United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 3, 2023
Lyle W. Cayce
Clerk

No. 22-30389
Summary Calendar

VIRGINIA M. ADAMS,

Plaintiff—Appellant,

versus

COLUMBIA/HCA OF NEW ORLEANS, INCORPORATED, INCORRECTLY IDENTIFIED BY PLAINTIFF AS LAKEVIEW REGIONAL MEDICAL CENTER, LLC, DOING BUSINESS AS LAKEVIEW REGIONAL MEDICAL CENTER,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:20-cv-3030

Before DAVIS, SMITH, and DENNIS, *Circuit Judges*.

PER CURIAM:*

Plaintiff-Appellant, Virginia M. Adams ("Adams"), filed suit against her former employer, Defendant-Appellee, Lakeview Regional Medical Center ("Lakeview"), alleging employment discrimination in violation of the

* This opinion is not designated for publication. *See* 5TH CIRCUIT RULE 47.5.

Americans with Disabilities Act (ADA) and interference with her rights under the Family Medical Leave Act (FMLA). For the reasons discussed below, we AFFIRM the district court's dismissal of Adams's claims under the ADA for discrimination, failure to accommodate, and failure to engage in the interactive process. We VACATE the court's summary-judgment dismissal of Adams's FMLA interference claim and REMAND that claim for further proceedings.

I.

In January of 2018, Lakeview hired Adams in its Laboratory Department as a "Lead Tech." Adams asserts that before she was hired, she informed Lakeview that she suffers from mast cell disorder, allergies, and asthma. Adams states that throughout 2018 these disabilities got progressively worse, and thus before she became eligible for FMLA leave, she was often late to work due to her disabilities. She asserts that she became eligible for FMLA leave on October 9, 2018. In its answer to Adams's complaint, Lakeview admitted that her FMLA request was approved on October 9.[1]

On October 9, 2018, Adams's supervisor issued her a Performance Improvement Plan ("PIP") to help her, among other things, report on time to her shifts in compliance with Lakeview's attendance policy. Adams subsequently received a verbal and written disciplinary warning for arriving late to work on the following dates: October 12, 15-18, 22, 26, 29, 30, November 2, 2018, and January 8-9, 2019. Additionally, in October and November of 2018, Adams received warnings and counseling for making two

[1] As discussed *infra*, inconsistent with this admission, Lakeview now takes the position that Adams's FMLA leave request was approved on November 6, 2018, and was retroactively applicable starting on October 24, 2018.

mistakes at the Blood Bank, one of which Lakeview classified as presenting "a grave patient safety concern." Also in November of 2018, Lakeview suspended Adams for engaging in disrespectful conduct to a co-worker.

On July 25, 2019, Adams's supervisor asked her to work in the Blood Bank. Adams replied that she did not "feel comfortable" working in the Blood Bank because she had taken almost 300 milligrams of Benadryl since she woke up that morning to treat the symptoms of her disability. Adams was sent home after her supervisors determined that if she did not feel comfortable working in the Blood Bank, she could not "perform safely in other parts of the lab." Following this event, Lakeview conducted an investigation and determined that Adams had violated its Substance Use Policy by failing to notify her supervisor that she had taken an over-the-counter drug that she believed may impair her ability to perform her job. On August 9, 2019, Lakeview terminated Adams's employment based on the July 25 incident, in addition to her previous disciplinary warnings related to her behavior and performance.

On September 29, 2019, Adams filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC subsequently issued a "no cause" determination and a right-to-sue letter. Adams thereafter filed the instant action, alleging that Lakeview (1) discriminated against her due to her disability; (2) failed to engage in the ADA's interactive process; (3) failed to provide a reasonable accommodation for her disability; and (4) interfered with her right to FMLA leave.

Lakeview filed a Rule 12(b)(6) motion to dismiss Adams's claims that it failed to engage in the ADA's interactive process and provide a reasonable accommodation. The district court granted Lakeview's motion. Lakeview then moved for summary judgment on Adams's two remaining claims, which the district court also granted. Adams filed a timely notice of appeal as to

both judgments, as well as the district court's order denying her motion for leave to file a surreply.

II.[2]

We review de novo the district court's grant of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and of a motion for summary judgment under Rule 56.[3]

A.

Adams first challenges the district court's 12(b)(6)[4] dismissal of her accommodation and interactive process claims based on the court's holding that she failed to exhaust those claims before the EEOC. Before filing suit in federal court for a violation of the ADA, a plaintiff must exhaust her

---

[2] In addition to appealing the district court's order granting Lakeview's motion for summary judgment, Adams also challenges the district court's refusal to allow her to file a surreply to defendant's motion for summary judgment. We find that the district court did not abuse its discretion because Lakeview did not raise a new argument in its reply that was relied on by the district court. *See RedHawk Holdings Corp. v. Schreiber Trustee of Schreiber Living Trust-DTD 2/8/95*, 836 F. App'x 232, 235-36 (5th Cir. 2020) (per curiam) (unpublished) ("And while there is no right to file a surreply and surreplies are 'heavily disfavored,' a district court abuses its discretion when it denies a party the opportunity to file a surreply in response to a reply brief that raised new arguments and then relies solely on those new arguments in its decision." (citations omitted)). Unpublished opinions issued in or after 1996 are "not controlling precedent" except in limited circumstances, but they "may be persuasive authority." *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

[3] *White v. U.S. Corr., L.L.C.*, 996 F.3d 302, 306 (5th Cir. 2021) (noting the standard for a motion to dismiss); *Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 226 (5th Cir. 2009) (noting the standard for a motion for summary judgment).

[4] In granting Lakeview's 12(b)(6) motion to dismiss, the district court properly considered Adams's EEOC charge that was attached to Lakeview's motion to dismiss, referenced in Adams's complaint, and essential to determining whether Adams exhausted her administrative remedies. *See Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003).

administrative remedies, which include the timely filing of a charge of discrimination with the EEOC.[5] The scope of a plaintiff's federal complaint is limited to "discrimination like or related to the [EEOC] charge's allegations," and "the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination."[6] A plaintiff's failure to comply with the ADA's exhaustion requirement is grounds for dismissal.[7]

Both of Adams's claims stem from her assertion that Lakeview failed to provide her a reasonable accommodation by not assigning her to a different section of the lab on July 25, and instead sending her home early. Although Adams's EEOC charge of discrimination[8] states that she was directed to go home on July 25, it does not mention that she made any request for an accommodation, such as working in a different section of the lab.

Under this Court's precedent, Adams's charge is "too narrow to have exhausted a claim for failure to accommodate [and failure to engage in the interactive process]."[9] In particular, her charge does not mention that she

---

[5] *See Dao v. Auchan Hypermarket*, 96 F.3d 787, 789 (5th Cir. 1996) (per curiam) (noting that the ADA incorporates by reference the procedures set forth in Title VII for administrative exhaustion).

[6] *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 451 (5th Cir. 1983).

[7] *Dao*, 96 F.3d at 789.

[8] Adams states in her EEOC charge of discrimination that on "July 2[5]" she was having "severe symptoms due to [her] disability and had to take prescribed medication," and that after working for five hours she was "directed" to go home "for being under the influence of the prescribed medication." Adams then states that she was placed on "admin leave pending an investigation" and was subsequently "discharged" on August 9, 2019.

[9] *See Hamar v. Ashland, Inc.*, 211 F. App'x 309, 310 (5th Cir. 2006) (per curiam) (unpublished) (affirming the district court's dismissal of plaintiff's failure to accommodate claim for failure to exhaust his administrative remedies because his EEOC complaint alleged only disparate treatment, not a failure to accommodate); *Windhauser v. Bd. Of Supervisors for La. State Univ. & Agr. & Mech. Coll.*, 360 F. App'x 562, 565 (5th Cir. 2010)

requested an accommodation on July 25 before being sent home, which is a prerequisite for both of her claims.[10] Accordingly, we find that the scope of the EEOC investigation into Adams's complaint could not reasonably be expected to include her claims for failure to accommodate and engage in the interactive process.[11] Because these claims remain unexhausted, the district court correctly dismissed them pursuant to Rule 12(b)(6).

B.

Adams also appeals the district court's order granting summary judgment in favor of Lakeview on her two exhausted claims for discrimination based on her disability and FMLA interference.[12]

As to her discrimination claim under the ADA, Adams relies on circumstantial evidence of discriminatory intent, and thus the familiar

---

(per curiam) (unpublished) ("A failure-to-accommodate claim under the ADA is distinct from a claim of disparate treatment).

[10] *E.E.O.C. v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621 (5th Cir. 2009) (noting that an employee who needs an accommodation "has the responsibility of informing her employer"); *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (stating that an employer's duty to launch an interactive process is triggered by an employee's request for an accommodation).

[11] Adams seeks to avoid this conclusion by arguing that her EEOC intake questionnaire which states that she requested an accommodation, should be considered part of her EEOC charge document. But the case she relies on, *Patton v. Jacobs Engineering Group, Inc.*, 874 F.3d 437 (5th Cir. 2017), is inapposite. As explained by the district court, Adams filed her questionnaire forty days prior to her EEOC charge, and there is no evidence that the EEOC's investigation encompassed her accommodation and interactive process claims.

[12] Adams asserts that the district court erred in disregarding her FMLA retaliation claim. However, the district court correctly noted that because Adams's retaliation claim was raised for the first time in her opposition to summary judgment, it was not properly before the court, and that even if it was properly pled, it had no merit. *Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990); *see also Miller v. Metrocare Servs.*, 809 F.3d 827, 832 (5th Cir. 2016) (affirming the district court's order granting summary judgment in favor of the employer on the plaintiff's FMLA and ADA claims because even though

McDonnell Douglas[13] burden-shifting framework applies. Under that framework, a plaintiff has the initial burden of establishing a prima facie case of discrimination.[14] If the plaintiff establishes the four elements of a prima facie case, the burden of production shifts to the employer to provide a "legitimate, nondiscriminatory reason" for the plaintiff's termination. If the employer meets this burden, the burden then shifts back to the plaintiff to show by a preponderance of the evidence that the employer's articulated reason is pretext for discrimination.[15] Here, the district court assumed that Adams established a prima facie case of discrimination, but held that Lakeview had articulated a legitimate, nondiscriminatory reason for her termination: Adams's violation of the Substance Use Policy.[16] The court then determined that because Adams failed to offer sufficient evidence that Lakeview's proffered reason was pretextual, summary judgment in favor of Lakeview was appropriate. We agree.

Adams offers two arguments in support of her assertion that Lakeview's proffered explanation is pretextual. Specifically, she contends that Lakeview has offered inconsistent reasons for her termination and that

---

"these claims vary in their prima facie elements, none will give rise to any relief where the employer has terminated the employee for valid reasons unrelated to any alleged discriminatory or unlawful motive").

[13] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

[14] *Id.*

[15] *See Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332 (5th Cir. 2005).

[16] *See Smith v. Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1179 (5th Cir. 1990) (per curiam) (upholding the district court's finding that the employer articulated a legitimate, nondiscriminatory reason for terminating the plaintiff based on her violation of the company's policy).

she suffered disparate treatment. We find that neither of Adams's arguments presents "substantial evidence" of pretext.[17]

First, Lakeview has consistently stated it terminated Adams because of the events of July 25, 2018, involving her violation of Lakeview's Substance Abuse Policy and related refusal to work in the Blood Bank. Second, Adams has not presented evidence of proper comparators for the purposes of establishing disparate treatment. In order to establish disparate treatment, a plaintiff must show that "the misconduct for which she was discharged was nearly identical to that engaged in by a[n] employee [not within her protected class] whom [the company] retained."[18] However, "employees who have different work responsibilities or who are subjected to adverse employment actions for dissimilar violations are not similarly situated."[19]

Here, Adams points to the same comparators that the district court correctly concluded were not sufficiently similar to Adams to establish pretext. In particular, Adams remains unable to point to a would-be comparator that shared a similar history of violating Lakeview's Substance Use Policy on top of existing disciplinary warnings for patient safety and behavioral violations.[20] Accordingly, we agree with the district court that Adams has not presented substantial evidence of pretext, such that a

---

[17] *Auguster v. Vermillion Parish Sch. Bd.*, 249 F.3d 400, 402-03 (5th Cir. 2001).

[18] *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001) (internal quotation and citation omitted) (alterations in original).

[19] *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259-60 (5th Cir. 2009).

[20] *See Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 514-15 (5th Cir. 2001) (rejecting plaintiff's comparators as not similarly situated to plaintiff because they engaged in different violations of defendant's employment policy).

reasonable factfinder could conclude that Lakeview's proffered explanation is false.

For the first time on appeal, Adams asserts that even if she is unable to establish pretext, she can still survive summary judgment by asserting that her employer had mixed motives for terminating her. Because Adams did not raise her mixed-motive argument in her complaint or opposition to Lakeview's motion for summary judgment, she has waived it.[21] Thus, we affirm the district court's judgment as it pertains to Adams's ADA discrimination claim.

Adams also appeals the district court's dismissal of her FMLA interference claim. To establish a claim for FMLA interference, an employee must show that the employer "interfered with, restrained, or denied her exercise or attempt to exercise FMLA rights, and that the violation prejudiced her."[22] The term "interfered" includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave."[23]

Adams alleges that Lakeview interfered with her FMLA rights by "denying her the right to use FMLA leave for tardy occurrences caused by

---

[21] *See Richardson*, 434 F.3d at 333-34 ("The mixed-motive framework applies to cases in which the employee concedes that discrimination was not the *sole* reason for her discharge, but argues that discrimination was *a* motivating factor in her termination."); *Nasti v. CIBA Specialty Chems. Corp.*, 492 F.3d 589, 595 (5th Cir. 2007) (holding that plaintiff waived her mixed-motive claim by "fail[ing] to present [it] . . . to the district court in the first instance," and refusing to concede "before the district court, even for argument's sake, that [defendant] had a legitimate nondiscriminatory reason").

[22] *D'Onofrio v. Vacation Publ'ns, Inc.*, 888 F.3d 197, 209 (5th Cir. 2018) (quoting *Brayant v. Tex. Dep't of Aging & Disability Servs.*, 781 F.3d 764, 770 (5th Cir. 2015)).

[23] *Bell v. Dallas County*, 432 F. App'x 330, 334 (5th Cir. 2011) (per curiam) (unpublished) (quoting *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050-51 (8th Cir. 2006)).

her serious health condition." In support of this claim, Adams argues that her FMLA intermittent leave was approved on October 9, 2018, but that on that same day her supervisor wrote on her PIP that "FMLA [leave is] not to be applied to Tardy occurrences." Adams contends that her supervisor's comment discouraged her from seeking leave for her subsequent tardy arrivals, and that she was prejudiced by this interference because she received verbal and written disciplinary actions for her late arrivals in October, November, and January.

In response, Lakeview contends that Adams was not entitled to leave until her FMLA intermittent leave was approved on November 6, 2018, and therefore it had no choice but to consider her tardy arrivals before then as violations of its attendance policy. However, as Adams points out, Lakeview admitted in its answer to Adams's complaint that her FMLA request "was approved beginning on October 9, 2018."

In granting Lakeview's summary judgment motion, the district court addressed only one date on which Adams alleges Lakeview denied her FMLA benefits, and it did not address the impact of her supervisor's comment that she could not use her FMLA leave for her tardy arrivals. We vacate and remand Adams's FMLA interference claim to allow the district court the opportunity to consider in the first instance whether Adams's supervisor's comment would have discouraged a reasonable person from taking FMLA leave on the additional days she was marked tardy after her FMLA leave was approved.[24]

[24] *See Baker v. Bell*, 630 F.2d 1046, 1055 (5th Cir. 1980) (noting that this Court "will not reach the merits of an issue not considered by the district court"); *Chaudhary v. Arthur J. Gallagher & Co.*, 832 F. App'x 829, 835-36 (5th Cir. 2020) (per curiam) (unpublished) (finding it "appropriate to vacate and remand the district court's judgment" on a specific

III.

For the reasons above, the district court's judgment is AFFIRMED as to the dismissal of Adams's claims under the ADA for discrimination, failure to accommodate, and failure to engage in the interactive process. As to Adams's claim for FMLA interference, however, the district court's judgment is VACATED AND REMANDED for further proceedings.

AFFIRMED in part; VACATED AND REMANDED in part.

---

claim for "consideration in the first instance" because "[t]o do otherwise would risk overstepping our role as an appellate court").