# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
**FILED**
June 6, 2023
Lyle W. Cayce
Clerk

No. 22-10829

LINDA MOORE,

*Plaintiff—Appellant*,

*versus*

LUBBOCK STATE SUPPORTED LIVING CENTER, *operated by* TEXAS HEALTH & HUMAN SERVICES,

*Defendant—Appellee*.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:20-CV-272

Before JONES, CLEMENT, and HAYNES, *Circuit Judges*.

PER CURIAM:[*]

Linda Moore sued her former employer, Lubbock State Supported Living Center ("Center"), asserting it retaliated and discriminated against her due to being a black woman in violation of Title VII of the Civil Rights Act of 1964. The district court granted the Center's motion for summary judgment, and Moore appealed. We AFFIRM.

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

## I. Facts

The undisputed facts are as follows. Lubbock State Supported Living Center is a state-run residential center that provides long-term care to disabled individuals. The Center is divided into several "homes" or "units," with one "Residential Coordinator" assigned to each. Each Residential Coordinator reports to a "Unit Director," and each Unit Director, in turn, reports to the "Assistant Director of Programs."

Linda Moore started working at the Center as a Residential Coordinator in September 2017. Originally, Moore was assigned to "Sparrow Home." However, Moore was subsequently reassigned twice, first to "Aspen Home" in April 2018, and then to "Rose Home" in July 2018. The day after her transfer to Rose Home, Moore filed an official report to the Office of the Inspector General ("OIG"), asserting that (1) staff members were falsifying their time sheets, and (2) her supervisors were discriminating against her based on her race.

On August 1, 2018, the Center issued Moore a written warning referencing several staff complaints and performance counseling sessions. The warning also cited an incident in which Moore failed to fulfill her responsibility to ensure staff members had access to facility keys.

Shortly thereafter, Moore was investigated for another, separate incident. Her Unit Director reported that Moore had ignored an administrator's call directing her to send a staff member to the hospital to accompany a resident. According to the Center, the resident was left unattended for several hours, threatening his safety.[1] During the

[1] Per the Center, the standard practice is for the Residential Coordinator to arrange for a staff member to accompany all residents to the hospital in order to help coordinate care with medical professionals.

investigation, the Center removed Moore from Rose Home and reassigned her to work at the Center's guard shack. On September 20, 2018, she was terminated. After properly exhausting her administrative remedies, Moore sued the Center for racial discrimination and retaliation under Title VII. The Center moved for summary judgment, which the district court granted.

Moore contends that the aforementioned disciplinary actions and her subsequent termination constituted unlawful (1) retaliation for her report to the OIG, and (2) race discrimination. In the Center's motion for summary judgment, it contended that Moore's termination wasn't retaliatory or discriminatory, but rather was a natural response to months of inadequate performance. Per the Center, shortly after Moore started her position, administrators began receiving complaints that she mistreated staff, showed up late to meetings, was generally unfocused, and interfered with other departments' work. Moore's supervisors tried implementing multiple interventions, including providing Moore with performance counseling sessions, re-training her, and transferring her to other units. Despite these efforts, Moore failed to improve.

As a result, when administrators learned that Moore failed to ensure staff had enough facility keys, they gave her the option to either self-demote to another position or receive a written warning. Moore refused to step down, so they issued the warning. The hospital incident occurred the very next day. Accordingly, per the Center, Moore's failure to ensure the resident was accompanied to the hospital was not the sole reason for her termination. Rather, it was the final straw following a series of serious performance issues.

Along with its motion, the Center attached significant and detailed documentation supporting its points.[2]

In contrast, Moore's response to the Center's motion included only a single piece of evidence—her declaration—which provides conclusory assertions that she was not having performance issues and disputes the Center's account of the hospital incident. Specifically, Moore's declaration avers that the written warning was "a complete sham." She contends that prior to receiving the written warning, she had little notice about any performance issues. Rather, she was informed about the complaints on only one occasion, and she had been assured by her supervisor that they were frivolous. She also denies that she received some of the referenced performance counseling sessions. She further states that she appropriately addressed the key shortage, and that the Center did not suggest that she mishandled the situation until *after* she had contacted OIG.

Moore's declaration also disputes the Center's description of the hospital incident discussed above. She urges that she never received a call and maintains that she only learned of the resident's hospitalization when she returned to the Center that afternoon. She claims that when she heard that the resident was unaccompanied, she immediately went to the hospital.

Finally, Moore's declaration urges that, after the hospital incident, the Center treated her differently than three similarly situated white staff members. Specifically, Moore identifies three other Rose Home employees—a registered nurse; a Qualified Intellectual Disability Professional; and her Unit Director. Per Moore, each (1) was equally

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[2] This evidence includes, among other things, copies of the staff complaints, detailed records of performance counseling sessions, the written warning, and affidavits from Moore's supervisors.

responsible for ensuring the resident had a staff escort to the hospital, (2) knew Moore was offsite at the time of the incident, and (3) was aware the resident was being sent to the hospital without an escort. However, only Moore was removed from Rose Home during the investigation and terminated. According to Moore, this disparate treatment demonstrates that the Center discriminated against her based on her race.

In its order granting summary judgment for the Center, the district court concluded that while Moore's evidence was sufficient to establish her prima facie case of racial discrimination, she failed to demonstrate pretext as to either of her claims. Moore timely appealed.

## II. Jurisdiction and Standard of Review

The district court had jurisdiction under 28 U.S.C. § 1331, and we have appellate jurisdiction under 28 U.S.C. § 1291.

We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the non-moving party. *United Fire & Cas. Co. v. Hixson Bros., Inc.*, 453 F.3d 283, 285 (5th Cir. 2006). Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to prevail as a matter of law. *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017) (citing FED. R. CIV. P. 56(a)).

## III. Discussion

Moore contends that the district court erred by granting summary judgment for the Center as to her Title VII race discrimination and retaliation claims.[3] We consider each claim in turn.

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[3] The district court also separately concluded that under 42 U.S.C. § 1981a(b)(1), Moore was precluded from seeking punitive damages. Moore doesn't brief this issue, and

### A. Race Discrimination Claim

To establish a Title VII discrimination claim, the plaintiff must show, by a preponderance of the evidence, a prima facie case under the familiar *McDonnell Douglas* framework.[4] *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999). Therefore, to prevail against the Center's motion for summary judgment as to this claim, Moore must produce evidence raising a fact issue as to whether she "(1) is a member of a protected class, (2) was qualified for the position that she held, (3) was subject to an adverse employment action," and (4) was "treated less favorably than other similar[ly]-situated employees who were not in her protected class." *Harville v. City of Houston*, 945 F.3d 870, 875 (5th Cir. 2019). We address only the fourth prong below, which is dispositive.

#### 1. Differential Treatment

The Center argues that Moore's evidence ultimately cannot establish that she was treated less favorably than other similarly situated non-black employees. To satisfy this element of her prima facie case, Moore needed to "show that [the Center] gave preferential treatment" to at least one other employee "under nearly identical circumstances," and that the employee's purported misconduct "was nearly identical." *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001) (internal quotation marks and citation omitted). As previously discussed, Moore asserts that three other white staff members were equally culpable for the hospital incident—yet only she was disciplined and fired.

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accordingly, we don't consider it. *See Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 653 (5th Cir. 2004).

[4] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–03 (1973).

But even assuming Moore and the other three employees were similarly responsible for the hospital incident, Moore has not raised a fact issue as to whether they shared comparable *histories* of misconduct. The record is replete with evidence that Moore had received numerous complaints about her performance—and even a written warning—prior to the hospital incident. But Moore presents no evidence that the other three staff members had similar performance records. Under our precedents, this is fatal to Moore's contention that they were "similarly situated." *See Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259–60 (5th Cir. 2009) (noting that employees "subjected to adverse employment action for dissimilar violations are not similarly situated").[5] Accordingly, Moore cannot establish her prima facie case for racial discrimination. That is sufficient for us to affirm the district court's grant of summary judgment as to this claim.[6]

**2. Pretext**

But even if Moore could sufficiently establish her prima facie case for the purpose of defeating the Center's motion for summary judgment, the Center would still be entitled to summary judgment. Under the *McDonnell Douglas* framework, once a plaintiff makes out her prima facie case, the burden shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for the adverse employment action. *Price v. FedEx*, 283 F.3d 715, 720

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[5] *See also Okoye*, 245 F.3d at 514 (holding plaintiff was not similarly situated to others who committed similar violations because unlike him, they had not previously assaulted a co-worker); *Shackelford*, 190 F.3d at 405 (noting plaintiff was not similarly situated to other employees who had not "engaged in the same pattern of complaining about several co-workers").

[6] Although the district court did not so find, we may affirm the ultimate decision on any grounds supported by the record and raised in the Center's motion for summary judgment. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc.*, 123 F.3d 301, 307 (5th Cir. 1997).

(5th Cir. 2002). The Center has met this burden by providing evidence that Moore was disciplined and terminated for poor performance. Accordingly, the burden shifts back to Moore to create a fact issue as to whether the Center's "proffered reason is a pretext for discrimination." *Harville*, 945 F.3d at 875 (quotation omitted).

"[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false," *may* suffice to establish pretext. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000). However, the Supreme Court has noted that "there will be instances" where, despite this showing, "no rational factfinder could conclude that [an adverse employment action] was discriminatory." *Id.* For example, a defendant may nonetheless be entitled to summary judgment "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.*

This case falls into the latter category. Moore's sole piece of evidence—her declaration—fails to undermine the Center's explanation for her termination. Instead, her responses to the Center's evidence of her performance issues are either weak and conclusory or miss the point altogether. *See Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160–61 (5th Cir. 2021) (noting that while self-serving affidavits "may create fact issues," they cannot do so if they are "conclusory" or "vague"). For example, in her declaration, Moore doesn't attempt to rebut the specific allegations asserted in the staff complaints. Rather, she simply states that one of her supervisors told her some of the complaints lacked merit.[7] Moreover, Moore only

[7] Moore also asserts that she believes she received the complaints because she "was a strict coordinator." This statement doesn't necessarily contradict staff members' complaints that Moore mistreated them. But even if it did, it still doesn't refute any of the

disputes that she received *some* of the performance counseling sessions cited by the Center[8]—and even then, she simply disagrees that they occurred. She does not address why the performance records indicate otherwise. Additionally, Moore doesn't deny she received a written warning, or that she failed to ensure staff had enough facility keys. She merely claims that, in her view, she addressed the key shortage adequately when she was alerted to it. Finally, and significantly, Moore provides no non-conclusory evidence of intentional discrimination beyond her assertion that the Center treated her differently than other, white staff members.[9] But again, absent evidence that these employees had a similarly extensive violation history, this argument fails.

Accordingly, in light of the extensive evidence of Moore's poor job performance—and the lack of evidence of intentional discrimination—we cannot conclude that a reasonable factfinder could find that the Center's reasons for disciplining and firing Moore were pretextual. We therefore affirm the grant of summary judgment as to this claim.

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Center's evidence addressing other aspects of Moore's performance, like her lack of knowledge of the facility's procedures or her tardiness to meetings.

[8] The Center provided records demonstrating that Moore received performance counseling on three separate occasions: (1) March 21, 2018, (2) April 2, 2018, and (3) May 1, 2018. In her declaration, Moore denies she received performance counseling in April or May. However, she does not address the March record.

[9] Moreover, Moore's blanket statements in her declaration to the effect that she "believe[s]" she was discriminated against cannot, in isolation, create a fact issue on her race discrimination claim. *See Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1186 (5th Cir. 1997) (noting that broad, generalized statements and *opinions* of witnesses on fact issues don't qualify as "evidence" for summary judgment purposes).

### B. Retaliation Claim

In her appellate brief, Moore argued her discrimination and retaliation claims together, primarily asserting the same arguments. Her retaliation claim similarly fails for many of the same reasons discussed above.

A Title VII retaliation claim involves an employee's contention that an adverse employment event was caused by her engagement in a protected activity. *Septimus v. Univ. of Houston*, 399 F.3d 601, 610 (5th Cir. 2005) (explaining the requirements for a Title VII retaliation claim). Here, Moore contends that the Center retaliated against her for submitting her OIG report. Accordingly, to survive summary judgment on this claim, Moore must raise a fact issue as to whether her participation in a protected activity—filing the OIG report—was the but-for cause of an adverse employment action—the disciplinary actions and her termination. *See Chaney v. New Orleans Pub. Facility Mgmt.*, 179 F.3d 164, 167 (5th Cir. 1999).

Moore wholly failed to do so. Even assuming Moore could establish her prima facie case of retaliation, she cannot show that her report to OIG was the but-for cause of her subsequent discipline and termination. Moore's only evidence of pretext relevant to her retaliation claim is her testimony challenging the Center's account of the hospital incident. But, as discussed above, Moore fails to adequately address the Center's additional, substantial evidence of her poor work performance.

Moreover, as to Moore's termination, the Center asserts—and Moore doesn't dispute—that Curtis Anderson, the Rose Home Unit Director, made the ultimate decision to terminate Moore. But according to Anderson's affidavit, he lacked any knowledge of Moore's report to OIG. Moore failed to produce evidence contradicting his statement. Accordingly, on these facts, Moore cannot possibly establish that her termination was motivated by the requisite retaliatory animus. *See Chaney*, 179 F.3d at 168

("If an employer is unaware of an employee's protected conduct at the time of the adverse employment action, the employer plainly could not have retaliated against the employee based on that conduct."). Therefore, we conclude that she has also failed to create a fact issue sufficient to survive summary judgment on her retaliation claim.

## IV. Conclusion

For the foregoing reasons, we conclude that the Center was entitled to summary judgment on Moore's Title VII race discrimination and retaliation claims. Therefore, we AFFIRM.