[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13758
Non-Argument Calendar

D.C. Docket No. 1:16-cv-03133-AT

DIANA H. BYRD,

Plaintiff-Appellant,

versus

UPS (UNITED PARCEL SERVICE),

Defendant-Appellee,

DEBBIE MATHISON,
Supervisor, et al.,

Defendants.

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

(June 2, 2020)

Before JORDAN, NEWSOM and MARCUS, Circuit Judges.

PER CURIAM:

Diana Byrd, proceeding pro se, appeals the district court's grant of summary judgment to United Parcel Service ("UPS") in her lawsuit alleging racial

discrimination and retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, and a reasonable accommodation claim under the American with Disabilities Act ("ADA"), 42 U.S.C. § 12101. On appeal, she argues that: (1) the district court failed to consider all the evidence in granting summary judgment to UPS on her Title VII claims; and (2) the district court improperly granted summary judgment to UPS on her reasonable accommodation claim. After careful review, we affirm.

We review a district court's grant of summary judgment de novo. Kernel Records Oy v. Mosley, 694 F.3d 1294, 1300 (11th Cir. 2012). Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A factual dispute exists where a reasonable factfinder could find by a preponderance of the evidence that the nonmovant is entitled to a verdict. Kernel Records, 694 F.3d at 1300. In determining whether evidence creates a factual dispute, we draw reasonable inferences in favor of the nonmoving party, but inferences based upon speculation are not reasonable. Id. at 1301. To overcome a motion for summary judgment, the nonmoving party must present more than a scintilla of evidence supporting its position. Brooks v. Cty. Comm'n of Jefferson Cty., Ala., 446 F.3d 1160, 1162 (11th Cir. 2006).

First, we are unpersuaded by Byrd's argument that the district court erred in granting summary judgment to Byrd on her Title VII racial discrimination and retaliation claims. Before suing under Title VII, a plaintiff must exhaust her

administrative remedies by filing a charge of discrimination with the EEOC within 180 days of the last discriminatory act. H&R Block E. Enterprises, Inc. v. Morris, 606 F.3d 1285, 1295 (11th Cir. 2010). While a claimant may fill out, and submit, an intake questionnaire prior to a charge, absent exceptional circumstances, an intake questionnaire will not be deemed tantamount to a charge. Pijnenburg v. West Ga. Health Sys., Inc., 255 F.3d 1304, 1307 (11th Cir. 2001) (holding that an intake questionnaire did not satisfy statutory requirements for an administrative "charge").

If remedies are exhausted, we analyze a claim based on circumstantial evidence under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which requires the plaintiff to create an inference of discrimination through her prima facie case. McDonnell Douglas, 411 U.S. at 802. If the plaintiff can make this showing, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the challenged employment action. Springer v. Convergys Customer Mgmt. Grp. Inc., 509 F.3d 1344, 1347 (11th Cir. 2007). If the employer satisfies this burden, the burden shifts back to the plaintiff to show that the proffered reason is merely a pretext for unlawful discrimination. Id. A plaintiff establishes a prima facie case of discrimination by showing that: (1) she is a member of a protected class; (2) she was qualified for the job; (3) she was subjected to an adverse employment action; and (4) her employer treated similarly situated employees outside the protected class more favorably. Evans v. Books-A-

Million, 762 F.3d 1288, 1297 (11th Cir. 2014). Bare and self-serving allegations are inadequate to carry a plaintiff's burden. Stewart v. Booker T. Washington Ins., 232 F.3d 844, 851 (11th Cir. 2000). An unlawful employment action occurs each time an employee is paid under a discriminatory compensation scheme. 42 U.S.C. § 2000e-5(e)(3)(A).

To establish a prima facie retaliation claim a plaintiff must show that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there was some causal relationship between the adverse employment action and her protected activity. Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001). A plaintiff may satisfy the causal connection element by producing sufficient evidence that the employer was aware of the protected activity and that there was a close temporal proximity between the awareness and the adverse action. Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1180 n.30 (11th Cir. 2003). An employment action is considered "adverse" only if it results in some tangible, negative effect on the plaintiff's employment. Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001).

Here, the district court did not err in granting summary judgment to UPS on Byrd's Title VII disparate-impact and retaliation claims.[1] As for Byrd's failure to

[1] Nor did the district court err in disregarding Byrd's excuses for delayed filings, since pro se litigants still must conform to procedural rules. See Albra v. Advan, Inc., 490 F.3d 826, 829 (11th Cir. 2007).

exhaust the disparate-impact claims she raised based on cross-training, time-off requests, and negative performance reviews, she failed to exhaust her remedies because she did not file a timely EEOC charge. As the record reflects, Byrd contacted the EEOC on or about May 3, 2015, but she did not file a charge against UPS until June 3, 2015. Her last day of work was November 14, 2014, which made that the last date that type of misconduct (i.e., the denial of preferred flex time or vacation days or cross-training opportunities) could have occurred. H&R Block, 606 F.3d at 1295. Because the day Byrd filed her EEOC charge, June 3, 2015, is the operative date for purposes of exhaustion, Byrd failed to exhaust her remedies by waiting more than 180 days from the last date of the alleged misconduct, November 14, 2014, to file the EEOC charge. Id.; Pijnenburg, 255 F.3d at 1307. As a result, the district court did not err in finding that those events were unexhausted and could not constitute stand-alone adverse employment actions.

The only disparate treatment claim Byrd exhausted was her claim that white co-workers were cherry-picking the easier jobs, leaving her with harder jobs that took longer to complete, which negatively affected her compensation, and consequently, her short-term disability. This claim fell within the 180-day exhaustion period because she received some form of payment through September 2015. H&R Block, 606 F.3d at 1295. Nevertheless, Byrd provided no evidence demonstrating that the alleged cherry-picking misconduct by her co-workers had a

tangible impact on her own compensation. Lucas, 257 F.3d at 1261; Evans, 762 F.3d at 1297. For example, she did not present any evidence that African Americans were specifically prohibited from cherry-picking or that the inflated production numbers resulted in higher merit raises for white employees than for African Americans. Without any concrete evidence of any adverse employment action, her own bare assertions were insufficient to establish a prima facie case and defeat summary judgment. Evans, 762 F.3d at 1297; Kernel Records, 694 F.3d at 1301; Stewart, 232 F.3d at 851.

The district court also properly granted summary judgment to UPS on Byrd's retaliation claim. As with her discrimination claim, Byrd failed to show any adverse effect on her compensation. In addition, Byrd failed to show a connection between an alleged threat from UPS Human Resources ("HR") Manager Sunny Kurian and her compensation, since Byrd offered no evidence that Kurian had control or influence over whether she received a raise. Pennington, 261 F.3d at 1266; Shotz, 344 F.3d at 1180 n.30. And even if Byrd's allegations were construed more liberally to include other allegedly retaliatory acts, she failed to demonstrate any tangible adverse employment action taken against her. Kernel Records, 694 F.3d at 1301. On this record, the district court did not err in finding that Byrd failed to establish a prima facie case of retaliation.

Similarly, we find no merit to Byrd's argument that the district court erred in granting summary judgment to UPS on her ADA reasonable-accommodation claim. The ADA prohibits discrimination against a qualified individual on the basis of disability. 42 U.S.C. § 12112(a). The burden-shifting analysis applicable to Title VII also applies to ADA claims of intentional disability discrimination. Hilburn v. Murata Elec. N. Am., Inc., 181 F.3d 1220, 1226 (11th Cir. 1999). To establish a prima facie case of discrimination under the ADA, a plaintiff must show: (1) she is disabled; (2) she is a qualified individual; and (3) she was subjected to unlawful discrimination because of her disability. Holly v. Clairson Indus., LLC, 492 F.3d 1247, 1255–56 (11th Cir. 2007).

Discrimination under the ADA also includes the failure to make a reasonable accommodation to the known physical or mental limitations of the individual. 42 U.S.C. § 12112(b)(5)(A). An employer's failure to reasonably accommodate a disabled individual is itself discrimination, and the plaintiff does not bear the additional burden of having to show that the employer acted in a discriminatory manner toward its disabled employee. Holly, 492 F.3d at 1262. The plaintiff bears the burden both to identify an accommodation and show that it is reasonable. Willis v. Conopco, Inc., 108 F.3d 282, 284–86 (11th Cir. 1997). Further, the duty to provide a reasonable accommodation is not triggered under the ADA unless a specific demand for an accommodation has been made by the plaintiff. Gaston v.

Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363-64 (11th Cir. 1999). Only after the employee has satisfied this burden and the employer fails to provide that accommodation can the employee prevail on a claim that her employer has discriminated against her. Id. at 1364.

Further, the employer is not required to accommodate an employee in any manner in which that employee desires. Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86 (11th Cir. 1997). An employer is not liable where it made reasonable efforts to communicate with the employee and to provide accommodations based on the information it possessed, and where the employee's actions caused the breakdown in the interactive process. Id. at 1286-87.

Here, the district court did not err in granting summary judgment to UPS on Byrd's reasonable accommodation claim. Although Byrd says that she was ready to return to work after her medical leave-of-absence, she admitted in her deposition that she was unsure whether she would be able to; she also admitted this in an e-mail to an HR representative, Jennifer Monyhan; and she did not present any evidence from doctors indicating she was ready to return to work in some capacity. Accordingly, Byrd did not establish that she was both disabled and a qualified individual. Holly, 492 F.3d at 1255-56.

But even assuming she could have returned to work, Byrd never clearly requested an accommodation from UPS. Gaston, 167 F.3d at 1363-64; Willis, 108

F.3d at 284–86. Rather, the evidence submitted indicates that her conversations with Monyhan were about the possibility of certain accommodations, but nothing unambiguously said that she could return if a specific accommodation was made. Stewart, 117 F.3d at 1286. On this record, Byrd failed to meet her burden by showing she was a qualified individual who made a reasonable accommodation request. Accordingly, the district court properly granted summary judgment to UPS on her ADA claim. See Holly, 492 F.3d 1255–56.[2]

AFFIRMED.

[2] Lastly, Byrd's "Motion to Amend Reply Brief" is DENIED because the brief does not conform to the Federal Rules of Appellate Procedure and it is not responsive to Appellee's brief. See Albra, 490 F.3d at 829; see also F. R. App. P. 27(a)(4), (d)(2)(D) (providing that a reply brief must not present matters that do not relate to the response and must not exceed 10 pages). Nor, moreover, does Byrd offer a valid reason as to why she should be granted leave to amend her reply brief.