

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-11374
Non-Argument Calendar

FOLASADE A. LOYE,

Plaintiff-Appellant,

versus

EMORY UNIVERSITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:23-cv-05847-JPB

Before JORDAN, LUCK, and KIDD, Circuit Judges.

PER CURIAM:

Folasade Loye, a former administrator at Emory University, sued the university after it fired her, alleging age discrimination and retaliation under the Age Discrimination in Employment Act. She

appeals the summary judgment for Emory on both counts. After careful review, we affirm.

FACTUAL BACKGROUND

Loye began working for Emory in 2006, and was promoted to her most recent position—financial manager—in 2013. From 2016 to 2021, Loye reported to the senior administrator of Emory’s financial department. During that period, Loye’s performance evaluations were generally positive, indicating that she either met or exceeded expectations.

While at Emory, Loye complained several times about discrimination and harassment. In 2016, she filed a discrimination report with Emory’s Office of Equity and Inclusion. She argued that her then-supervisor had denied her promotions and discriminated against her based on her race. The office told her it found no evidence to corroborate her report. In 2021, she filed another discrimination complaint with the office against her entire department for failing to promote her. The office interviewed her, but explained in a letter it would not investigate any further.

When her supervisor retired in 2021, Loye applied for his position, but in April 2022, Emory hired Matt Drohan instead, and he became Loye’s new supervisor. In March 2022, Loye says that her former supervisor, who had agreed to stay on for a few months while they hired his replacement, asked her when she was going to retire, and another Emory employee asked the same question, threw a laptop onto her lap, and yelled at her.

25-11374

Opinion of the Court

3

Despite the generally positive performance reviews, Loye's retiring supervisor had an "extended conversation" with Drohan about "problems that he was not able to address" with Loye, including her "lack of ability" and "challenging interpersonal relationships with team members." Drohan thought Loye's position should encompass more responsibilities than she was currently fulfilling, and he began to redefine her role and set expectations for her going forward. On September 6, 2022, he met with Loye and "raised concerns" about her performance. On September 14, he submitted his first performance review of Loye, which indicated she "need[ed] improvement." On September 26, he emailed Loye to follow up on the performance review and to confirm she had received it.

On February 13, 2023, Loye filed a discrimination charge with the Equal Employment Opportunity Commission. Her charge alleged race discrimination, age discrimination, and retaliation on the bases of both race and age. On February 15, Emory was notified of the charge. In September 2023, the commission dismissed Loye's charge and notified her of her right to sue.

On February 14, 2023, Drohan met with Loye again to clarify his expectations for her role. On March 14, he wrote her with a list of questions about recent work she had submitted and asked her to complete her work instead of delegating it to others. On May 22, Drohan wrote Loye telling her that she "d[id] not meet the departmental performance expectations on a consistent basis" and

that she “ha[d] not demonstrated an understanding of the expectations for [her] role, building of trust, adequate delivery of results, effective communication, taking initiative, problem solving,” or the “functional skills and knowledge” her role required. Accordingly, he placed Loye on a performance improvement plan, which had an overall assessment scheduled for the end of July.

While on the plan, Loye frequently met with Drohan and Emory human resources representatives to discuss her progress. At one meeting, Drohan and the representative told Loye that she was not allowed to record the meeting, and although she told them that she would not, she did anyway. Later, Loye requested leave to travel to Nigeria. Drohan denied Loye’s leave request because she was on an active performance improvement plan, but Loye still traveled to Nigeria without leave. On June 21, Drohan issued Loye a written warning, explaining that she had violated university policy by recording meetings, had been disengaged and unresponsive in a department meeting, and had been insubordinate and inappropriate in her communications, particularly by deflecting responsibility for her work tasks.

Drohan continued to meet with Loye regarding her performance improvement plan and sent her summaries that indicated her progress was unsatisfactory. For example, Drohan explained that Loye was disengaged, missing work deadlines, not accepting responsibility for tasks within her purview, and showing a lack of substantive competency at her job. Additionally, Drohan wrote that Loye had not taken initiative to set up their weekly meetings

25-11374

Opinion of the Court

5

and had not put effort into meeting the objectives of the performance improvement plan.

Finally, on July 26, Drohan texted Loye that he was rescheduling her performance improvement meeting to that afternoon and asked her to confirm her attendance. When she responded that she was too busy to meet, Drohan replied that her attendance was not optional and she needed to confirm the meeting. Loye declined the meeting invitation and didn't attend. After Loye skipped the meeting, Drohan fired her, effective immediately, "[d]ue to ongoing performance failures."

Drohan then sought to hire Loye's replacement. The job posting specified the minimum qualifications, including a "[b]achelor's degree in accounting or finance, [seven] years of related experience, preferably in healthcare with a MBA or CPA preferred OR [four] years [of] experience required preferably in healthcare with a MBA or CPA required." He interviewed several candidates and hired a thirty-two-year-old with a bachelor's degree in economics, a master's degree in health administration, and six years of work experience.

PROCEDURAL HISTORY

Loye sued Emory, alleging two violations of the Age Discrimination and Employment Act. First, she alleged the university had discriminated against her by issuing her reprimands for minor performance issues and "by terminating her because of her age." Second, Loye asserted Emory had retaliated against her for filing

her charge with the commission “in the form of [] adverse employee reviews, continued criticism of her job performance, and ultimately by termination.”

Emory moved for summary judgment on both claims. As to the age-discrimination claim, it argued that Loye couldn’t establish a prima facie case, and that even if she could, Emory had offered legitimate, nondiscriminatory reasons for terminating her which she could not rebut. As to the retaliation claim, Emory argued that its actions were not causally related to the discrimination charge Loye filed with the commission and, again, that Loye could not show its stated legitimate nondiscriminatory reason for terminating her was a pretext.

Loye responded, arguing that she had established a prima facie case of age discrimination and that she had created a genuine issue of material fact about whether Emory’s stated reason for the termination was pretextual. Similarly, she argued that she had presented evidence establishing a prima facie case of retaliation and supporting an inference that Emory’s reason for firing her was pretextual.

A magistrate judge issued a report recommending granting Emory’s summary-judgment motion. As to age discrimination, the magistrate judge concluded Loye had established a prima facie case, but that Emory had “articulated a legitimate, non-discriminatory reason” for termination—her “job performance was unsatisfactory and failed to meet [Drohan’s] expectations.” And Loye had

25-11374

Opinion of the Court

7

not established that Emory’s reason was a “pretext for age discrimination.” The magistrate judge also explained that Loye “had not argued . . . that a convincing mosaic of age discrimination [evidence] exist[ed],” and he “fail[ed] to see one.”

As to retaliation, the magistrate judge concluded that Loye offered no evidence of causation and thus “failed to establish a prima facie case.” And even if Loye could establish a prima facie case, “her claim still fail[ed] because Emory terminated her employment for a legitimate, non-retaliatory reason,” which Loye had not shown was a pretext.

The magistrate judge warned the parties (in bold print) that “[i]f no objections [were] filed” within fourteen days, the recommendation could be “adopted as the opinion and order of the [d]istrict [c]ourt, and on appeal, [we would] deem waived any challenge to factual and legal findings to which there was no objection.” When neither side filed objections, the district court adopted the report and granted summary judgment for Emory.

DISCUSSION

On appeal, Loye challenges the district court’s summary judgment for Emory on both her age-discrimination claim and her retaliation claim. We’ll take each in turn.

The Age-Discrimination Claim

First, Loye argues that the district court erred by granting summary judgment on her age-discrimination claim. But she waived that challenge by failing to object to the magistrate judge’s

report, and she doesn't contend that this is one of the rare exceptions where we review for plain error in the interests of justice.

After the magistrate judge issued his report, he warned the parties that “[i]f no objections [we]re filed” the district court may adopt the recommendation and that we would “deem waived any challenge to factual and legal findings.” Loye didn't object, and the district court adopted the magistrate judge's recommendation as its final order. She, therefore, waived any challenge to the report. *See* 11th Cir. R. 3-1; *see also* 28 U.S.C. § 636(b)(1).

There's a narrow exception to the general rule allowing us to review arguments—even where a party didn't object—for plain error “if necessary in the interests of justice.” *See* 11th Cir. R. 3-1. But in Loye's initial brief, she made no argument that our plain-error exception applies. That means she waived this argument too. *See Smith v. Marcus & Millichap, Inc.*, 106 F.4th 1091, 1099 (11th Cir. 2024) (citing *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014)).

Even if Loye did preserve her argument that we should review for plain error, she still could not prevail because she hasn't met the heightened plain-error standard for civil cases. Civil plain-error review “rarely applies.” *Id.* (quoting *Ledford v. Peebles*, 657 F.3d 1222, 1258 (11th Cir. 2011)). “Even when it does, we require a greater showing of error than in criminal appeals.” *Id.* (quotation omitted). We consider an issue not raised in the district court only if “refusal to consider it would result in a miscarriage of justice.”

25-11374

Opinion of the Court

9

Burch v. P.J. Cheese, Inc., 861 F.3d 1338, 1352 (11th Cir. 2017) (quoting *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982)).

Loye hasn't made that showing here. First, she contends that Emory's reason for termination was pretextual, pointing to a "series of age-related comments . . . by the very people who made the adverse decisions." Loye points to her testimony that, before she reported to Drohan, two of her supervisors asked her when she would retire. But those remarks were not made by decisionmakers who were responsible for the allegedly discriminatory acts. Drohan, not those other managers, gave Loye the performance review saying she needed improvement, implemented her performance improvement plan, issued her the written warning, and fired her. See *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1079 (11th Cir. 2003) ("[S]tatements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process' at issue will not satisfy the employee's burden." (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring))).

Next, Loye relies on her testimony that, after Drohan implemented her performance improvement plan, he told her "[m]aybe about three times" that "it would be better if [she] resigned because [otherwise she] would be terminated." But those comments suggest an offer for Loye to avoid the stigma of termination rather than discriminatory intent. Loye testified that, when Drohan made the statements, she had already received a performance evaluation that she needed improvement and had been put on a performance

improvement plan. She also testified that Drohan had told her she “would be terminated” if she didn’t resign, so “it would be better if [she] resigned.” His comments do not suggest that Emory’s stated reason for terminating Loye—her poor job performance—was a pretext. Instead, they suggest that Drohan was offering Loye a chance to avoid the stigma of termination and take advantage of the retirement benefits for which she was eligible. *See Young v. Gen. Foods Corp.*, 840 F.2d 825 (11th Cir. 1988) (affirming summary judgment because an “offer of retirement” was “not probative of discriminatory intent” where the employer decided to terminate its employee but offered him “the alternative choice of retirement . . . to avoid the stigma associated with having been fired”). *See also Ziegler v. Beverly Enters.-Minnesota, Inc.*, 133 F.3d 671, 676 (8th Cir. 1998) (“We do not think that suggesting retirement to an employee who is eligible for retirement, and who is not performing satisfactorily, provides a reasonable basis for inferring age discrimination.”).

Third, Loye argues that the fact that Emory hired Drohan instead of her, and then hired a younger, less experienced candidate to replace her, “undermines the credibility” of Emory’s nondiscriminatory reason for firing her. Not so. As Loye concedes, she didn’t bring a failure-to-promote claim regarding Emory’s choosing Drohan over her for the supervisor position. And Emory’s choices of candidates—both for the supervisor position and for Loye’s replacement after she was terminated—were consistent with Emory’s nondiscriminatory explanation for firing Loye. Nothing about the candidates suggests they were hired based on

their age, rather than based on their ability to do the job. Both candidates met the educational and work-experience requirements for the positions. And while the fact that Loye's replacement was younger than her may be sufficient to establish a prima facie case of age discrimination, it's not enough, on its own, to support an inference of pretext. *See Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1315–16 (11th Cir. 1998) (holding plaintiffs' data showing that defendant fired eight engineers whose average age was 56.6 years old and hired ten engineers whose average age was 33.7 years old “may have satisfied plaintiffs' prima facie burden, [but] it failed to support any inference of intentional age discrimination after [defendant] explained the data in a plausible, age-neutral fashion”). Here, the record shows Emory had a legitimate basis for firing Loye. She had repeatedly violated university policy and failed to live up to her supervisor's expectations.

Fourth, Loye asserts that her decreased performance ratings, “in conjunction with the retirement comments and Loye's protected activity,” establishes a “compelling mosaic that casts substantial doubt on Emory's stated reason” for her firing. But Loye has not shown a convincing mosaic here. As we explained above, the only retirement comments made by the decisionmaker, Drohan, suggested an offer of a more favorable alternative to termination, rather than a discriminatory animus. Loye's “protected activity”—her discrimination charge with the commission—is relevant not to her age-discrimination claim, but to her retaliation claim, which we discuss below. That leaves only “the shift in Loye's performance ratings.” But the fact that Loye's performance ratings

were positive for some time before trending downward in the time leading up to her termination doesn't, by itself, support an inference that age was the reason Drohan fired her. We agree with the district court that no convincing mosaic of circumstantial evidence exists in this record.

Thus, even if Loye hadn't waived the argument that we should review for plain error, there was no plain error here.

The Retaliation Claim

Loye also argues that the district court erred by granting summary judgment for Emory on her retaliation claim. But, just as with her arguments about the age-discrimination claim, Loye waived any challenge to the magistrate judge's recommendation on her retaliation claim, and her appeal didn't invoke the "rare exception" of plain error review in the interests of justice.

The magistrate judge recommended granting summary judgment for Emory because it concluded that Loye had shown neither a *prima facie* case of retaliation, nor any evidence that Emory's stated non-discriminatory reason for firing her was pretextual. Just as with her age-discrimination claim, Loye didn't object to the magistrate judge's conclusions about retaliation, and the district court adopted the magistrate judge's recommendation as its final order. And again, Loye doesn't argue in her initial brief that we should apply the rare exception to review the magistrate judge's conclusions "for plain error . . . in the interests of justice." See 11th Cir. R. 3-1. Thus, she has abandoned her challenge to the summary judgment. See *Sapuppo*, 739 F.3d at 681.

Even if Loye had preserved the argument that we should review for plain error, she hasn't satisfied the civil plain-error standard on her retaliation claim. *See Smith*, 106 F.4th at 1099; *Burch*, 861 F.3d at 1352. Loye contends that she established a prima facie case of retaliation because there was a causal connection between Emory's adverse actions and her complaint of discrimination to the commission. Specifically, Loye relies on the fact that Emory "plac[ed] her under special scrutiny" when Drohan met with her on February 14, 2023, the day after she filed her charge with the commission. But, even assuming the "special scrutiny" was a sufficient adverse action to support a retaliation claim, the record shows that "Emory received notice" of Loye's discrimination charge "[o]n February 15, 2023." Because Loye does not dispute that the February 14 meeting took place before Emory knew of her discrimination charge, she cannot show a causal connection between the two.

Loye also argues that she presented a convincing mosaic of circumstantial evidence that was sufficient for a fact finder to infer retaliation. She cites three pieces of evidence. First, she points to "the continuous escalation of adverse actions that [she] faced." But Loye doesn't identify the specific actions by Emory that made up the "continuous escalation." To the extent her argument is based on the institution of her performance improvement plan in May 2023 and her termination in July, both of those actions were too far removed from Loye's protected activity in February to give rise to an inference of causation based on timing. *See Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (explaining "mere

temporal proximity, without more, must be ‘very close’” to give rise to an inference of causation, and “[a] three to four month disparity . . . is not [close] enough” (quoting *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001)). And to the extent her argument is based on the criticism and scrutiny of her performance at work, it also fails. Even assuming that workplace criticism and scrutiny constitutes an adverse activity, Emory’s concerns predated Loye’s protected activity, as we explained above, so the temporal proximity does not support an inference of causation. See *Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006) (“[I]n a retaliation case, when an employer contemplates an adverse employment action before an employee engages in protected activity, temporal proximity between the protected activity and the subsequent adverse employment action does not suffice to show causation.”).

Next, Loye asserts that “similarly situated younger employees were treated better than she was.” Specifically, Loye again notes Emory’s decision to hire a younger replacement after she was fired and its decision to hire Drohan for the supervisor position that Loye also applied for. But Loye was not situated similarly to the candidate that was hired to replace her. Unlike that candidate, Loye had a history of violating university policy, poor workplace performance, and insubordination. And Emory chose Drohan over Loye for the supervisor position long before Loye engaged in her protected activity. So, neither of Emory’s hiring decisions is probative of retaliatory intent.

25-11374

Opinion of the Court

15

Last, Loye repeats her argument that Emory’s reason for terminating her was pretextual, relying on the “same evidence of pretext” from her age-discrimination claim. But, as we explained, Loye’s evidence doesn’t support an inference that Emory’s non-retaliatory reason for terminating her was pretextual.

AFFIRMED.