United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 29, 2020
Lyle W. Cayce
Clerk

No. 20-30286
Summary Calendar

BRANDON LEE BRACKENS,

Plaintiff—Appellant,

versus

STERICYCLE, INCORPORATED; BRIAN DEMAREST; CHRISTOPHER DAVID PEREZ; DAVID FALLETTA; BRANDON ARCENEAUX, SR.,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:19-CV-13454

Before HAYNES, WILLETT, and HO, *Circuit Judges*.

PER CURIAM:*

Brandon Lee Brackens appeals the district court's order granting Appellees' motion to dismiss for failure to state a claim for discrimination or retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

§§ 2000e-2(a)(1), 2000e-3(a), intentional infliction of emotional distress ("IIED"), defamation, and for the denial of various evidentiary rulings. For the following reasons, we AFFIRM the district court's order.

I. Background

Brackens is a former employer of Stericycle, Inc. He started working as a swing driver for the company in 2017, and he was terminated for misconduct in 2019. Following his termination, Brackens filed a pro se lawsuit against Stericycle and several of its employees[1] (collectively, "Stericycle"), bringing discrimination and retaliation claims under Title VII, as well as state law claims for IIED and defamation. He sought $10 million in punitive damages.

Brackens alleged that Stericycle took various adverse actions against him in retaliation for filing an anonymous complaint against his supervisor with Stericycle's Human Resources department ("HR Complaint"). Brackens described the general nature of his complaint as an issue of "communication and favoritism." He maintained that his supervisor gave preferential treatment to another swing driver and allowed that driver to do "nothing for the day," while Brackens was subject to sudden route changes.

Brackens claimed that, after filing the HR Complaint, he and a small group of other swing drivers were singled out by his supervisors in a meeting to discern the identity of the complainant. Brackens maintained that, in the aftermath of this meeting: (1) his workload fluctuated unfairly, (2) his vehicle was vandalized, (3) he was stalked by other Stericycle drivers, (4) he was drug

[1] The Stericycle employees sued are Brian Demarest, Christopher David Perez, David Falletta, and Brandon Arceneaux, Sr.

tested more than any other driver, and (5) he was harassed by his supervisors—all leading to his termination from Stericycle.

In the wake of his termination, Brackens filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging that Stericycle discriminated and retaliated against him in violation of Title VII ("EEOC Complaint"). Notably, Brackens did not indicate that the alleged discrimination was based on race, color, sex, religion, national origin, age, disability, or genetic information. The EEOC was "unable to conclude that the information obtained establishe[d] violations of [Title VII]." Nonetheless, it issued Brackens a "Notice of Suit Rights[,]" allowing his lawsuit to go forward.

Brackens filed a pro se complaint in federal district court, and the parties consented to proceed before a U.S. magistrate judge (hereafter the "district court").[2] Stericycle moved to dismiss all of Brackens's claims with prejudice, arguing that Brackens failed to plead (1) that he was part of a protected class or engaged in a protected activity, as required under Title VII; (2) sufficiently severe or outrageous conduct for IIED; and (3) any of the elements necessary under Louisiana law to support his defamation claim.

Brackens responded to Stericycle's motion to dismiss and attached thirty-two exhibits to support his allegations against Stericycle. These exhibits included, among other things, Brackens's HR Complaint, several write-ups concerning on-the-job incidents, a police report documenting vandalism to a personal vehicle, the EEOC Complaint, EEOC's Notice of

[2] Matters resolved by a consented-to magistrate judge are appealable on the same grounds as those resolved by a district judge: "[A]n aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court." 28 U.S.C. § 636(c)(3).

Suit Rights, and documents related to the denial of Brackens's benefits. Stericycle moved to strike Brackens's response as untimely or, alternatively, to strike the attached exhibits.

The district court declined to strike Brackens's response in its entirety but did strike Brackens's attached exhibits. The court subsequently granted Stericycle's motion to dismiss with prejudice for failure to state a claim. Brackens timely appealed.

II. Jurisdiction and Standard of review

The district court had federal question jurisdiction under 28 U.S.C. § 1331 over the Title VII claim and supplemental jurisdiction over the related state law defamation and IIED claims under 28 U.S.C. § 1367. We have jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 636(c)(3).

We review the district court's grant of a motion to dismiss de novo. *See James v. Hyatt Corp. of Del.*, 981 F.2d 810, 812 (5th Cir. 1993); *see also Budhathoki v. Nielsen*, 898 F.3d 504, 507 (5th Cir. 2018). Accordingly, "[w]e accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff." *Whitley v. Hanna*, 726 F.3d 631, 637 (5th Cir. 2013). The facts, taken as true, must "state a claim that is plausible on its face." *Amacker v. Renaissance Asset Mgmt. LLC*, 657 F.3d 252, 254 (5th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to an assumption of truth. *Id.*

Unlike a motion to dismiss, we review a district court's evidentiary rulings for abuse of discretion. *Mahmoud v. De Moss Owners Ass'n, Inc.*, 865

F.3d 322, 327 (5th Cir. 2017) (quotation omitted). "Evidentiary rulings . . . are also subject to harmless error review, so even if a district court has abused its discretion, we will not reverse unless the error affected the substantial rights of the parties." *Id.* (internal quotation marks and citations omitted).

We also note that Brackens is a pro se plaintiff. "Although we liberally construe briefs of pro se litigants and apply less stringent standards to parties proceeding pro se than to parties represented by counsel, pro se parties must still brief the issues and reasonably comply with the standards of [Federal Rule of Appellate Procedure] 28." *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995) (per curiam).

III. Discussion

On appeal, Brackens raises the same arguments addressed by the district court in striking his exhibits and dismissing his complaint.[3] Namely, Brackens argues that the district court erred in dismissing his Title VII claims related to retaliation, harassment (as a form of employment discrimination), and disparate treatment. He also asserts related state law claims for defamation and IIED. Lastly, he challenges the district court's decision to strike his thirty-two exhibits, as well as his inability to conduct discovery. We reject Brackens's arguments and AFFIRM the district court's rulings.

[3] Brackens raises several new arguments on appeal related to allegations of tampering, allegations that the magistrate judge engaged in questionable conduct, and allegations of fraud. Brackens also adds several new defendants in his brief, including counsel for Stericycle, the magistrate judge overseeing the case, members of the magistrate judge's chambers, and the clerk of the district court where this case was filed. We decline to address these new arguments for the first time on appeal, *see Estate of Duncan v. Comm'r*, 890 F.3d 192, 202 (5th Cir. 2018), nor will we consider the addition of new defendants when there is no evidence that they were properly joined and served, *see* Fed. R. Civ. P. 4(c)(1).

To prevail on his Title VII claims, Brackens must show that he is entitled to protected status, *see* 42 U.S.C. § 2000e-2(a)(1), or engaged in a protected activity, *see id.* § 2000e-3(a). He failed to plead the necessary facts to support either aspect. Protected status extends to individuals on the basis of "race, color, religion, sex, or national origin[.]" *Id.* § 2000e-2(a)(1). Protected activity is the "opposition to any practice rendered unlawful by Title VII, including making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII." *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 385 (5th Cir. 2003) (internal quotation marks and citation omitted). Title VII is an anti-discrimination law, not a general civility code. *See, e.g.*, *West v. City of Houston*, 960 F.3d 736, 742 (5th Cir. 2020). In the retaliation context, protected activity is dependent on Title VII's categories of protected individuals. *See* 42 U.S.C. § 2000e-3(a). Importantly, "Title VII protects an employee only from 'retaliation for complaining about the types of discrimination it prohibits.'" *O'Daniel v. Indus. Serv. Sols.*, 922 F.3d 299, 307 (5th Cir. 2019), *abrogated in part on other grounds by Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (quoting *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1007 (7th Cir. 2000)).

Brackens maintains that he suffered retaliation, harassment, and disparate treatment[4] under Title VII when he made an anonymous complaint to HR. But he never indicated in his EEOC Complaint that he was subjected to such treatment because of his race, color, religion, sex, or national origin, nor does any document in the record suggest that this was the case. In fact,

[4] It is questionable whether Brackens sufficiently briefed his disparate treatment argument to preserve it on appeal. *See Justiss Oil Co. v. Kerr-McGee Refin. Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996) ("When an appellant fails to advance arguments in the body of its brief in support of an issue it has raised on appeal, we consider such issues abandoned."). We need not reach this question, however, because this claim can ultimately be dismissed for the same reason as his other Title VII arguments.

his EEOC Complaint, filed in the district court, utilized a form that contained a list of Title VII boxes of discrimination categories but none were checked. Indeed, Brackens maintained that his "race, color, sex, or nationality . . . was of no significance" to the viability of his claims. We disagree.

Title VII was created to give certain categories of individuals protection from employment discrimination, and Brackens's utter lack of pleading in this regard demonstrates that he is not entitled to such protection under the law. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Congress enacted Title VII ... to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."). Because Brackens failed to plead a necessary element for his Title VII claims, we conclude that the district court did not err in dismissing these claims.

Brackens's state law claims were also properly dismissed for failing to plead necessary elements.[5] To prevail on his IIED claim, Brackens needed to allege "(1) that the conduct of [Stericycle] was extreme and outrageous; (2) that the emotional distress suffered by [Brackens] was severe; and (3) that [Stericycle] desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from [its] conduct." *White v. Monsanto Co.*, 585 So. 2d 1205, 1209 (La. 1991). We conclude that Brackens failed to plead various elements of his IIED claim.

[5] It is questionable whether Brackens sufficiently briefed his state law arguments to preserve them on appeal. *See Justiss Oil*, 75 F.3d at 1067. However, Stericycle makes several arguments in its brief addressing the merits of these claims, though it maintains these claims were waived. Because Stericycle refuted the state law claims, it would not be prejudicial to consider them. *See Arredondo v. Univ. of Tex. Med. Branch at Galveston*, 950 F.3d 294, 298 (5th Cir. 2020).

Brackens alleged the following facts supporting his IIED claim: (1) Stericycle changed his route unexpectedly, (2) he was threatened and reprimanded with fraudulent write-ups, (3) he was "gang-stalk[ed]" by Stericycle employees, and (4) his vehicle was vandalized. "[M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities[,]" like changing his route and employment-related reprimands, are not sufficiently outrageous to sustain an IIED claim.[6] *See id.* Hence, these allegations clearly fail the first element of an IIED claim.

Brackens's stalking and vandalism claims fair no better. Notably, Brackens's claim of stalking is not supported by the facts: he would encounter people he did not think should be there when he was out and about. This does not amount to stalking. Likewise, Brackens claims the glass of his car was scratched with the letter "B" at his place of work. Such petty conduct is not within the bounds of an IIED cause of action, which is limited to extraordinary conduct. *See Branden v. F.H. Paschen, S.N. Nielsen, Inc.*, No. CV 19-2406 at *3–5 (E.D. La. Apr. 22, 2019) (concluding that repeated threats of adverse employment action and physical harm, including a specific death threat of being shot in the head, were sufficient to support an IIED claim); *Bustamento v. Tucker*, 607 So. 2d 532 (La. 1992) (concluding that almost daily improper sexual comments and advances, threatened physical violence, and an attempt to run over the plaintiff with a forklift properly alleged a claim of IIED); *Walters v. Rubicon, Inc.*, 706 So. 2d 503 (La. Ct. App. 1997) (concluding that allegations of verbal abuse, ridicule, threats at work, harassment over the phone, ordering the plaintiff to ignore company policy

[6] Brackens needed to demonstrate that the conduct he experienced went far beyond insulting, threatening, annoying, or oppressive; it had to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *White*, 585 So. 2d at 1209.

in possible violation of the law, endangering the plaintiff and his son in traffic, as well as pointing a hand in the form of a gun and saying "pow," were sufficient to state an IIED claim). Consequently, Brackens's stalking and vandalism allegations do not support his IIED claim. The district court therefore properly dismissed that claim.

Brackens also failed to adequately plead required elements of his defamation claim. Under Louisiana law, to establish a claim for defamation, a plaintiff must prove four elements: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury." *Cyprien v. Bd. of Supervisors for the Univ. of La. Sys.*, 5 So. 3d 862, 866 (La. 2009) (internal quotation marks and citation omitted). Here, Brackens appears to allege three potential instances of defamation: (1) generalized "lie[s]" and "stories" that were "told amongst others[,]"[7] (2) false statements in his writeups, and (3) placing the word "terminated" next to his name on the safety training roster after he was fired. None of these instances rise to the level of defamation.

In the first instance, Brackens did not allege the existence of a false and defamatory statement because he failed to "allege *sufficient facts* that . . . state a claim that is plausible on its face." *Amacker*, 657 F.3d at 254 (emphasis added). Instead, he puts forth only "conclusory allegations" which we need not accept as true. *See Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005). In the second instance, Brackens did not allege that the statements in his write-ups were published—a fatal defect because, "[i]n Louisiana, statements between employees, made within the course and scope of their

[7] Context suggests that Brackens was referring to other Stericycle employees. Assuming that is the case, this potential instance of defamation would fail for the same reason as the second potential instance of defamation.

employment, are not statements communicated or publicized to third persons for the purposes of a defamation claim." *Williams v. United Parcel Serv., Inc.*, 757 F. App'x 342, 345 (5th Cir. 2018) (citing *Commercial Union Ins. Co. v. Melikyan*, 424 So.2d 1114, 1115 (La. Ct. App. 1982)). In the third instance, Brackens admits the "termination" statement was written on the roster *after* he was fired from Stericycle, and he does not allege that the roster was accessible to parties outside of the company. *See Badeaux v. Sw. Comput. Bureau, Inc.*, 929 So. 2d 1211, 1218 (La. 2006) (acknowledging that a plaintiff, suing for defamation, "must prove that the defendant . . . published a *false statement* with defamatory words which caused plaintiff damages" (emphasis added) (internal quotation marks and citation omitted)); *see also Williams*, 757 F. App'x at 345. Accordingly, the district court did not err in dismissing Brackens's defamation claim.

Finally, we affirm the district court's decision to strike Brackens's exhibits under the facts of this case.[8] Here, the district court relied on our decision in *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000), to strike the exhibits because they were not part of the pleadings or its attachments. Although a "court may also consider documents attached to either a motion to dismiss or an opposition to that motion when the documents are referred to in the pleadings and are central to a plaintiff's claims," *Brand Coupon Network, L.L.C. v. Catalina Mktg. Corp.*, 748 F.3d 631, 635 (5th Cir. 2014), the court need not do so. We conclude the district

[8] Brackens also argues the district court abused its discretion in refusing to allow him to take discovery prior to the ruling on the motion to dismiss. Because the district court was correct in granting the motion to dismiss for failure to state a claim, we conclude that it did not abuse its discretion in disallowing discovery. *See Whitaker v. Collier*, 862 F.3d 490, 502 (5th Cir. 2017) (acknowledging that "plaintiffs [are] not entitled to discovery without a properly pleaded complaint" (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007)). In this situation, "[a]ny discovery error [would be] harmless[.]" *Id.*

court did not abuse its discretion in excluding the exhibits, even though some were referenced in Brackens's pleading. *See Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (using permissive language regarding a court's ability to rely on documents incorporated into the complaint by reference). In any event, Brackens has not shown how the exhibits would change the outcome of the district court's determination.

AFFIRMED.