IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
July 30, 2020

Lyle W. Cayce
Clerk

No. 19-10376

CONEISHA L. SHERROD,

Plaintiff - Appellant

v.

UNITED WAY WORLDWIDE,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CV-758

Before OWEN, Chief Judge, and SOUTHWICK and OLDHAM, Circuit Judges.

PER CURIAM:*

Coneisha Sherrod sued her former employer, the United Way of Tarrant County. That entity is a member of United Way Worldwide, which Sherrod also sued. Sherrod alleged her employment was terminated due to complaints she made that her employer was violating the Employee Retirement Income Security Act and 42 U.S.C. § 1981. The claims against her employer were settled by joint stipulation after a jury trial, but her claims against United Way

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Worldwide were dismissed prior to the trial. She appeals seeking reinstatement of those claims, but we AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

United Way Worldwide ("UWW") is an international charity that through its local member organizations is engaged in nearly 1,800 communities around the world. United Way of Tarrant County ("UWTC") is one of those members. In her complaint, Sherrod, the former Vice President of Human Resources at UWTC, described several incidents that she claimed led to her termination. It causes awkward phrasing, but we will use titles for some individuals because that is how Sherrod identified them in her complaint.

First, Sherrod alleged that she discovered UWTC failed to pay employee benefits and comply with reporting requirements in accordance with the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. § 1001 *et seq*. Sherrod reported her discovery to UWTC's Chief Executive Officer ("CEO"). Sherrod also alleged that when she was hired, the CEO told her he would retire in four years and his successor had already been selected. Sometime after Sherrod's conversation with the CEO, UWTC's Senior Vice President of Community Development, an African-American female, told Sherrod she was interested in the CEO position. Because the position was never posted to permit others to apply, and the selection of the CEO's successor was not announced, Sherrod "express[ed] concern" to UWTC's CEO that failure to follow protocol for selecting a new CEO could result in unlawful discrimination.

Following Sherrod's comments, UWTC created a committee to select the CEO's successor. Sherrod was neither a member of the committee nor otherwise involved in the selection. The naming of a new CEO caused the Senior Vice President of Community Development to complain of racial discrimination. Sherrod claims that UWTC, the chairman of its board, and the

CEO prevented Sherrod from investigating the complaint — even though human resources was her portfolio. Sherrod alleged UWTC settled this racial discrimination claim by giving the Senior Vice President of Community Development a pay raise. Sometime after this incident, the Senior Vice President of Community Development was promoted to the role of Executive Vice President of Community Development.

Sherrod further alleged that after UWTC's partner agencies received letters explaining UWTC employees would not receive raises, UWTC board members authorized a pay raise for the CEO. Sherrod expressed concern to the chairman of the board regarding the CEO's pay raise, but the "Chairman of the Board expresse[d] frustration to [Sherrod] for raising the concern."

After UWTC authorized a pay raise for the CEO, the Executive Vice President of Community Development again complained of racial discrimination and retaliation because she did not receive a raise when she was promoted to Executive Vice President. UWTC and its CEO instructed Sherrod to meet with UWTC's attorney regarding the complaint. According to Sherrod, the CEO said that if the Executive Vice President of Community Development filed a lawsuit, "it would be the kiss of death" for that vice president's employment. Sherrod alleged UWTC's CEO and UWTC's counsel agreed that if another settlement was made with the Executive Vice President of Community Development, termination of that vice president's employment must be part of the settlement. According to Sherrod, she disagreed with that settlement term and expressed her disagreement to the CEO. The Executive Vice President of Community Development did later sue UWTC for racial discrimination and retaliation.

Last, Sherrod alleged that four women complained of mistreatment by UWTC's Finance Manager. When Sherrod attempted to investigate these complaints, the Chief Operating Officer ("COO") told her that he would conduct

the investigation himself because the four women were "out to get the finance manager" and because he believed Sherrod did "not have the necessary skills to investigate discrimination or retaliation complaints." On February 21, 2017, sometime after the incident with UWTC's COO, Sherrod complained to UWW that UWTC "retaliated against [Sherrod] for reporting and correcting ERISA violations, for opposing race discrimination, for being a witness to race discrimination, and because of her own race." Sherrod also reported to the Fort Worth division of the Equal Employment Opportunity Commission ("EEOC") that UWTC was violating discrimination and retaliation laws. Sherrod did not include claims against UWW in this report to the EEOC.

According to Sherrod, she notified UWTC's CEO of her complaint to the EEOC. She told the CEO that the COO breached the confidentiality of the four complaining women, and Sherrod had contacted the EEOC on their behalf. As alleged by Sherrod, on March 3, 2017, the day after she reported discrimination and retaliation to the EEOC and CEO, UWTC fired her, citing her failure to appear for meetings as the reason. Following Sherrod's termination, she was sent a severance agreement conditioned on her release of any discrimination or retaliation claims she may have had against UWTC and UWW. Sherrod contacted UWW following her termination and complained about her dismissal. Sherrod alleged that even though UWW told her it would review her termination, a UWW representative later contacted her to explain that UWW would "not be taking any action to help her."

On September 18, 2017, Sherrod filed suit in the United States District Court for the Northern District of Texas against UWTC and UWW. She claimed UWTC and UWW violated Section 510 of ERISA by "discharging, suspending, expelling, or discriminating against Sherrod because she gave information and was willing to testify about violations of ERISA related to

employee benefit plans," and Section 1981 by "discriminating and retaliating against Sherrod" because of her race.

UWW moved for dismissal of Sherrod's claims under Federal Rule of Civil Procedure 12(b)(6). Sherrod responded by filing an amended complaint, and UWW again moved to dismiss. On April 18, 2018, the district court dismissed Sherrod's claims against UWW without prejudice, allowing her to file another amended complaint against UWW. Sherrod filed notice informing the district court she would not file another amended complaint against UWW. Instead, she would "stand on the allegations made in her first amended complaint." On July 12, 2018, the district court dismissed Sherrod's claims against UWW with prejudice.

Following the dismissal of UWW, Sherrod proceeded to trial against UWTC on her Section 1981 claim. A jury rendered a verdict in her favor. Sherrod and UWTC then settled her Section 510 claim and filed a joint stipulation dismissing all other claims Sherrod may have had against UWTC. The same day that Sherrod and UWTC filed a joint stipulation, Sherrod filed a notice of appeal from the dismissal of her claims against UWW.

DISCUSSION

Our review is *de novo* of a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 385 (5th Cir. 2017). "To survive a motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). On appeal, we are not concerned with whether the plaintiff was likely

to succeed on the claims but only whether the complaint contains any legally cognizable claims that are plausible. *Id.*

Sherrod brought clams against UWW both under ERISA and Section 1981. We examine them in that order.

I. ERISA retaliation claim

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990). Section 510 provides: "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act." 29 U.S.C. § 1140.

In dismissing Sherrod's Section 510 claim against UWW, the district court concluded that although the "Fifth Circuit has not spoken directly to the issue of whether an employment relationship is required" to bring a case under Section 510, caselaw implied that an employment relationship was the "*sine qua non* of a § 510 claim." Six months after the district court's dismissal, we specifically held that Section 510 claims "may be maintained against non-employers." *Manuel v. Turner Indus. Grp., L.L.C.*, 905 F.3d 859, 871 (5th Cir. 2018). In *Manuel*, though, we had not addressed the circumstances under which a non-employer may be liable under Section 510.

We decline to reach a conclusion on these legal issues concerning the reach of Section 510 liability. Even if UWW were a proper defendant and could be liable under Section 510, and even if Sherrod's unsolicited internal

complaint was a statutorily protected activity,[1] Sherrod still failed to plead a case. UWW did not "discharge, fine, suspend, [or] expel" Sherrod within the meaning of Section 510. There also is not anything in Sherrod's complaint that sets out any facts explaining how UWW discriminated against her. Dismissal was proper.

II. Section 1981 claims

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Section 1981 reaches "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." § 1981(b). As with the open issues about Section 510 that we just pretermitted, this court has not resolved whether Section 1981 creates liability for a non-contracting party who interferes with making and enforcing a plaintiff's contract. *See Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997). Yet again, we start with the assumption that the claim Sherrod tries to make is legally cognizable. Even if it is, the claim fails if Sherrod did not allege facts that plausibly support the claim. We thus first examine the factual assertions.

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[1] We recognize that the circuits are split over what constitutes statutorily protected activity within the meaning of Section 510. Currently, the Fifth, Seventh, and Ninth Circuits consider unsolicited, informal complaints to be protected activity, and the Second, Third, Fourth and Sixth Circuits have reached contrary conclusions. *Compare Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994), *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812, 816–17 (7th Cir. 2012), *and Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993), *with Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 329 (2d Cir. 2005), *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010), *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 426–28 (4th Cir. 2003), *and Sexton v. Panel Processing, Inc.*, 754 F.3d 332–42 (6th Cir. 2014). Admittedly, however, *Anderson* does not provide analysis on the topic and is not very clear.

To state a claim of discrimination under Section 1981, "a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerns one or more of the activities enumerated in the statute." *Green v. State Bar of Tex.*, 27 F.3d 1083, 1086 (5th Cir. 1994). Sherrod successfully pled her status as a racial minority but failed to allege discriminatory intent. Actually, she alleged the opposite. The facts as stated by Sherrod about her communication with UWW indicate that the organization was sympathetic toward her. Nothing in Sherrod's stated facts indicated that UWW acted with racial animus. Sherrod's assertion that UWW "participated" in or "should have prevented" her termination is not enough to make her claim of discrimination by UWW plausible. She needed to allege facts sufficient to support an inference of discriminatory intent. *Body by Cook*, 869 F.3d at 387 n.1.

Similarly, Sherrod failed to allege facts to support her claim of retaliation under Section 1981. "To assert a successful [Section] 1981 retaliation claim, [a plaintiff] must show (1) that it engaged in activities protected by [Section] 1981; (2) that an adverse action followed; and (3) a causal connection between the protected activities and adverse action." *White Glove Staffing, Inc. v. Methodist Hosps. of Dallas*, 947 F.3d 301, 308 (5th Cir. 2020). Even assuming that Sherrod adequately pled the first two elements, she failed to allege facts supporting a causal connection between her protected activity and the adverse action that followed. Sherrod argues that the timeline of events in her case supports an inference that UWW participated in her termination. According to Sherrod, on February 21, 2017, she notified UWW that UWTC was retaliating against her for reporting ERISA violations and for opposing racial discrimination, for being a witness to racial discrimination, and because of her own race, and then on March 3, 2017, she was terminated. Although a plaintiff

may rely on temporal proximity to support a causal nexus, *see Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001), Sherrod alleged no facts supporting an inference that UWW actually did anything that affected her employment.

Sherrod's allegation that UWW could have played a role in her termination is insufficient to make her claim facially plausible. *See Iqbal*, 556 U.S. at 678.

AFFIRMED.