[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10731

Non-Argument Calendar

BRIAN PLAIR,

Plaintiff-Appellant,

versus

INTERACTIVE COMMUNICATIONS INTERNATIONAL, INC., INTERACTIVE COMMUNICATION INTERNATIONAL CANADA, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

D.C. Docket No. 1:21-cv-02455-WMR

Before WILSON, ROSENBAUM, and GRANT, Circuit Judges.

PER CURIAM:

Ms. Brian Plair[1] appeals the district court's order granting summary judgment to the defendant on her claims of race discrimination, sex discrimination, and retaliation.[2] She argues first that the court erred in finding that she did not make out a case for race discrimination under the "convincing mosaic" standard. Further, Plair contends that her sex discrimination case is legally cognizable under Title VII and maintains that she successfully pled sex discrimination under the *McDonnell Douglas*[3] standard. After careful consideration of all issues, we affirm.

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[1] Plair's appellate brief makes clear that she is a transgender woman who uses female pronouns (she/her). This opinion identifies her as "Brian," as this is the name used in the case caption, and no other name is provided.

[2] While Plair's initial complaint and summary judgment filings maintained a § 1981 retaliation claim, her appellate brief makes no mention of that claim, and she does not make any challenge to the district court's granting of summary judgment as to that claim. Thus, we deem Plair's retaliation claim abandoned on appeal. *See United States v. Campbell*, 26 F.4th 860, 871–72 (11th Cir. 2022) (en banc) (explaining that "issues not raised in the initial brief on appeal are deemed abandoned"), *cert. denied*, 143 S. Ct. 95 (2022).

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

I. Background

Plair, a Black transgender woman, was previously employed with Interactive Communication International, Inc. (InComm). On or around January 8, 2020, she informed her supervisor, Elisha Schmookler, that she was applying for a different position within InComm. Plair alleges that Schmookler began engaging in "harassing and unprofessional conduct" toward her after she stated her intention to switch positions.

On January 24, Schmookler asked Plair why Plair did not submit project notes before she took paid time off. Plair stated she did provide notes, but Schmookler interpreted her response as insubordinate. On January 27, Plair realized she did not provide the notes as previously thought and apologized to Schmookler. On February 12, Schmookler and the Director of Human Resources (HR) met with Plair and placed her on a performance improvement plan (PIP). The PIP provided examples of inadequate performance, including outbursts, failure to maintain an up-to-date project tracker, and other mistakes. Plair alleges placement on the PIP was "retaliation toward [her] for applying for another position within the company."

In response, Plair contacted InComm HR on February 24 to express disagreement with the PIP and submit formal complaints related to Schmookler's conduct, including allegations of "many incidents" of Schmookler's sexual harassment of her from July 2019 to December 2019. InComm HR launched an investigation

into the allegations, which included interviewing members of Schmookler's team.

On March 12, InComm HR told Plair that the investigation found no evidence of discrimination, retaliation, or harassment by Schmookler. Nevertheless, Schmookler recommended Plair's PIP be removed and that Schmookler would work with Plair on a new success plan instead.

On March 16, a meeting was held with Plair to hear whether Plair intended to continue working on Schmookler's team under the new plan. When no progress was made, another meeting was held the following day. At the meeting on March 17, Plair was told that, if she continued in her current role under the new plan, she would be able to apply for future openings within InComm. Plair alleged that she requested to be transferred to another department reporting to a different supervisor. She alleged this request was denied, and she was "immediately terminated" as a result of protesting returning to work under Schmookler. But InComm states that HR informed Plair that the only viable options were for her to continue in her present role under the new plan or resign. When Plair refused to stay in her current role, HR believed she was resigning.

Based on these factual allegations, Plair alleged race discrimination under 42 U.S.C. § 1981. Her complaint also asserted a claim of "42 U.S.C. § 1981 Sex Discrimination." Plair alleged that InComm became aware of her transgender identity after she was hired and engaged in unlawful discrimination based upon this

identity. InComm answered, denied liability, and asserted various affirmative defenses.

Post-discovery, InComm moved for summary judgment. In support of its motion for summary judgment, InComm submitted, among other things, a "Statement of Undisputed Material Facts," excerpts of Plair's deposition, and a declaration from Schmookler. Plair testified in her deposition that her entire complaint, including her sex discrimination claim, rested on § 1981.

In Plair's response to InComm's motion for summary judgment, she stated that, instead of finding her sex discrimination claim not cognizable under § 1981, "the better view is that such a claim is legally cognizable under 42 U.S.C. § 2000e et seq." Plair further argued that InComm knew of her transgender status during her employment, and that it discriminated against—and ultimately terminated—her based on this status.

Regarding the race discrimination claim, Plair stated that she brought a "racial hostile work environment" claim. However, her response contained no distinct section or argument in support of this claim. Further, her argument in favor of the hostile work environment claim was limited to one sentence in an introduction paragraph in which she states, without any citations to the record, the following:

> Plaintiff's racial hostile work environment claim can succeed because (1) Defendants' conduct towards Plaintiff was a pretext for their discriminatory practice against her and Plaintiff's assertion with regards

> to Defendants discriminatory practice against her was not based on speculation; (2) the alleged conduct was severe and pervasive; and (3) Plaintiff exhausted all administrative remedies to report the harassment she was subject too; however, Defendants failed to remedy Plaintiff's claims even though they acknowledged that such activities were occurring during Plaintiff's tenure of employment.

A magistrate judge issued a report and recommendation (R&R) recommending that the district court grant InComm's motion for summary judgment. As an initial matter, the magistrate judge found that, for summary judgment purposes, "[t]he factual background is drawn entirely from [InComm's] statement of material facts because [Plair] failed to file a statement of additional facts even though the Local Rules and the Scheduling Order clearly directed her to do so."

The magistrate judge also found that a claim for sex discrimination was not a cognizable cause of action under 42 U.S.C. § 1981. Therefore, InComm was entitled to judgment on that claim. It further noted that, while Plair stated in her response to InComm's motion for summary judgment that sex discrimination is cognizable under Title VII, "[a] plaintiff may not amend her complaint through argument in a brief opposing summary judgment." *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (per curiam).

The magistrate judge also adopted InComm's construction of Plair's race discrimination claim as a racial hostile work

environment claim, finding that Plair did not dispute or contest this construction. It further stated in a footnote that, even if Plair's claim was construed as a "traditional race discrimination claim," it would fail on its merits. The court also found that Plair, in her response to InComm's summary judgment motion, addressed her hostile work environment claim in only "a single conclusory sentence in an introductory paragraph." It determined that Plair's failure to address the race discrimination claim or offer any evidence in support thereof constituted claim abandonment. Based on this abandonment and Plair's failure to make a showing on the essential elements of her race discrimination claim, the court granted summary judgment to InComm as to that claim.

The district court subsequently adopted the R&R in its entirety, thereby granting summary judgment to InComm. Following the entry of judgment, Plair timely appealed.

II. Analysis

A. Standard of Review

Eleventh Circuit Rule 3-1 provides that a party who does not object to an R&R and was informed of the timeline for which to do so waives the right to appeal the district court's order if the order concerns "unobjected-to factual and legal conclusions." We *may*, but are not bound to, review for plain error if the plain interests of justice exception applies. *Id.*

To succeed on the "extremely stringent" plain error standard of review, an appellant must prove: (1) an error occurred; (2) the error was plain; (3) it affected substantial rights; and (4) not

correcting the error would seriously affect the judicial proceeding's fairness. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999). Plain error cannot arise when the statutory language does not explicitly resolve an issue and when neither Supreme Court nor Eleventh Circuit precedent exists directly resolving it. *United States v. Curtin*, 78 F.4th 1299, 1310 (11th Cir. 2023).

Summary judgment is only 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). In summary judgment proceedings, "the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned." *Resol. Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995). Moreover, it is not the district court's burden to extract any potential argument that could be proffered based upon the materials before it. *Id.* Additionally, "[a]n appellant forfeits an issue when she raises it in a perfunctory manner without supporting arguments and authority." *Harner v. Soc. Sec. Admin., Comm'r*, 38 F.4th 892, 899 (11th Cir. 2022) (internal quotation mark omitted).

Any issue that an appellant wants us to consider should be "specifically and clearly identified" in her appellate brief. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004). We have stated that, should a party fail to do so, the claim will be considered abandoned—even if preserved at the district court level. *Id.* An appellant's failure to address a district court's alternative holding or disposition constitutes an abandonment of any

argument thereto. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682–83 (11th Cir. 2014).

We "generally will not consider an issue or theory that was not raised in the district court." *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001). We are "unable to reach the merits" of a claim where we determine that an appellant "ha[s] abandoned the claim and argument [she] made before the district court, and in its place raised an entirely new theory on appeal—one never presented to or considered by the trial court." *Access Now, Inc.*, 385 F.3d at 1326–27.

We address the race discrimination and sex discrimination claims in turn.

A. Race Discrimination Under § 1981

Here, Plair's failure to object to the magistrate judge's R&R warrants dismissal of her appeal in its entirety, unless we determine that plain error review is "necessary in the interests of justice." Plair provides no argument on appeal as to why her case is one where this exception should apply. Therefore, we dismiss her race discrimination claim under § 1981.

But even assuming plain error review applied, Plair abandoned her race discrimination claim on appeal. She did not challenge the district court's finding that her claim was best construed as a hostile work environment claim. She did not put forth any arguments in favor of such a claim in her response to InComm's summary judgment motion, nor did she argue a hostile work environment claim on appeal, both of which constitute abandonment

of that claim. We do not address the merits of Plair's race discrimination claim to the degree she argues it under the "convincing mosaic" framework, because this framework was never argued below. Accordingly, we affirm as to this issue.

B. Sex Discrimination Under § 1981

Section 1981, among other things, "affords a federal remedy against discrimination in private employment on the basis of race." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975). The Supreme Court has stated that § 1981 does not address classifications or categories other than race. *See Runyon v. McCrary*, 427 U.S. 160, 167–68 (1976). Where a district court finds that a plaintiff has brought a claim not cognizable under § 1981, it may properly grant summary judgment in favor of the defendant as to that claim. *See Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 537 (11th Cir. 1992) (affirming summary judgment where the district court properly found that plaintiff's "store assignment claims" were not cognizable under § 1981).

We have stated that, even under the liberal notice pleading standard of Federal Rule of Civil Procedure 8(a), plaintiffs may not "raise new claims at the summary judgment stage." *Gilmour*, 382 F.3d at 1314. "Efficiency and judicial economy require that the liberal pleading standards . . . are inapplicable after discovery has commenced." *Id.* at 1315. Rather, if plaintiffs desire to assert a new claim at the summary judgment stage, the proper procedure is to amend the complaint. *Id.* Therefore, "[a] plaintiff may not amend

her complaint through argument in a brief opposing summary judgment." *Id.*

Here, as with her race discrimination claim, we dismiss Plair's sex discrimination claim in its entirety because she failed to object to the R&R, and because she has not provided any argument as to why plain error review of her claim is "necessary in the interest[] of justice."

Even under plain error review, Plair does not contest or otherwise challenge the district court's finding that her sex discrimination claim was not cognizable under § 1981, thus abandoning any challenge to that dispositive finding. And the district court did not err in making that finding, as clear Supreme Court precedent dictates that § 1981 claims are cabined to race discrimination. Further, Plair could not amend her complaint to raise a Title VII claim through her response in opposition to the motion for summary judgment—only an amended complaint would have been procedurally appropriate. As Plair did not do so, any argument for us to contemplate her claim under Title VII is forfeited, thus barring it from our consideration. Accordingly, we affirm as to this issue.

III. Conclusion

We affirm the summary judgment order of the district court.

AFFIRMED.