[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 17-11027
Non-Argument Calendar

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D.C. Docket No. 6:15-cv-00890-JA-DCI

ANN MARIE HILL,

Plaintiff - Appellant,

versus

SUNTRUST BANK,

Defendant - Appellee.

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Appeals from the United States District Court
for the Middle District of Florida

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(January 24, 2018)

Before TJOFLAT, WILLIAM PRYOR, and JORDAN, Circuit Judges.

PER CURIAM:

Ann Marie Hill sued her former employer, SunTrust Bank, for alleged race discrimination and retaliation in violation of 42 U.S.C. § 1981. She now appeals

the district court's grant of summary judgment in favor of SunTrust. After a review of the parties' briefs and the record, we affirm.

**I**

Because we write for the parties, we assume their familiarity with the underlying record and recite only what is necessary to resolve this appeal. In reviewing the evidence, we draw all reasonable inferences in Ms. Hill's favor as the non-moving party. *See Vessels v. Atlanta Indep. School Sys.*, 408 F.3d 763, 767 (11th Cir. 2005).

Ms. Hill, who is African-American, was an employee of SunTrust for roughly thirty years before she was terminated. From 2003 until her termination in 2011, she worked as a Business Banking Relationship Manager (BBRM). She claims that she excelled in her position until the global financial crisis in 2007 and 2008, which significantly impacted the banking industry, as well as her ability to attain her performance goals.

In 2008, Robert McCollum, a white male, was Ms. Hill's supervisor. That year she received an overall evaluation rating of "3 - Fully Successful" at her annual review. The next year, in 2009, she received an overall rating of "2 - Needs Improvement."

In January of 2010, Christopher Kendall, a white male, became Ms. Hill's supervisor. Ms. Hill alleged that Mr. Kendall's actions as her supervisor—not Mr. McCollum's—prompted her lawsuit.

Mr. Kendall completed his first review of Ms. Hill in August of 2010 for her mid-year evaluation, and gave her an overall rating of "2 - Needs Improvement." Based on her scores from that review, Mr. Kendall placed Ms. Hill on a Verbal Warning and issued a Corrective Action Plan, which provided a list of action items for Ms. Hill to complete.

A couple of months later, Mr. Kendall placed Ms. Hill on a Written Warning based on her failure to meet the goals set out for her in August. Ms. Hill was again provided with a list of action items to complete. Despite being signed in November of 2010, the Verbal Warning Corrective Action Plan stated that the effective date was in October of 2010. In February or March of 2011, Ms. Hill was issued a Probation Corrective Action Plan.[1]

On March 8, 2011, Mr. Kendall suggested to Ms. Hill that she apply for a position in a different department, and on the next day completed her annual

[1] The record is unclear about when Ms. Hill was actually put on probation. Although the Probation Corrective Action Plan's effective date was February 16, 2011, and the Plan states that she would be placed on probation immediately, Ms. Hill claims she was put on probation in March of 2011, when she signed the Plan. Moreover, emails from March of 2011 state that SunTrust was "holding off on official probation status." *See* D.E. 31-3 at 59. When Ms. Hill was put on probation, however, does not alter our conclusions.

review for 2010. In that review, he gave her an overall score of "2 - Needs Improvement."

The very next day, March 10, 2011, Ms. Hill called SunTrust's employee hotline and complained that Mr. Kendall "intimidated" her and "wan[ted] to fire her." D.E. 31-4 at 8. Ms. Hill also complained about alleged unfair treatment in February of 2011. Ms. Hill alleged that Mr. Kendall insulted her on several occasions. One example she provided was a comment Mr. Kendall made about her hair. Mr. Kendall had allegedly asked Ms. Hill whether she had done something to her hair one day at work and when she said she had not, he referred to her hair style, which was styled in a "natural, twisted pattern," as a "weekend look." *Id*. The second example Ms. Hill provided involved an instance when Mr. Kendall called her a "cackling hen." *Id*. Ms. Hill also explained that she had been receiving low evaluation scores and "d[id] not want to lose her job." *Id*.

Robbin Winters from SunTrust's human resources department investigated Ms. Hill's allegations. She concluded that she did not find any evidence to support misconduct on Mr. Kendall's part. She also found that Ms. Hill's evaluation scores were consistent with her performance, but that there was an opportunity for Ms. Hill and Mr. Kendall to communicate more effectively.

On April 7, 2011, Mr. Kendall recommended Ms. Hill's termination, citing to her sustained poor performance and failure to meet her performance goals.

SunTrust's termination form stated the same bases. Sooner thereafter, Ms. Hill was terminated.

Ms. Hill then filed suit in Florida state court. When SunTrust removed the case to federal district court, Ms. Hill filed an amended complaint in which she alleged age and race discrimination and retaliation claims under 42 U.S.C. § 1981 and the Florida Civil Rights Act. The district court dismissed all of Ms. Hill's claims except the race discrimination and retaliation claims under § 1981, in which Ms. Hill alleged that she was disciplined and ultimately terminated because of her race, and that she was terminated because she complained about Mr. Kendall. After discovery, SunTrust filed a motion for summary judgment, which the district court granted. Ms. Hill now appeals.

## II

We review a district court's grant of summary judgment *de novo*. *See Vessels*, 408 F.3d at 767. 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). "A factual dispute will preclude summary judgment if its resolution might affect the outcome of the suit under the governing law or the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Flowers v. Troup Cty., Ga., School Distr.*, 803 F.3d 1327, 1335 (11th Cir. 2015) (internal quotation marks and citation omitted).

## III

The Supreme Court has explained that § 1981 "affords a federal remedy against discrimination in private employment on the basis of race." *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 460 (1975). In reviewing § 1981 claims, we rely on the same analytical framework and requirements of proof that we employ in Title VII cases. *See Standard v. A.B.E.L. Servs. Inc.*, 161 F.3d 1319, 1330 (11th Cir. 1998).

If a plaintiff brings a § 1981 claim based on circumstantial evidence, like Ms. Hill has, we use the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Standard*, 161 F.3d at 1331–33. The *McDonnell Douglas* framework initially puts the burden on the plaintiff to establish a prima facie case of discrimination. *See Flowers*, 803 F.3d at 1336. This requires the plaintiff to establish by a preponderance of the evidence that (1) she is a member of a protected class, (2) she was qualified for the position, (3) she suffered an adverse employment action, and (4) her employer treated similarly-situated employees outside of her protected class more favorably or replaced her with someone outside of her protected class. *See id.* at 1336.[2]

If the plaintiff can establish these elements, the burden then shifts to the employer to produce a legitimate, non-discriminatory reason for the alleged

[2] Ms. Hill conceded that she could not show that she was replaced by someone outside of her protected class because SunTrust replaced her with an African-American woman.

disparate treatment. *See id*. If the employer can do so, the plaintiff must show that the employer's proffered reasons are merely pretextual. *See id.*

We have recognized, however, that the *McDonnell Douglas* framework is not the only way to evaluate an employment discrimination claim at the summary judgment stage. *See Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). In *Smith*, we held that a plaintiff "will always survive summary judgment if [s]he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id*. "A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Id*. (internal quotation marks and citations omitted).

**A**

The district court concluded that Ms. Hill failed to establish a prima facie case of discrimination under the *McDonnell Douglas* framework because she failed to present similarly-situated comparators who were treated more favorably than her, and that even if she could establish a prima facie case, she failed to demonstrate that SunTrust's bases for terminating her were pretextual. The district court also concluded that Ms. Hill's claim did not fare any better under *Smith*. The district court explained that Ms. Hill did not specify what record evidence

supported her argument, and held that the only evidence unrelated to her job performance—the alleged comments Mr. Kendall made to Ms. Hill—were insufficient to support an inference of racial animus.

**B**

Ms. Hill argues first that the district court erred in rejecting her comparator evidence and she properly established a prima facie case of discrimination. She asserts that two other members of SunTrust's BBRM team—Paul Weber and Leah Douglas, a white male and female, respectively—similarly underperformed but were not disciplined or terminated like she was. She also claims that the district court erroneously restricted its analysis to the 2010 evaluations and ignored evidence showing that she outperformed Mr. Weber and Ms. Douglas in certain instances. For example, Ms. Hill points out that she made more calls than Mr. Weber and Ms. Douglas in 2010 but received a lower score than them in the "Client Focused Professionalism" category (which represented 15% of the overall score). She also asserts that the district court did not consider the fact that she outranked Mr. Weber and Ms. Douglas in certain performance measures during the first couple of months in 2011.

In evaluating whether other employees are adequate comparators, we assess "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Burke-Fowler v. Orange Cty., Fla.*, 447

F.3d 1319, 1323 (11th Cir. 2006) (quoting *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999)). Comparators have to be "similarly situated [ ] in all relevant respects." *Smith*, 644 F.3d at 1326 n.17. In the disciplinary context, we consider most importantly "the nature of the offenses committed and the nature of the punishments imposed." *Maniccia*, 171 F.3d at 1368 (internal quotation marks and citations omitted). We require the "quantity and quality" of the misconduct to be "nearly identical" to avoid second-guessing reasonable employment decisions. *See id*. at 1368–69.[3]

Based on the record before us, we conclude that Mr. Weber and Ms. Douglas were not adequate comparators because the "quantity and quality" of their performance differed from Ms. Hill's, despite the fact that they too were underperforming in certain respects. For one, Ms. Hill performed worse overall than Mr. Weber and Ms. Douglas in 2010—the year Mr. Kendall, who Ms. Hill

[3] Ms. Hill relies on *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001), in support of her position that a plaintiff does not have to prove that similarly-situated individuals were engaged in the same or "nearly identical" conduct to prove disparate treatment. *See* Br. of Appellant at 22. We are not persuaded. We have previously recognized that the "nearly identical" requirement governs, despite some cases suggesting otherwise. *See, e.g.*, *Burke-Fowler*, 447 F.3d at 1323 n.2 (rejecting case that did not apply "nearly identical" misconduct requirement and stating "we are bound to follow *Maniccia*'s 'nearly identical' standard[.]'"). It also appears that our earliest cases addressing the issue applied the "nearly identical" standard. *See Nix v. WLCY Radio/Rahall Comm'ns*, 738 F.2d 1181, 1185 (11th Cir. 1984) ("We have consistently held that a plaintiff fired for misconduct makes out a prima facie case of discriminatory discharge if he shows . . . the misconduct was nearly identical to that engaged in by an employee outside the protected class whom the employer retained.") (internal quotation marks and citations omitted); *Davin v. Delta Airlines, Inc.*, 678 F.2d 567, 570 (5th Cir. Unit B 1982) ("her burden . . . was to establish that the misconduct for which she was discharged was nearly identical to that engaged in by a male employee whom Delta retained"). *Davin* is binding precedent in the Eleventh Circuit under *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

claims discriminated against her, was the supervisor for all three employees. Ms. Hill received an overall rating of "2 - Needs Improvement," whereas Mr. Weber and Ms. Douglas both received "3 - Fully Successful" ratings based on their scores in the five evaluation categories. Across those categories, Ms. Douglas received a "3 - Fully Successful" in each category, and Mr. Weber received scores at or above a "3" except in one category. Ms. Hill received the lowest score (a "1 - Unsatisfactory") among the three employees in the most heavily weighted category ("Focus on Profitable Growth"), which represented 40% of the overall score. Ms. Hill also received lower scores than Mr. Weber and Ms. Douglas in seven of the nine subcategories of this category. Ms. Hill contends that although she and Mr. Weber both met their goals in only two subcategories, she received a lower overall category score. She fails to mention, however, that she did worse than Mr. Weber in most of the other subcategories, and in some by a large margin.

As for Ms. Hill's argument that the district court ignored evidence that she outperformed Mr. Weber and Ms. Douglas, we conclude that we cannot consider this argument because Ms. Hill did not rely on this evidence when she argued that Mr. Weber and Ms. Douglas were proper comparators below. In fact, she only argued that Mr. Kendall's disparate treatment was "most glaring" when it came to Mr. Weber's evaluation, without a citation to the record. She did not argue that Mr. Weber and Ms. Douglas were proper comparators because she outperformed

them or cite to the evidence she relies on now to support such an argument. As a result, we will not consider this argument or evidence now. *See Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009) ("It is well established in this circuit that, absent extraordinary circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal."). We therefore hold that Ms. Hill has failed to establish a prima facie case of discrimination under § 1981.[4]

**C**

Assuming she could establish a prima facie case, Ms. Hill argues on appeal that there is "ample record evidence demonstrating pretext" for both of her claims. She directs us to "the reasons articulated under section I(A)" of her brief, which lays out her comparator evidence concerning Mr. Weber and Ms. Douglas. Br. of Appellant at 39. She then adds that SunTrust's failure to explain why they did not discipline Mr. Douglas and Mr. Weber for acting similarly "points toward pretext."

[4] We recognize that Ms. Hill referred to the fact that she was "the top person on her team" on the SunTrust's Leaderboards for January and February of 2011 in the fact section of her response to SunTrust's motion for summary judgment. *See* D.E. 32 at 3. This could be the same evidence Ms. Hill references on appeal, but because she did not include a record cite on appeal, we are left to assume as much. Nevertheless, even if this is the same evidence, Ms. Hill did not preserve this argument because she did not rely on the 2011 evidence to support her argument that Mr. Weber and Ms. Douglas were similarly-situated comparators below.

*Id.*[5] We conclude that Ms. Hill has failed to show pretext even if she could have established a prima facie case of discrimination.

Despite the fact that Ms. Hill did not argue pretext in detail below, and merely referred to evidence related to Mr. Weber, the district court considered Ms. Hill's argument broadly and reviewed other evidence in the record. The district court added that Ms. Hill received poor performance reviews from her prior supervisor, Mr. McCollum, and that other BBRMs, including Ms. Douglas, were also disciplined based on their performances. We review Ms. Hill's argument notwithstanding her failure to raise it in detail below because the district court appears to have evaluated her argument with the entire record in mind, and our doing so does not alter our decision.

To establish pretext, a plaintiff must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Vessels*, 408 F.3d at 771 (quotation marks and citation omitted). The plaintiff must show "*both* that the reason [proffered by the employer] was false, *and* that discrimination was the real reason." *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007)

[5] Ms. Hill also presents a public policy argument regarding pretext at the end of her brief. She did not raise this argument below, so we do not consider it. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

(internal quotation marks and citations omitted). If the reason presented by the employer could motivate a reasonable employer, the plaintiff must meet the reason "head on and rebut it." *Id*. at 1350 (quotation marks and citation omitted).

Ms. Hill has not created a jury issue on whether the reasons stated by SunTrust for terminating her were false and that her race was the real basis. In fact, Ms. Hill does not contest that she received poor performance ratings or that this could be a reasonable basis for dismissing her. She points only to the fact that other employees were not disciplined in the same way despite their alleged poor performances. But as we previously discussed, these employees were not performing as poorly as Ms. Hill in 2010. *See Standard*, 161 F.3d at 1334 ("A plaintiff may not in all cases merely rest on the laurels of her prima facie case in the face of powerful justification evidence offered by the defendant.") (citation omitted). Moreover, as Ms. Hill herself mentions, Ms. Douglas *was* disciplined for her poor performance in 2011. Despite Ms. Hill's belief that this was Mr. Kendall "covering his tracks," she does not explain how SunTrust disciplining Ms. Douglas demonstrates that SunTrust's basis for firing *her* was pretextual. Overall, Ms. Hill has failed to contest SunTrust's reason for terminating her "head on" to "rebut it."

**D**

Ms. Hill also asserts that even if she is unable to meet the requirements of the *McDonnell Douglas* framework, she has provided sufficient evidence to

withstand summary judgment under *Smith*. Ms. Hill argues that evaluations of Mr. Weber and Ms. Douglas, in combination with Mr. Kendall's intimidating comments, serve as sufficient evidence of discrimination.[6]

We conclude that the evidence Ms. Hill presented of discrimination is insufficient even under the *Smith* framework. The fact that two of her white colleagues were given higher scores for performing better than her does not create a "convincing" inference of discrimination.

Even coupled with Mr. Kendall's comments, Ms. Hill's evidence is still insufficient. Ms. Hill does not explain how the comments made by Mr. Kendall evidence racial animus and does not try to contest the district court's reading of the record. As the district court explained, the record indicates that Mr. Kendall made the "cackling hen" comment to Ms. Hill *and* her white co-worker because they were gossiping together, and that Mr. Kendall intended to compliment Ms. Hill when he referred to her hair as a "weekend look." Taken independently or together, the evidence is insufficient to "allow a jury to infer intentional discrimination." *Smith*, 644 F.3d at 1328.

[6] Ms. Hill again attempts to raise an argument she did not discuss below. In her response to SunTrust's motion for summary judgment, Ms. Hill stated the standard under *Smith* and later asserted that based on "all of the record evidence, and drawing every reasonable inference . . . in [her] favor," she met her burden under *Smith*. D.E. 32 at 11. The district court concluded that the record did not support an inference of discrimination and evaluated Mr. Kendall's "cackling hen" and "weekend look" comments to ultimately hold that these comments did not create an inference of racial animus. Given that the district court evaluated the evidence presented and doing so does not alter our decision, we will consider Ms. Hill's argument.

## IV

Under § 1981, an employer may not retaliate against an employee for engaging in a statutorily protected activity, such as filing a complaint of discrimination. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (holding that § 1981 encompasses retaliation claims). To prove retaliation, a plaintiff must show that "(1) she engaged in statutorily protected activity[,] (2) she suffered a material adverse action[,] and (3) there was a causal connection between the protected activity and the adverse action." *Chapter 7 Tr. v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1258 (11th Cir. 2012) (internal quotation marks and citations omitted). We evaluate retaliation claims based on circumstantial evidence, like Ms. Hill's, using the *McDonnell Douglas* framework. *See Bryant*, 575 F.3d at 1307.

The district court held that the retaliation claim failed because Ms. Hill did not establish a causal connection between her complaint of discrimination to human resources and her termination given the preceding months of poor performance and discipline. The district court also held that even if Ms. Hill could satisfy the causation element, she failed to "present evidence creating a genuine issue of material fact as to whether [SunTrust's stated bases for termination were] mere pretext for retaliation." D.E. 34 at 20.

**A**

On appeal, Ms. Hill argues that the district court erred in holding that she did not establish a causal connection between her complaint to human resources and her termination. She asserts that the short time between the two events, combined with the alleged disparate treatment she was receiving, demonstrates retaliation.

Although we recognize that temporal proximity can serve as evidence of causation, *see McCann v. Tillman*, 526 F.3d 1370, 1376 (11th Cir. 2008), and there was only about a month between Ms. Hill's complaint and her termination, we cannot ignore the fact that Ms. Hill had been underperforming for three years, disciplined multiple times in 2010, and offered opportunities to improve before she was terminated in 2011. Employers are free to act on their legitimate non-discriminatory reasons for terminating an employee even if an employee has filed a discrimination claim, as long as the employee's complaint is not the basis for the termination. *See Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1270 (11th Cir. 2010) (recognizing that although "[t]he record [ ] establish[ed] that [the employer] had legitimate non-discriminatory reasons to fire [the employee] before she complained, and it remained free to act on those reasons afterward," there was a genuine issue of material fact as to whether the employer fired the employee earlier than it would have because of her complaint); *Whatley v. Metro. Atlanta Rapid Transit Auth.*, 632 F.2d 1325, 1329 (5th Cir. 1980) (concluding that there

was no causal connection because the evidence demonstrated that the employee's termination was caused by "a culmination of problems" related to the employee's performance). Aside from temporal proximity, Ms. Hill has not attempted to show what evidence establishes the causal connection between the two events so as to establish a prima facie case for retaliation. Without more, she has failed to establish a prima facie case for retaliation.

**B**

Even if we were to assume she did establish a prima facie case, Ms. Hill has not shown pretext. She failed to argue pretext below and similarly fails to articulate her rationale on appeal. Instead, she directs us to "section I(A)" of her brief. We cannot decipher from this section of her brief what evidence she believes supports her pretext argument on the retaliation claim, and it would be improper for us to construe any argument on her behalf. *See Access Now*, 385 F.3d at 1330–31 (explaining that appellate courts should not evaluate the merits of arguments not raised below or fully briefed on appeal).

**V**

Ms. Hill has not raised a genuine issue of material fact as to either of her § 1981 claims. As a result, we affirm.

**AFFIRMED.**