NOT FOR PUBLICATION

In the United States Court of Appeals

For the Eleventh Circuit

No. 24-13815

EBONY KELLEY,
an individual,

Plaintiff-Appellant,

versus

ALLEGIANT AIR, LLC.,
a Nevada limited liability company,
d.b.a. Allegiant Airlines,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:23-cv-01162-WFJ-SPF

Before NEWSOM, LUCK, Circuit Judges, and LEIBOWITZ,* District Judge.

PER CURIAM:

Ebony Kelley appeals the District Court's final judgment and grant of summary judgment against her and in favor of Allegiant Air, LLC on her claims for race discrimination and retaliation under 42 U.S.C. § 1981. After careful review, and with the benefit of oral argument, we affirm.

I. BACKGROUND

This case involves a black employee who befriended a white co-worker who allegedly told racist jokes. Had the employee reported her friend's racist remarks and her concerns about racism in the workplace before she faced termination herself, this case might turn out differently. But that is not what is before us. Based on the summary judgment record, this case cannot result in Section 1981 race discrimination or retaliation liability, as the District Court correctly found.

A. Kelley's Employment History

Ebony Kelley ("Kelley") is a black woman who worked for Allegiant Air, LLC ("Allegiant") as a Customer Service Agent ("CSA") at the Clearwater/St. Petersburg Airport ("PIE") in

* Honorable David S. Leibowitz, United States District Judge for the Southern District of Florida, sitting by designation.

Clearwater, Florida.[1] Kelley joined Allegiant in March 2021 as a part-time CSA. In April 2021, Kelley received an hourly-rate increase upon her completion of CSA training. In July 2021, Kelley received a "Level 2 Warning for Attendance" for excessive unexcused absences from work. About eight months later, on March 4, 2022, Kelley received a "coaching" due to more repeated unexcused absences.

Then on March 9, 2022, Kelley applied for a full-time CSA position, and she was promoted to that position beginning on April 1, 2022. After that, on November 22, 2022, Kelley received a Final Warning for attendance and tardiness based upon repeated unexcused absences and late arrivals for her shifts. As of that date, Kelley had earned enough "attendance points" to warrant her discharge under Allegiant's employee policies; however, Kelley received a Final Warning instead. A little more than one month later, on December 28, 2022, Allegiant terminated Kelley's employment, citing misconduct by Kelley during an internal investigation as the reason.

[1] For convenience and because it dovetails with other evidence submitted in the case, this opinion refers to the Clearwater/St. Petersburg Airport by its three-letter International Air Transport Association code.

B. Facts Surrounding Kelley's Termination

Viewing the summary judgment evidence in the light most favorable to her, Kelley began experiencing what she viewed as racial animus from co-workers at Allegiant beginning in June of 2021. Specifically, co-workers would touch Kelley's hair (styled as an "afro") daily, commenting "is it real?" After Kelley complained to a supervisor about the "hair touching," it ceased immediately. Kelley also testified she had heard rumors about a "race war" at Allegiant, and she felt as though she was "collateral" to racial tensions at the airline. However, Kelley reported to a supervisor in November 2022 that she "chose to steer clear of it because it didn't personally involve [her]."

The events leading up to Kelley's termination began with a breakroom incident on November 20, 2022, between Kelley and her white co-worker and friend, Janelle. That evening, Janelle was using the breakroom computer to complete mandatory training when Kelley asked if she could use the computer to enter and print her flight notes. Janelle refused. According to Kelley, Janelle then stormed out of the breakroom without explanation. According to Janelle, Kelley called her a racist for not sharing the computer, which is why she left the breakroom abruptly.

After the breakroom incident, Janelle complained to HR about Kelley calling her a racist for not sharing the computer. HR subsequently interviewed Kelley about the incident. During the interview, Kelley denied calling Janelle a racist, explaining "there's nothing racist about [Janelle] not letting [Kelley] use the

computer." That said, Kelley did admit to calling Janelle a racist previously and stated Janelle had "very racist tendencies because she says a lot of stupid racist stuff."[2] Kelley never reported these prior racist remarks to management, because Janelle was "just joking" and Kelley said she "preferred peace."

On December 15, 2022, Kelley provided a written statement to HR about the events that took place in the breakroom on November 20. In that statement, Kelley denied calling Janelle a racist for not sharing the computer and also mentioned:

> As a random side note … there has been a lot of racial tension with allegiant at [the airport] as of late. Although I previously heard stories about it, I chose to steer clear of it because it didn't personally involve me. It's my understanding that the supervisors are trying to keep the incidents from becoming a huge

[2] Kelley testified at her deposition that Janelle joked, "George Washington was the only white guy with the last name Washington… because he was a slave owner." On another occasion, Janelle "made a joke about black people and chainsaws," stating black people were afraid of chainsaws because "it says n****r, n****r, n****r, n****r, n****r, n****r." Another time, Janelle complained about Kelley's car radio playing "ghetto" music too loudly, which gave Janelle a headache. Finally, Janelle and her sister told Kelley they had contracted a cold because they had "hugged a black person." There is no evidence in the summary judgment record that Kelley ever reported these interactions to HR or a supervisor. Indeed, Kelley testified that she never raised the issue until after HR investigated her for calling Janelle a racist.

> problem within the workplace by denial. Therefore, I was not comfortable expressing my concerns. . . .

On December 12 and December 19, 2022, HR interviewed and obtained written statements from three witnesses who reported that (contrary to Kelley's written statement) Kelley had indeed called Janelle a racist for not sharing the breakroom computer.

On December 19—a week after Kelley submitted her written statement to HR—HR interviewed Kelley again. During that interview, Kelley was advised that three witnesses had corroborated Janelle's version of events, and that, as a result, Kelley was being suspended for dishonesty pending further investigation.

Five hours after her suspension, Kelley e-mailed Allegiant's CEO with the subject line, "Racism at pie international." That e-mail stated, in relevant part, as follows:

> I have been wanting to contact you for a while about the ongoing racial tensions here at allegiant. I really love working at allegiant but it's out of control how situations are handled here. I've been dealing with racism and all the stereotypes that go with it since I've started. Anytime I mentioned it, it was swept under the rug as me overreacting. I recently addressed a co worker about their racist comments and then I was placed on suspension pending investigation. I have been dealing with this stupid topic my entire life. Every (sic) since I was born as a brown baby. I am hurt. I feel let down and extremely offended that I am the one accused of such acts. I was wondering if

> you could possibly contact me so I can tell my story. Honestly I don't want to work in such a racially hostile environment anymore but I feel by communicating with you, it can prevent future incidents.
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> Allegiant's CEO did not respond to Kelley's e-mail.

On December 28, 2022, Allegiant terminated Kelley's employment for purportedly lying about calling Janelle a racist, which Allegiant thought was confirmed by Kelley's e-mail to the CEO in which Kelley states, "I recently addressed a co-worker about their racist comments and then I was placed on suspension pending investigation."

II. PROCEDURAL HISTORY

On May 24, 2023, Kelley filed a Complaint against Allegiant alleging (1) race discrimination and (2) retaliation, both in violation of 42 U.S.C. § 1981. Allegiant answered the Complaint, and the Court entered a Case Management and Scheduling Order. During discovery, Kelley moved to compel the deposition of Allegiant's CEO—the intended recipient of Kelley's December 19, 2022, e-mail. The magistrate judge denied the motion, and Kelley did not appeal the ruling.[3]

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[3] Kelley contends that the District Court erred by denying her motion to compel the deposition of Allegiant's CEO. But, by failing to object to the magistrate judge's nondispositive order denying her motion to compel, Kelley waived any objection to the denial of that motion on appeal. *See O'Neal v. Am. Shaman Franchise Sys., Inc.*, 166 F.4th 1274, 1282 (11th Cir. 2026) ("We have long held that, when a party fails to timely challenge a magistrate's

In response to Allegiant's motion for summary judgment, Kelley argued that a genuine dispute existed "as to the role" Kelley's race played in both Allegiant's internal investigation and its subsequent termination of Kelley's employment. First, Kelley pointed out that Janelle's complaints about being called a racist were investigated thoroughly; whereas, Kelley's revelation that Janelle was, in fact, a racist fell on deaf ears. Because Janelle is white and Kelley is black, Kelley argued Allegiant's disparate treatment of the two women created an issue for the jury as to whether Allegiant discriminated against Kelley based on her race. Second, Kelley relied upon Janelle as an "apt comparator" who received more favorable treatment than Kelley, given that Kelley was suspended pending further investigation while Janelle continued to report to work. Third, Kelley cited her own testimony (that she did not call Janelle a racist during the breakroom incident) as creating a triable issue on whether Allegiant's proffered reason for firing Kelley was pretextual.

On October 22, 2024, the District Court granted Allegiant's motion for summary judgment on both counts of the Complaint. With respect to the race discrimination claim, the District Court found Kelley (1) was not qualified for the job given her purported dishonesty during Allegiant's internal investigation and her violation of Allegiant's attendance policies; (2) failed to show a proper comparator; (3) failed to rebut Allegiant's proffered reason

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nondispositive order before the district court, the party waived [her] right to appeal those orders in this Court." (citation modified)).

for her termination; and (4) failed to present a convincing mosaic that Allegiant terminated her employment because she is black. As for the retaliation claim, the District Court found the causal chain for establishing but-for causation was broken both by Kelley's untruthful statements given during the internal investigation as well as her conduct during the breakroom incident. As a result, Final Judgment was entered in favor of Allegiant and against Kelley.

III. STANDARD OF REVIEW

We review *de novo* the District Court's grant of summary judgment in Allegiant's favor, viewing the evidence in the light most favorable to Kelley and drawing all justifiable inferences in her favor. *See Lebron v. Sec'y of Fla. Dep't of Child. & Fams.*, 772 F.3d 1352, 1359 (11th Cir. 2014). We "apply[] the same legal standards as the district court." *Alvarez v. Royal Atl. Dev., Inc.*, 610 F.3d 1253, 1263 (11th Cir. 2010).

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 genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278, 1328 (11th Cir. 2022) (cleaned up); *see also Hammett v. Paulding Cnty.*, 875 F.3d 1036, 1049 (11th Cir. 2017) ("The fact that the record contains anything at all in support of the nonmovant's position is not dispositive; a 'genuine' dispute requires that the evidence is

such that a reasonable jury could find for the nonmovant."). When we make this determination, "a litigant's self-serving statements based on personal knowledge or observation can defeat summary judgment." *United States v. Stein*, 881 F.3d 853, 857 (11th Cir. 2018) (en banc)

A movant may meet its burden by showing that "the nonmoving party has failed to present sufficient evidence to support an essential element" of its claims. *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1311 (11th Cir. 2018) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). "[O]nce that burden is met the burden shifts to the nonmoving party to bring the court's attention to evidence demonstrating a genuine issue for trial." *Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 1121 (11th Cir. 2014) (citing *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997)). "Overcoming that burden requires more than speculation or a mere scintilla of evidence." *Id.* at 1122 (citing *Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008))

If a party attempts to create an issue of fact through an affidavit, that affidavit may be disregarded if it "flat[ly] contradict[s]" earlier "clear" deposition testimony to "unambiguous questions" without explanation. *Tippens v. Celotex Corp.*, 805 F.2d 949, 953–54 (11th Cir. 1986) (cleaned up). We review de novo issues of appellate jurisdiction. *See Allen v. AT&T Mobility Servs.*, LLC, 104 F.4th 212, 215 (11th Cir. 2024). "We may affirm on any ground supported by the record, regardless of whether that

ground was relied upon or even considered below." *Waldman v. Conway*, 871 F.3d 1283, 1289 (11th Cir. 2017) (per curiam).

IV. DISCUSSION

A. Section 1981 Race Discrimination

Title 42, United States Code, Section 1981 provides that "[a]ll persons … shall have the same right … to make and enforce contracts … and to the full and equal benefit of all laws … as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Section 1981 "affords a federal remedy against discrimination in private employment," notwithstanding other available remedies like Title VII. *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Section 1981 also provides for a private cause of action for employees who face retaliation for their complaints about workplace discrimination. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445 (2008); *see also Ismael v. Roundtree*, 161 F.4th 752, 759 (11th Cir. 2025). "An employee must prove (1) intentional racial discrimination (2) that caused a contractual injury." *Melton v. I-10 Truck Ctr., Inc.*, 166 F.4th 905, 912 (11th Cir. 2026) (citation omitted).

The elements of a cause of action for race discrimination under Section 1981 are "(1) that the plaintiff is a member of a racial minority; (2) that the defendant intended to discriminate on the basis of race; and (3) that the discrimination concerned one or more

of the activities enumerated in the statute."[4] *Kinnon v. Arcoub, Gopman & Assocs., Inc.*, 490 F.3d 886, 891 (11th Cir. 2007) (quoting *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1270 (11th Cir. 2004) (internal quotation marks omitted)). "Section 1981 liability must be founded on purposeful discrimination." *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 472 (11th Cir. 1999) (citing *Gen'l Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982); *Lincoln v. Bd. of Regents of Univ. Sys. of Ga.*, 697 F.2d 928, 935 n.6 (11th Cir. 1983)). To survive summary judgment, the plaintiff "must identify a genuine issue of material fact as to each element." *Kinnon*, 490 F.3d at 891.

Kelley satisfies the first and third elements of her Section 1981 race discrimination claim as an (1) African-American and (3) full-time employee. Looking at the second element—that Allegiant intended to discriminate against Kelley on the basis of race—discrimination can be proven through direct or circumstantial evidence. *See Hinson v. Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 827 (11th Cir. 2000). Direct evidence is evidence that, "if believed, proves the existence of a fact without inference or presumption. . . . Only the most blatant remarks whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination."

[4] "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Fernandez v. Trees, Inc., 961 F.3d 1148, 1156 (11th Cir. 2020) (cleaned up).

In single motive cases where there is no direct evidence of discrimination, as is the case here, there are two principal ways in which a plaintiff may establish such intent through circumstantial evidence. The first way is by using the burden-shifting framework under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220 (11th Cir. 2019) (*en banc*). As explained in *Lewis*:

> When proceeding under *McDonnell Douglas*, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination by showing (1) that she belongs to a protected class, (2) that she was subjected to an adverse employment action, (3) that she was qualified to perform the job in question, and (4) that her employer treated "similarly situated" employees outside her class more favorably.
>
> If the plaintiff succeeds in making out a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Finally, should the defendant carry its burden, the plaintiff must then demonstrate that the defendant's proffered reason was merely a pretext for unlawful discrimination, an obligation that merges with the plaintiff's ultimate burden of persuading the

> factfinder that she has been the victim of intentional discrimination.

Id. at 1220–21 (internal citations and quotation marks omitted).

However, the *McDonnell Douglas* framework is not, and "never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion. . . ." *Ismael*, 161 F.4th at 760 (quoting *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (internal quotation marks omitted)). Therefore, a plaintiff may also survive summary judgment if she can present circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent. *Tynes v. Fla. Dep't of Juv. Just.*, 88 F.4th 939, 947 (11th Cir. 2023).

Under the *Smith* framework, "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." 644 F.3d at 1328 (cleaned up) (emphasis added). "A 'convincing mosaic' may be shown by evidence that demonstrates, among other things, (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) that the employer's justification is pretextual." *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (alteration adopted and citation omitted).

The bottom line here: this case is completely devoid of any evidence of direct discrimination. Kelley provided no evidence of

any statements regarding her protected status made by her supervisors at Allegiant. The only direct evidence in the record of racism are statements made by Kelley's co-worker Janelle, which Kelley characterized and took as "jokes." Notably, Kelley never reported these statements to management until after Janelle reported Kelley for calling her a racist during the breakroom incident. Thus, due to the lack of direct evidence, to survive summary judgment, Kelley had to either establish a *prima facie* case under *McDonnell Douglas* or point to evidence of a convincing mosaic of intentional discrimination.

Viewing the evidence in the light most favorable to Kelley, she failed to make out a *prima facie* case of Section 1981 discrimination. Kelley failed to show that either Janelle (or her sister) had similar employment histories, jobs, or disciplinary records, and Kelley certainly did not show either of these women were suspected of lying during an investigation. So, to survive summary judgment, Kelley had to point to evidence establishing a convincing mosaic of intentional discrimination. That she did not do.

In evaluating whether Kelley made this showing, the District Court correctly applied the relevant factors. First, as for suspicious timing, while there was a close proximity between Kelley's e-mail to Allegiant's CEO and her termination, the e-mail essentially confirmed Kelley lied during the investigation. With respect to better treatment of similarly-situated employees, Kelley failed to show that Janelle was similarly situated as far as

employment history, disciplinary history, or that Janelle lied during an investigation, as noted above. Finally, as far as pretext goes, Kelley's argument—that the three breakroom-incident witnesses failed to recount exact details—falls flat. All three witnesses told the exact same story: Janelle left the breakroom after Kelley called her a racist. Allegiant's crediting three witnesses' accounts over the alleged offender's self-serving one is not dubious.[5] Finally, Allegiant's interpretation of Kelley's e-mail to the CEO as an admission that she lied to HR about the breakroom incident was reasonable.

Thus, the District Court did not err in granting summary judgment in favor of Allegiant and against Kelley on her Section 1981 race discrimination claim. We affirm summary judgment on Count I.

B. Section 1981 Retaliation

To bring a *prima facie* claim for retaliation under Section 1981, "a plaintiff must prove that [s]he engaged in statutorily

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[5] Kelley's attempt to use "me too" evidence to support her claim for intentional discrimination is misplaced. Such evidence is generally probative of hostile work environment claims, which Kelley did not assert. *See Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1285–86 (11th Cir. 2008) ("Goldsmith's 'me too' evidence does not rise to the level of habit under our precedents. First, Goldsmith offered evidence of only four responses of Bagby Elevator to complaints of racial discrimination. Four examples are not numerous enough to support an inference that Bagby Elevator systematically terminated any black employee who complained about discrimination. … In sum, the 'me too' evidence was marked by a variety of responses to different situations involving only four black employees.").

protected activity, [s]he suffered a materially adverse action, and there was some causal relation between the two events." *Goldsmith*, 513 F.3d at 1277 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)). Establishing the causation element requires the plaintiff to demonstrate that "her protected activity was a but-for cause of the alleged adverse action by the employer." *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1135 (11th Cir. 2020) (en banc) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013)); *see also Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 924 (11th Cir. 2018) ("Stated another way, a plaintiff must prove that had she not complained, she would not have been fired."). This requires the plaintiff to "show that the decision-makers were aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated." *Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002) (citation and internal quotation marks omitted).

Alternatively, "causation may be established when a decisionmaker followed a biased non-decisionmaker's recommendation without independently investigating the basis for the complaint." *Matamoros v. Broward Sheriff's Off.*, 2 F.4th 1329, 1336 (11th Cir. 2021) (citations omitted). 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." *Goldsmith*, 513 F.3d at 1278 (quoting *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998) (citation and internal quotation marks omitted)). Entering summary judgment is appropriate where a plaintiff fails to satisfy

any of the three elements of her *prima facie* case. *See Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1433 (11th Cir. 1998).

In this case, the District Court correctly concluded Kelley failed to show a causal connection between any alleged protected activity and Allegiant's investigation, suspension, or termination of her employment. "Under but-for causation statutes, like § 1981, we ask whether the discriminatory conduct had a 'determinative influence' on the injury." *Ziyadat v. Diamondrock Hosp. Co.*, 3 F.4th 1291, 1297–98 (11th Cir. 2021) (quoting *Sims v. MVM, Inc.*, 704 F.3d 1327, 1336 (11th Cir. 2013)).

The District Court correctly found that Kelley's misconduct of dishonesty was a superseding, intervening act which severed any causal connection. *See Berry v. Crestwood Healthcare LP*, 84 F.4th 1300, 1312–13 (11th Cir. 2023) (affirming summary judgment on retaliation claim; "intervening discovery of misconduct fatally undermines the probative value of temporal proximity between her protected activity and her termination"); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (explaining employers need not suspend previously planned actions because of intervening protected activity; "proceeding along lines previously contemplated, though not yet definitely determined, is no evidence what[so]ever of causality"). Kelley's termination occurred after she sent her e-mail to Allegiant's CEO, and Allegiant's interpretation of that e-mail (as a de facto admission of Kelley's earlier lie, corroborated by witness testimony), was not pretextual or unreasonable.

Thus, the District Court did not err in granting summary judgment against Kelley on her Section 1981 retaliation claim. Accordingly, we affirm summary judgment on Count II.

V. CONCLUSION

For the foregoing reasons, we affirm the District Court's grant of summary judgment on both counts of the Complaint.

AFFIRMED.