United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 18, 2023
Lyle W. Cayce
Clerk

No. 22-50149

BRITTANY HUDSON,

Plaintiff—Appellant,

versus

LINCARE, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-928

Before SMITH, BARKSDALE, and HAYNES, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

Brittany Hudson is a black woman who worked for Lincare, Incorporated. She sued her former employer under Title VII, claiming that she suffered from a racially hostile work environment and that Lincare both failed to address the situation and retaliated against her when she complained.

Although the parties disagree about the nature and frequency of Hudson's harassment, there is no genuine dispute that Lincare's response was prompt, reasonable, and effective. Nor could a reasonable jury find that Lincare retaliated against Hudson based on her complaints. We therefore affirm

the summary judgment in favor of Lincare.

I.

A.

Brittany Hudson was a sales representative for Lincare, a medical equipment and services company. She began working there in 2015 and transferred to the Austin office in December 2018. Her primary responsibilities were making sales calls and interfacing with hospitals.

Hudson was one of two sales representatives in the Austin office—the other was Adelle Boyd. Hudson and Boyd worked alongside three customer service representatives ("CSRs"): Anicia Torres, Patricia Ruiz, and Virginia Balli. The sales representatives and the CSRs reported to Casey Greenway, the manager of the Austin office, who in turn reported to Tina Avera, the area manager.[1] Lincare's human resources ("HR") representative was Juanita Lichtenberg, who worked out of Lincare's headquarters in Florida. Of those eight individuals, Hudson was the only black employee.

Hudson alleges that once she moved to the Austin office, she was subject to racial harassment. Although she describes a variety of objectionable interactions between her and her co-workers, each of those incidents falls into one of three general buckets: (1) Her co-workers used racial epithets and made racially charged comments in the office; (2) she was called the N-word at a contentious June 2019 meeting; and (3) she suffered additional mistreatment in the fallout from that meeting.

First, Hudson testified that she was the target of several racially insensitive comments between December 2018 and June 2019. In January 2019, Avera told Hudson at a sales meeting that she should change her hairstyle and

[1] Mike Potter eventually replaced Avera during Hudson's tenure at Lincare.

manner of dress. Avera allegedly insisted that she could give Hudson that advice because her daughter-in-law was black. Hudson avers that, on another occasion, Boyd told her that Ruiz (one of the CSRs) had called Hudson "loud and black" and "ghetto" behind her back.

Hudson further alleges that Torres, another one of the CSRs, repeatedly used the N-word in the office. Though Hudson could not quantify the number of times that occurred, she asserted in her deposition that it was "part of [Torres's] vernacular in the office" and "[s]he just said it all of the time." When asked to give examples, Hudson could recall two specific instances. Torres, for her part, insists that she used the word only outside of work, with her "close friends."

Second, Hudson asserts that she was called the N-word in a meeting on June 20, 2019. Greenway called the meeting to discuss a disagreement between the CSRs and the sales representatives. As tensions bubbled over at that meeting, Hudson confronted Torres about her usage of the N-word. Hudson told Torres not to use the slur, to which Torres responded angrily that she would continue to use it, at least outside of work.

According to Hudson, Torres then called her a "n****r bitch." Hudson asserts that, although Greenway was in the room when it happened, she did nothing in the wake of the comment besides telling everyone to treat each other with respect.

Lincare agrees that Torres called Hudson a "bitch" in the meeting but maintains that Torres did not call Hudson the N-word.[2] Lincare also characterizes Greenway's response as more robust and emphasizes that Greenway

[2] Hudson's original filing with the EEOC does not state that she was called the N-word directly, only that it was said at the meeting. Several other witnesses, when asked about the June 20 meeting, did not mention that Hudson had been called the N-word.

promptly reported the incident to HR.

Third, Hudson claims that Lincare took inadequate steps to address the racial tensions after the meeting. She alleges that Lichtenberg (Lincare's HR representative) did not travel to Austin to visit with people, there were no additional meetings to address the use of language, and there was no formal apology from the company. Greenway supposedly told Hudson to "move on" and instructed her to "get over it."

Lincare, meanwhile, points out that it launched an investigation immediately. Within five days, HR sent written warnings to Torres and Ruiz, explaining that they would be fired if they used similar language again. Greenway also testified that she made clear at the following week's meeting that "no foul language [was] to be used in the office." Lincare further emphasizes that after the June 2019 meeting and the subsequent warnings, no additional incidents of racial harassment were reported concerning Ruiz or Torres.

Hudson responds that, at least a week after the final warnings, Ruiz referred to her as "Aunt Jemima."[3] Hudson complained about this comment to HR the first week of July. She urges that this incident proves that the company's remedial measures were insufficient. But Lincare contends that HR investigated the "Aunt Jemima" allegation as soon as it was reported. It also maintains that Hudson was called "Aunt Jemima" before Ruiz and Torres received their final warnings.

Lastly, to support her claim of retaliation, Hudson contends that the two CSRs punished her for speaking out by refusing to work with her. Although Hudson never reported that behavior to HR, Boyd sent an email to HR in which she claimed to overhear Ruiz and Torres conspiring to sabotage

[3] A reference to the breakfast food brand whose now-discontinued logo is considered a racial stereotype.

Hudson's work. Hudson alleges that Lincare took no action in response to the tip. Additionally, Hudson claims that Lincare put her on a "formal action plan," meaning she was one infraction away from being fired. Lincare, meanwhile, insists that it was not on notice about the CSRs' behavior and denies that Hudson was ever placed on a formal action plan.

Hudson left Lincare for another job in August 2019. On her exit, she informed HR that she resigned because of perceived racial harassment and discrimination.

B.

Hudson then sued Lincare under Title VII, 42 U.S.C. § 1981, and Texas state antidiscrimination law (as well as for breach of contract). Lincare moved for summary judgment on all claims.

The district court granted Lincare's motion in full. The court found no genuine dispute of material fact that would support Hudson's Title VII claim of a hostile work environment. The court reasoned that, at most, Hudson could demonstrate a few examples of racist language in the office and one verbal altercation. Although "unacceptable and inappropriate," circuit precedent required more "to sustain a claim for hostile work environment." The court also found it indisputable that once Lincare was aware of the racist language, it "initiated an investigation, interviewed the employees involved, and issued final warnings to Torres and Ruiz." That response was "sufficient to shield it from potential liability." The court dismissed Hudson's Title VII retaliation claims, as she was never subject to any "adverse employment action," and any alleged mistreatment from her co-workers could not be "imputed" to her employer.[4]

[4] Because racial discrimination claims under § 1981 and Texas state discrimination law are analyzed under the same standards as is Title VII, the court ruled for Lincare on those

Hudson timely appealed.

II.

We review a summary judgment *de novo*. *Satterfield & Pontikes Constr., Inc. v. U.S. Fire Ins. Co.*, 898 F.3d 574, 578 (5th Cir. 2018). We apply the same standard as the district court and may affirm "on any ground supported by the record." *Bluebonnet Hotel Ventures, LLC v. Wells Fargo Bank, N.A.*, 754 F.3d 272, 276 (5th Cir. 2014) (quoting *Holtzclaw v. DSC Commc'ns Corp.*, 255 F.3d 254, 258 (5th Cir. 2001)).

Summary judgment is proper if "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). "[T]he mere existence of *some* alleged factual dispute between the parties" is not enough. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Summary judgment will be denied only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. All "reasonable inferences," however, "should be drawn in favor of the nonmoving party." *Tolan v. Cotton*, 572 U.S. 650, 660 (2014).

III.

Hudson contends that summary judgment was improper on her Title VII claims for a hostile work environment and unlawful retaliation. We will deal with each in turn.[5]

A.

Hostile work environment is a specific discrimination claim under Title VII. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18–19 (1993). Title VII

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counts as well. It also found no merit to Hudson's separate breach-of-contract claim.

[5] All other theories of liability not briefed or presented on appeal are forfeited. *See Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004).

prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e–2(a)(1). When a "workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris*, 510 U.S. at 21 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)) (internal citations omitted).

To prove a hostile work environment under Title VII, a plaintiff must demonstrate five things. *Johnson v. PRIDE Indus., Inc.*, 7 F.4th 392, 399–400 (5th Cir. 2021). Just two of those are relevant here. Hudson must demonstrate (1) that her mistreatment "affected a term, condition, or privilege of employment" and (2) that Lincare "knew or should have known of the harassment in question and failed to take prompt remedial action." *Id.*[6]

1.

To "affect[] a term, condition or privilege of employment"—as required by Title VII's text—the harassment must be "severe or pervasive." *Id.* at 399–400; *see also* 42 U.S.C. § 2000e–2(a)(1).

Because it is unnecessary to determining the result, we decline to decide whether the racial harassment was "severe or pervasive" as a matter of law. Instead, we resolve this case based on Lincare's response to Hudson's mistreatment.

[6] A plaintiff must also prove that he belongs to a "protected group," that he suffered from "unwelcome harassment," and that the harassment was based on his "membership in the protected group." *Johnson*, 7 F.4th at 399. There is no dispute that Hudson, as a black woman, was a member of a protected group and was subject to unwelcome harassment based on her race.

2.

Even assuming that Hudson suffered from severe or pervasive harassment, Lincare cannot be liable under Title VII because it took prompt remedial action.

When an employee is harassed by a co-worker, "the negligence standard governs employer liability." *Sharp v. City of Hous.*, 164 F.3d 923, 929 (5th Cir. 1999); *see also Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).[7] "An employer is negligent with respect to . . . harassment if it knew or should have known about the conduct and failed to stop it." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998). It weighs against finding negligence if the affected employee "unreasonably fail[s] to take advantage of corrective opportunities provided by" the employer. *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 329 (5th Cir. 2004). Furthermore, an employer is not negligent when it takes "prompt remedial action" that is "reasonably calculated to end the harassment." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989) (quotation omitted).

The record amply demonstrates that as soon Lincare knew about Hudson's harassment, it intervened.[8] After Torres's invective against Hudson at the June 2019 meeting, Greenway reported the misconduct to HR that very day. An investigation ensued, and only five days later, Lincare issued final written warnings to Torres and Ruiz, informing them that another instance of

[7] An employer can also be vicariously liable under "agency-based standards" for the actions of supervisors and those empowered to act on the company's behalf, *Sharp*, 164 F.3d at 929, but Hudson has not tried to meet that "more stringent standard of . . . liability," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998).

[8] Lincare was not on notice about the comments that preceded the June 2019 meeting, as no one ever reported those events to HR. Greenway separately testified that she heard Torres use the N-word in the office once before June 2019, but she immediately responded and told Torres that such language was unacceptable, putting a note in her file.

racial slurs would result in their termination.[9] In other words, Lincare "took the allegations seriously, it conducted prompt and thorough investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigations." *Carmon v. Lubrizol Corp.*, 17 F.3d 791, 795 (5th Cir. 1994). It is beyond dispute that such action was "reasonably calculated to end the harassment." *Harvill v. Westward Commc'ns, LLC*, 433 F.3d 428, 437 (5th Cir. 2005) (quoting *Skidmore v. Precision Printing & Pkg. Inc.*, 188 F.3d 606, 615 (5th Cir. 1999)).

Hudson responds that the remedial measures were inadequate because, even if the use of the N-word ceased, Ruiz called her "Aunt Jemima" even after she received a final warning. Yet even assuming that a sole stray comment from a single employee is enough to invalidate a defendant's remedial action—a proposition for which Hudson furnishes no support—Hudson's argument fails as a factual matter.

There is no genuine dispute that the "Aunt Jemima" comment was made, at the latest, on June 25, 2019. Although Ruiz testified that she made the comment many months earlier, Scott Gove—the Lincare employee who overheard the comment—wrote to HR that it happened on June 24 or 25. Lincare issued final warnings to Ruiz and Torres on June 25. Thus, the comment was made before (or at worst concurrently) with the final warnings.

Hudson claims that she *reported* the "Aunt Jemima" comment the first week of July, after the warnings were issued. Nevertheless, Hudson did not actually hear the remark firsthand. She learned about it from Gove, who stated in response to an HR inquiry that it *occurred* on June 24 or 25. Hudson

[9] Hudson unpersuasively tries to manufacture a factual dispute about whether Lincare actually issued final warnings to Ruiz and Torres. But Lincare produced copies of the warnings (marked with issue dates), and multiple witnesses testified to their existence.

merely parroted Gove's report two weeks later. Her report does not create a genuine dispute that the remark postdated Ruiz's final warning.

As a final rejoinder, Hudson insists that the timing of the "Aunt Jemima" comment is a genuine dispute of material fact because Lichtenberg stated that she could not determine precisely when the incident occurred. But all the evidence in the record suggests it was made before Ruiz received a final warning. No reasonable factfinder could conclude otherwise.

Aside from that one remark, Hudson could not remember any use of the N-word in the office after she made her reports to HR. Nor does she identify a single racially insensitive comment that *occurred* after Torres and Ruiz received final warnings. In short, Lincare "acted swiftly in taking remedial measures and the harassment ceased." *Harvill*, 433 F.3d at 439. Because of its prompt and effective response, Lincare cannot be liable under Title VII for creating a hostile work environment.

B.

Having concluded that summary judgment was proper on Hudson's first claim, we turn to retaliation.[10] That second theory of Title VII liability fares no better.

Retaliation claims are analyzed under the well-known *McDonnell Douglas* burden-shifting framework. The burden first lies with the plaintiff to show a *prima facie* case of retaliation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To do so, a plaintiff must show that "(1) he engaged in conduct protected by Title VII; (2) he suffered a materially adverse action; and (3) a causal connection exists between the protected activity and the

[10] Title VII prevents employers from discriminating against its employees for opposing or complaining about an unlawful employment practice. 42 U.S.C. § 2000e-3(a).

adverse action." *Cabral v. Brennan*, 853 F.3d 763, 766–67 (5th Cir. 2017) (quoting *Jenkins v. City of San Antonio Fire Dep't*, 784 F.3d 263, 269 (5th Cir. 2015)).

The parties do not dispute that Hudson's reporting her discrimination to HR or complaining about racial slurs in the office were activities "protected" by Title VII. Instead, the focus is on whether Hudson suffered an "adverse employment action" and whether any such action was caused by her protected behavior. Hudson can satisfy neither requirement.

1.

Hudson did not suffer an adverse employment action, which is one that "a reasonable employee" would find "materially adverse, which . . . means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal quotations omitted). Although that is a fact-specific inquiry, an employment decision tends to be "materially adverse" when it changes "job title, grade, hours, salary, or benefits" or effects a "diminution in prestige or change in standing among . . . co-workers." *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 332 (5th Cir. 2009).

None of the conduct that Hudson complains of rises to the level of a materially adverse action. She alleges that the CSRs failed to fulfill her orders and refused to work with her after the June 20 meeting. Even if that were true, it is not retaliation from her *employer*, Lincare. "The actions of ordinary employees are not imputable to their employer unless they are conducted 'in furtherance of the employer's business.'" *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012) (quoting *Long*, 88 F.3d at 306). The CSRs' alleged misconduct was not in furtherance of Lincare's business.

Hudson suggests separately that Lincare put her on a "formal action plan" after her complaints in June 2019, a sort of short-term probation which

she claims was the "first step in terminating her employment." Yet she fails to explain how a "formal action plan" affected her title, hours, salary, benefits, or reputation. In fact, there is no evidence that it affected her working conditions at all, only that the plan opened up the possibility of further action (which never occurred). An employment decision is not an adverse action if it does not objectively worsen the employee's working conditions. *See Wheat v. Fla. Par. Juv. Just. Comm'n*, 811 F.3d 702, 709 (5th Cir. 2016). Similarly, a warning about Hudson's work performance, with no accompanying changes to her job, is not a "materially adverse" employment action.[11]

2.

Additionally, even assuming that Hudson did suffer some adverse action, the record shows no causal connection between her protected activity and the retaliation she supposedly suffered. Her complaints to HR were confidential, so any mistreatment she suffered from the CSRs has no causal link to her protected activity. Furthermore, the only evidence that Hudson's formal action plan was prompted by her complaints is that it began sometime after she reported her harassment.[12] Although "temporal proximity" between protected conduct and retaliation can sometimes suffice to establish

[11] Hudson's brief contends that Ruiz and Torres made Greenway put Hudson on a final action plan via "cat's paw" manipulation. On a "cat's paw" theory, retaliatory co-workers "manipulat[e] the decisionmaker into taking what appears to the decisionmaker to be a non-retaliatory action." *Zamora v. City of Houston*, 798 F.3d 326, 335 (5th Cir. 2015). Even if there was evidence to support that speculative theory of liability, it was raised for the first time on appeal and must be disregarded. *Martco Ltd. P'ship v. Wellons, Inc.*, 588 F.3d 864, 877 (5th Cir. 2009). We decline to consider it.

[12] Lincare maintains that Hudson was never put on a final action plan, and some evidence in the record suggests that is true. But other witnesses corroborate Hudson's claim that she was put on such a plan. Because we must resolve all factual disputes in favor of Hudson, we assume that she was indeed put on a formal action plan.

causation,[13] the inference is weakened by the fact that Hudson also had documented performance issues that began around the same time she made her reports to HR.

Indeed, even if Hudson could meet her initial burden to show some evidence of causation, the burden would shift back to Lincare to "articulate some legitimate, nondiscriminatory reason" for its adverse action. *McDonnell Douglas*, 411 U.S. at 802. And Lincare offers unrebutted evidence that it put Hudson on probation for failing to meet sales targets. Hudson was given documented warnings about her work before transferring to Austin; she was also underperforming in the Austin office and failing to meet expected benchmarks in the summer of 2019. As of August 9, she had failed to note anything in the company's reporting software for eight weeks, and others reported that she was inexcusably absent from work. Failure to perform job tasks is a classic example of a legitimate reason to fire an employee. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 391 (5th Cir. 2007).

Because Lincare articulated a *bona fide* reason to put Hudson on a formal action plan, Hudson bears the burden to demonstrate that the company's rationale was a pretext. *Septimus v. Univ. of Hous.*, 399 F.3d 601, 607 (5th Cir. 2005). But Hudson makes no meaningful attempt to dispute that her performance lagged in July 2019. Thus, even assuming that a "formal action plan" is an adverse employment action, Hudson cannot meet her burden to demonstrate that it was retaliatory.

IV.

In summary, no reasonable jury could find for Hudson on her Title VII claims. Even construing all factual disputes in Hudson's favor, the evidence

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[13] *See Haire v. Bd. of Sup'rs of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 368 (5th Cir. 2013).

demonstrates that once Lincare knew that she was subject to racial harassment, it took prompt corrective action. After the company's response, there were no further incidents of harassment. Similarly, there is no evidence to support Hudson's accusation that Lincare itself retaliated against her.

The summary judgment is AFFIRMED.