class; (2) the plaintiff was subjected to unwanted or unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known about the harassment and failed to act promptly to address it. *See Jones v. Flagship Int'l*, 793 F.2d 714, 719–20 (5th Cir. 1986) (citing *Henson v. City of Dundee*, 682 F.2d 897, 903–905 (11th Cir. 1982)); *see also Waltman v. Int'l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989).

Here, several of the incidents Cerda complains of were not "based upon sex[.]" *See Jones*, 793 F.2d at 719. For example, discussions about male employees having sex with their wives were not directed at Cerda, and the record is devoid of evidence that they were motivated by her sex. And the demeaning names that her co-workers called her were, according to Cerda's own testimony, based on her height and the fact that she could crawl under the equipment at work rather than on her sex. Moreover, some of the incidents did not alter the conditions of her employment because they were not adequately severe or pervasive. *See id*. at 719–20. For instance, the incident in which Gibbons needed to enter the women's locker room and mentioned something about Cerda being fully clothed happened only once and was not patently offensive. Finally, Cerda failed to point to evidence that Blue Cube had knowledge of the remaining conduct to which she objects.

For these reasons, Cerda's Title VII sexual harassment claims cannot survive summary judgment.

## III

Cerda lastly challenges the district court's denial of her request to reconvene Mulligan's deposition on a second day. Discovery rulings are reviewed for abuse of discretion. *JP Morgan Chase Bank, N.A. v. DataTreasury Corp.*, 936 F.3d 251, 255 (5th Cir. 2019). "A trial court enjoys wide discretion in determining the scope and effect of discovery, and it is therefore unusual to find an abuse of discretion in discovery matters." *Id.* (quoting *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 698 (5th Cir. 2017)). "Even if a district court abuses its discretion, the reviewing court will not overturn its ruling unless it substantially affects the rights of the appellant." *Id.* (citing *N. Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co.*, 898 F.3d 461, 481 (5th Cir. 2018)).

We hold that the district court did not abuse its discretion in denying Cerda's request to reconvene Mulligan's deposition. Cerda did not request to depose Mulligan until one week before the discovery deadline. Blue Cube repeatedly informed Cerda that Mulligan had to leave the deposition by 3:00 PM, yet Cerda never asked to conduct the deposition on a different day, chose to start the deposition at 10:00 AM, and took frequent and extended breaks. A party cannot rely on Rule 30(d)(1) to compel a witness to spend multiple days sitting for a deposition when that party's own choices precluded completion of a seven-hour deposition in one day. *Cf. Walker v. Harris County*, 477 F. App'x 175, 180 (5th Cir. 2012) ("[A] party who does not diligently pursue discovery is not entitled to relief." (citing *Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 606 (5th Cir. 2001))). The district court did not abuse its "wide discretion," *JP Morgan*, 936 F.3d at 255, in so concluding.

AFFIRMED.