[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-13956

Non-Argument Calendar

SANDRA MOSS,

Plaintiff-Appellant,

versus

ST. VINCENT'S HEALTH SYSTEM,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 2:21-cv-00131-GMB

Before JORDAN, LAGOA, and ANDERSON, Circuit Judges.

PER CURIAM:

Sandra Moss, an African-American woman, appeals the magistrate judge's grant of summary judgment[1] to St. Vincent's Health System ("SVH") on her race discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, and 42 U.S.C. § 1981. She argues that her race discrimination claim presented sufficient facts to permit a jury to rule in her favor, satisfying the burden-shifting framework in *McDonnell Douglas*.[2] In the alternative, Moss argues that she adduced a convincing mosaic of circumstantial evidence that supported an inference of intentional race discrimination. Moss also argues that the magistrate judge erred by concluding that she failed to establish that the SVH decision-maker who disciplined her and who she alleged was unlawfully retaliating against her knew about her pending EEOC charge.

I.

We write only for the parties who are already familiar with the facts and proceedings below, so we set forth only matters which will facilitate an understanding of our decision.

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[1] Pursuant to 28 U.S.C. § 636(c)(1), the parties agreed that the case would be heard and decided by the magistrate judge.

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

We review the grant of summary judgment *de novo*. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2007). Summary judgment may be affirmed if there exists any adequate ground for doing so, regardless of whether it is the one on which the district court relied. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 (11th Cir. 1993). Summary judgment is appropriate if the movant shows that 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A factual dispute is genuine if it has a real basis in the record and the evidence is such that a reasonable jury could rule in favor of the nonmovant. *Ellis v. England*, 432 F.3d 1321, 1325-26 (11th Cir. 2005). When a district court considers a motion for summary judgment, it must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party and must resolve all reasonable doubts about the facts in favor of the nonmovant. *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1274 (11th Cir. 2008).

Title VII prohibits an employer from discriminating against a person with respect to the "terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Section 1981 of Title 42 of the United States Code likewise protects the right of all citizens to make and enforce contracts without fear of discrimination based on the color of their skin. 42 U.S.C. § 1981(a). In the absence of direct evidence of discrimination, a plaintiff may prove a discrimination claim under Title VII through circumstantial evidence, which we generally

analyze using the three-step, burden-shifting framework established in *McDonnell Douglas*. *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002). Claims of employment discrimination under § 1981 are generally analyzed under the same framework as claims under Title VII. *Ferrill v. Parker Grp.*, 168 F.3d 468, 472 (11th Cir. 1999). Under this framework, the plaintiff must first establish a *prima facie* case of intentional discrimination. *Id.*

If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its action. *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1221 (11th Cir. 2019) (*en banc*). As long as the employer articulates a clear and reasonably specific non-discriminatory basis for its actions, it has discharged its burden of production at this stage. *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 254-55 (1981). The burden then shifts back to the plaintiff to show that the stated reason is pretextual. *Id.* at 255-56. A plaintiff can show pretext by presenting evidence that a proffered reason is false, and that discrimination was the true reason for the adverse employment action. *Brooks v. Cnty. Comm'n of Jefferson Cnty., Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006). Employers are free to promote an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as the promotion is not based on discriminatory reasoning. *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (*en banc*). Provided a reason given might motivate a reasonable employer, the plaintiff must meet it head on and rebut it to prove pretext. *Id.* The employee cannot succeed by simply quarreling with the wisdom of the employer's reasoning. *Id.* When a

plaintiff chooses to attack the veracity of the employer's proffered reason, the inquiry is limited to whether the employer gave an honest explanation of its behavior. *Kragor v. Takeda Pharms. Am., Inc.*, 702 F.3d 1304, 1310-11 (11th Cir. 2012).

We have held that a plaintiff may also defeat a summary judgment motion by presenting a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination. *Lewis v. City of Union City, Ga.*, 934 F.3d 1169, 1185 (11th Cir. 2019). A convincing mosaic can be shown by (1) suspicious timing, ambiguous statements, and other "bits and pieces" from which an inference of discriminatory intent might be drawn, (2) systematically better treatment of similarly situated employees, and (3) evidence that the employer's justification is pretextual. *Id.* Thus, the plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case. *Id.* Speculation about the employer's actual reasoning does not create a genuine issue of fact. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005). To succeed, the plaintiff must show that the employer's proffered explanation is unworthy of credence by revealing weaknesses, inconsistencies, or contradictions in the explanation. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997).

Here, the magistrate judge did not err in granting summary judgment to SVH on Moss's race discrimination claim. Moss failed to establish that SVH's reasons for offering Jackson the promotion were a pretext for racial discrimination. *See Burdine*, 450 U.S. at 254 55; *see Brooks*, 446 F.3d at 1163. SVH proffered nondiscriminatory

reasons for promoting Jackson including (1) that every interview panelist in the second round of interviews[3] rated Jackson higher than Moss; and (2) that Jackson historically performed better at communicating safety issues to Kersh and Moss tended to disregard practices with which she disagreed.

It is undisputed that the interview panelists ranked Jackson higher than Moss based on their respective responses to the interview questions. Natasha Kersh, at the time the nurse manager and immediate supervisor of the telemetry monitoring team of which Moss and Jackson were a part, was charged with filling the vacancy caused when one of the two team leaders left. Kersh assembled two rounds of interviews, presided over the interviews, and was the ultimate decisionmaker. At the second round of interviews the candidates were narrowed to Moss and Jackson. Kersh had supervised and worked with both: Moss for over two and half years and Jackson for about a year. Like the other interview panelists, Kersh thought that the interviews revealed Jackson to be a better fit for the lead position. Particularly significant for Kersh were the respective answers to a question Kersh asked both candidates—i.e. their reaction to a hypothetical safety situation which Kersh posed. Jackson indicated that the matter should be reported immediately to the nurse manager, while Kersh had to probe Moss to reach that answer. This was consistent with Kersh's observations of the two candidates over her time supervising them. Kersh had worked

[3] In this second round of interviews, one member of the panel was an African American female.

with Moss for two and a half year and she had never brought an issue to Kersh for consideration and consultation. By contrast, Jackson had done so routinely. In making the decision to prefer Jackson over Moss, Kersh also relied on her observations over the years that Moss had a tendency to disregard hospital practices with which she disagreed. Although acknowledging Moss's superior skills in reading the monitors in her current position, as well as her seniority, Kersh also realized that the lead position to be filled entailed a more significant focus on interpersonal skills, and overall Kersh believed that Jackson was a better fit for the lead position.

In her current position as a Telemetry Technician (monitoring the telemetry devices which track patients' cardiac rhythms, etc.), Moss argues that she has received several certificates for actively supporting the effort to provide safe healthcare. She argues that those certificates and a similar remark in a previous evaluation by Kersh herself are inconsistent with Kersh's concerns about her with regard to safety. While the certificates are indicative that Moss has been good in her current position, they do not speak directly to Kersh's concerns about Moss with respect to the lead position at issue, which focuses more on interpersonal skills. Moss's certificates do not cast doubt on Kersh's concerns about Moss's interpersonal skills or her tendency to disregard practices with which she disagreed.

With respect to Moss's additional arguments—i.e. the allegedly inconsistent reasons given for the decision,[4] and Moss's argument that Kersh's belief that Moss disregarded practices with which she disagreed is inconsistent with a performance evaluation conducted by Kersh—both arguments fail. Thomas's statement to Moss that there were no right or wrong answers to the interview questions is not inconsistent with Kersh's statement that Jackson answered the interview questions better than Moss. Further, Thomas was not the decisionmaker, and there is no evidence in the record that Kersh, the decisionmaker, thought that there were no right or wrong answers. As SVH points out, a candidate's responses to subjective interview questions are not a basis for a discrimination claim so long as the employer can explain and show that its reasoning makes sense, which SVH has done here. Finally, the fact that Kersh, in a performance review, applauded Moss's attempts to ensure that the standards of the hospital were upheld to

[4] Kersh explained that her reasons for preferring Jackson included: Jackson's better answers during the interviews (including especially with respect to the safety hypothetical); Kersh's observations while working with both candidates, revealing that Moss, unlike Jackson, was reluctant to bring issues to the attention of the nurse manager for consideration and consultation, and that Moss had a tendency to disregard practices with which she disagreed, and that Jackson would be better than Moss with respect to the communication and interpersonal skills important in the lead position; and finally, notwithstanding Moss's longer seniority with SVH, both candidates had over thirty years of relevant experience. On the other hand, when Moss talked to Thomas, the Human Resources representative, Thomas told her that there were no right or wrong answers to the interview questions and that Jackson received the promotion because she was a better leader.

prevent safety issues is not inconsistent with Kersh's concerns about Moss's interpersonal skills and her tendency to disregard practices with which she disagreed. Moss fails to offer any evidence to rebut Kersh's assertion that Jackson was better at bringing safety concerns to the attention of Kersh. *See Chapman*, 229 F.3d at 1030; *see Kragor*, 702 F.3d at 1310-11.

While it is clear that Moss sincerely believes she was the more qualified candidate, we need not address that issue. Our law is clear. "The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs and, to be blunt about it, not on reality as it exists outside of the decision maker's head." *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010). The issue is whether the employer honestly believed its reasons for the decision, or whether the reasons were a mere pretext to cover discrimination based on race. *Id*. Relevant in this regard is the fact that Moss has pointed to no evidence that Kersh harbored any racial animus. Indeed, Moss admitted that she had never heard Kersh make any derogatory comments about African Americans.

For the foregoing reasons, we cannot conclude that the magistrate judge erred in holding that Moss had failed to prove that Kersh's reasons for not promoting Moss were mere pretext for discrimination based on race.

Moss also argues that she presented a convincing mosaic of circumstantial evidence, but she fails to offer more than speculation as to SVH's reasoning for the promotion decision. *See Cordoba*, 419 F.3d at 1181. Specifically, Moss testified that her being African

American and Jackson being Caucasian was the only basis for her racial discrimination claim because she could not identify any other reason for why she was denied the promotion. That statement and the arguments she presents on appeal fail to identify weaknesses, inconsistencies, or contradictions in SVH's explanation. For the reasons noted above in our discussion of the pretext issue, we cannot conclude that the magistrate judge erred in rejecting Moss's mosaic argument. The circumstantial evidence in this summary judgment record would not allow a jury to infer intentional discrimination.

II.

We turn now to Moss's argument that her later nurse manager, Regis, disciplined her in retaliation for her having filed an EEOC charge against SVH. Under Title VII, an employer may not retaliate against an employee because she has opposed any employment practice that Title VII makes unlawful. § 2000e-3(a). The three-step, burden-shifting *McDonnell-Douglas* framework also applies to cases of retaliation relying on circumstantial evidence. *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1181 (11th Cir. 2010). Retaliation claims arising under § 1981 are analyzed under the same framework as those arising under Title VII. *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1134 (11th Cir. 2020) (*en banc*).

To establish a *prima facie* case of retaliation, a plaintiff must show that (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action.

Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001). The standard for determining what constitutes an adverse employment action is different in retaliation claims than it is for claims of discrimination. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id*. "Trivial harms" are not adverse employment actions. *See id*.

The causal link element is construed broadly so that a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated. *Pennington*, 261 F.3d at 1266. The plaintiff may prove causation by showing that the employer knew of her statutorily protected activity and there was a close temporal proximity between this awareness and the adverse employment action. *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004). A putative causal connection between the plaintiff's protected conduct and the materially adverse decision may be undermined by evidence of a superseding cause of the adverse decision. *See Fleming v. Boeing Co.*, 120 F.3d 242, 248 (11th Cir. 1997) (no genuine issue of material fact as to a causal connection between plaintiff's complaints of harassment and the adverse employment decision where plaintiff failed a required typing test in the interim). A decisionmaker cannot have been motivated to retaliate by something unknown to her. *Martin v. Fin. Asset Mgmt. Sys., Inc.*, 959 F.3d 1048, 1053 (11th Cir. 2020). An argument that the decisionmaker must have known about the protected activity is too speculative

because evidence that she could have known about it is not the same as evidence that she did. *Id.* at 1054.

If the plaintiff has successfully made out a *prima facie* case, the burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Shannon v Bellsouth Telecomms., Inc.*, 292 F.3d 712, 715 (11th Cir. 2002). If the employer meets its burden, the presumption of retaliation disappears, and the plaintiff must then show that the reasons offered by the employer were merely a pretext for retaliation. *Id.* The plaintiff can do so by showing that it was more likely that a retaliatory reason motivated the employer or by pointing to "weaknesses, inconsistencies, incoherencies, or contradictions" in the explanation. *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010). If the proffered reason is one that would motivate a reasonable employer, a plaintiff cannot simply quarrel with the wisdom of the employer's decision and must instead meet that reason head on and rebut it. *Chapman*, 229 F.3d at 1030. The plaintiff must prove "that the desire to retaliate was the but-for cause of the challenged employment action." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013).

Here, the magistrate judge did not err in concluding that Moss failed to establish causation between the alleged retaliatory action taken against her and her pending EEOC charge. Moss's only evidence that Regis knew about her EEOC charge was that Regis responded affirmatively when asked by Moss whether Regis knew about what was going on. This vague statement does not

support the conclusion that Regis knew that Moss had filed an EEOC charge because a claim that Regis must have known that she had engaged in a protected activity is not the same as claiming that Regis actually knew about it. *See Martin*, 959 F.3d at 1054. Her statement to Regis did not include any information that would have suggested that Moss was referring to her race discrimination charge against SVH. Her argument is also contradicted by her testimony that she never told Regis that she had filed an EEOC charge. *See Martin*, 959 F.3d at 1053. Further, the fact that Moss admitted to committing the violation for which she was disciplined undermines her retaliation claim. *See Fleming*, 120 F.3d at 248. Finally, even if Moss were able to meet her prima facie burden, her argument that Regis's discipline was retaliatory discrimination fails because she fails to identify any weaknesses, inconsistencies, or contradictions in SVH's explanation of its disciplinary measures. *See Alvarez*, 610 F.3d at 1265. A reasonable employer would likely discipline an employee who took 22 minutes to notice a patient going off the monitor and who left her workstation to take an unauthorized break. *See Chapman*, 229 F.3d at 1030. Additionally, the severity of the discipline—a single day suspension with pay and a 90-day probationary period—was exactly what SVH's disciplinary policy set forth which supports the conclusion that Regis's action was not retaliatory in nature.

AFFIRMED.