

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-13659
Non-Argument Calendar

SYURII-KIAIRA SMITH,

Plaintiff-Appellant,

versus

BIRGE & HELD PROPERTY MANAGEMENT, LLC,
BIRGE & HELD ASSET MANAGEMENT, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:23-cv-05892-TWT

Before JILL PRYOR, BRANCH, and LUCK, Circuit Judges.

PER CURIAM:

Syurii-Kiaira Smith brought an employment-discrimination suit against her employer, Birge & Held Asset Management, LLC.¹ Smith alleged that Birge retaliated against her under Title VII, discriminated against her based on disability, and negligently retained an employee who harassed her in violation of Georgia law. The district court granted summary judgment for Birge on all claims. As to the negligent-retention claim, the district court concluded that to plead it properly Smith also had to plead an underlying tort committed by the negligently retained employee. Because Smith hadn't done so, Birge was entitled to summary judgment. Smith only appeals the judgment for Birge on her negligent-retention claim. She argues that she did plead an underlying tort: intentional infliction of emotional distress. After careful consideration, we agree with Smith. We therefore vacate the judgment for Birge on the negligent-retention claim and remand for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Smith, who is black, worked as an assistant property manager at an apartment complex that Birge owned in Decatur, Georgia. She reported to property manager Josette Fryer, who is also black. One day, Smith emailed Birge's human-resources manager to complain about Fryer's conduct. She explained that, beginning

¹ Smith also sued Birge & Held Property Management, LLC. But after the parties agreed that the property management company did not belong in the lawsuit, the district court dismissed the claims against the property management company, and that ruling is not challenged on appeal.

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when she was hired, Fryer started making inappropriate racial comments to her. For example, although Smith had applied to work as a leasing agent, Fryer hired her into the higher-paying assistant manager role over another non-black candidate. When Smith asked why Fryer had passed over the non-black candidate, Fryer told her “white people do [that] all the time” and that “black people need to stick together.” Later, Fryer proposed that she and Smith could host events in the apartment complex’s courtyard, charge vendors to participate, and pocket the proceeds. After Smith refused, Fryer called her a “typical [b]lack girl” because she did not want to make money. Soon after, Fryer began treating her poorly at work by, for example, refusing to approve qualified lease applicants because Smith had processed their applications. By the time of Smith’s email to human resources, Smith had already complained several times, and nothing had been done about it.

Two days after she sent the email, there was another incident at work. Smith had been meeting with a therapist because she was suffering from depression after the death of her son. Fryer had apparently grown skeptical of Smith’s requests for days off to address her mental health. Fryer asked a leasing agent to visit Smith’s doctor’s office to see if a sick note that Smith had provided was legitimate. When Smith found out about this, she confronted Fryer at the leasing office. While the parties disputed what happened at that confrontation, Smith admitted that she “lost it.” The human resources representative testified that she could hear screaming and cursing in the background when Fryer called her

during the confrontation, and the representative told Fryer to call the police.

Birge fired Smith a few days later, citing her conduct during the confrontation. Smith then sued Birge.

PROCEDURAL HISTORY

Smith brought three claims. First, she alleged that Birge violated Title VII when it fired her in retaliation for reporting Fryer's racist conduct to human resources. Second, she alleged that Birge violated the Americans with Disabilities Act by firing her because of her depression. Third, she alleged that Birge violated section 34-7-20 of the Georgia Code by negligently retaining Fryer as an employee despite "kn[owing] of Ms. Fryer's propensity to engage in harassing behavior toward Ms. Smith that was intended to inflict emotional distress." *See* O.C.G.A. § 34-7-20.

After discovery, Birge moved for summary judgment. As to the Title VII and ADA claims, Birge argued that it had a legitimate reason to fire Smith—her behavior during the confrontation violated Birge's workplace policies. As to the negligent-retention claim, Birge argued that "[a] negligent[-]retention claim is necessarily derivative and can only survive summary judgment to the extent that the underlying substantive claims survive the same." Because Birge had already advanced a winning argument on the Title VII and ADA claims, there was no remaining underlying substantive claim that could form the basis of a negligent-retention claim.

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Smith responded to Birge’s motion. As to Birge’s argument about negligent retention, she agreed that such a claim was necessarily “derivative,” but she argued she had alleged underlying tortious conduct—Fryer’s intentional infliction of emotional distress.

The magistrate judge recommended summary judgment on all three counts. The Title VII and ADA claims failed because Smith could not show that Birge’s reason for firing her—her behavior when she confronted Fryer—was not the true reason for firing her. The negligent-retention claim, the magistrate judge explained, did not allege any underlying tortious conduct. Although Smith had “reference[d] intentional infliction of emotional distress in her summary judgment response, there [was] no state law claim for intentional infliction of emotional distress alleged in the complaint.”

Smith objected to the magistrate judge’s report, arguing that she had “satisfied her burden under Federal Rule of Civil Procedure 8(a)(2) by pleading facts which, taken as true, establish a plausible claim for negligent retention and negligent supervision under Georgia law.” She also pointed out that Birge hadn’t argued the merits of the intentional-infliction-of-emotional-distress issue. Birge responded, arguing that Smith never mentioned intentional infliction of emotional distress in her preliminary report or initial disclosures, and maintaining that, “[i]n the [c]omplaint, there [was] no mention of an intentional infliction of emotional distress claim.”

The district court adopted the magistrate judge’s report and recommendation “as the judgment of the court,” overruling

Smith's objection without specifically commenting on it. Smith appeals, conceding that the district court properly dismissed her Title VII and ADA claims, but arguing, as she did below, that the district court erred in granting summary judgment on her negligent-retention claim.

STANDARD OF REVIEW

"We review de novo a district court's grant of summary judgment, applying the same legal standards as the district court." *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1263 (11th Cir. 2010) (citation modified).

DISCUSSION

The only issue on appeal is whether the district court erred in granting summary judgment on the negligent-retention claim. On one hand, Smith contends that she pleaded a viable negligent-retention claim that was premised on the underlying tortious conduct of Fryer's intentional infliction of emotional distress. On the other hand, Birge argues that Smith never mentioned the intentional-infliction-of-emotional distress claim until her response to its motion for summary judgment.

A movant is entitled to summary judgment "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). "At the outset, the moving party has the burden of demonstrating that there are no genuine issues of material fact." *Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 1121 (11th Cir. 2014). When, as here, the nonmovant would have the burden of proof at

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trial, “to prevail at summary judgment the moving party has the burden of either negating an essential element of the nonmoving party’s case or showing that there is no evidence to prove a fact necessary to the nonmoving party’s case.” *See McGee v. Sentinel Offender Servs., LLC*, 719 F.3d 1236, 1242 (11th Cir. 2013) (per curiam) (citing *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991)).

Under Georgia law, “[a]n employer ‘is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency.’” *Munroe v. Universal Health Servs., Inc.*, 596 S.E.2d 604, 605 (Ga. 2004) (quoting O.C.G.A. § 34-7-20). So, “an employer may be liable for hiring or retaining an employee the employer knows or in the course of ordinary care should have known was not suited for the particular employment.” *Id.* (citation modified).

The parties agree that, under Georgia law, a negligent-retention claim requires the plaintiff to plead underlying tortious conduct. *See Keisha v. Dundon*, 809 S.E.2d 835, 838 (Ga. Ct. App. 2018). The parties, however, dispute whether Smith’s complaint actually alleged that Birge’s negligent retention was based on Fryer’s intentional infliction of emotional distress.

Smith’s complaint unambiguously referred to intentional infliction of emotional distress. Within the paragraphs under the negligent-retention count, the complaint alleged that “Birge knew of Ms. Fryer’s propensity to engage in harassing behavior toward

Ms. Smith that was *intended to inflict emotional distress* by way of several complaints Ms. Smith made against Ms. Fryer.” Moreover, the complaint alleged that “Birge negligently retained the service of Ms. Fryer, a dangerous employee, after knowing . . . that it was foreseeable that she would engage in harassing behavior toward Ms. Smith.” So, Smith alleged underlying tortious conduct, invoking intentional infliction of emotional distress in those exact words, and explained that Birge failed to exercise care by being indifferent to that tortious conduct.

At summary judgment, Birge tried to defeat Smith’s negligent-retention claim on the purely legal grounds that “[a] negligent[-]retention claim is necessarily derivative,” and requires an “underlying substantive claim[.]” Because Smith’s Title VII and ADA claims failed, her negligent-retention claim had to fail too. But that argument relied on a faulty premise—that Smith’s negligent-retention claim was derivative of her Title VII or ADA claims. Birge’s argument thus failed to “negat[e] an essential element of [Smith]’s case.” *See McGee*, 719 F.3d at 1242. Birge also never contested the substance of the intentional-infliction-of-emotional-distress claim, so it did not “show[] that there [was] no evidence to prove a fact necessary to [Smith]’s case.” *See id.* As a result, Birge was not entitled to summary judgment on the negligent-retention claim.

Birge counters that Smith was required to set forth the elements of the intentional-infliction-of-emotional-distress claim in a

“‘separately captioned count’ in order to maintain her negligent retention . . . claim.” According to Birge, Georgia has a pleading requirement that compels a plaintiff bringing a negligent-retention claim to set out the “derivative” underlying tort claim in a separate count.

But while Georgia substantive law applies to the state law claim, “federal procedural law governs.” *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986) (per curiam) (citing *Hanna v. Plumer*, 380 U.S. 460, 465–74 (1965)). “[U]nder *Hanna* a federal court need not adhere to a state’s strict pleading requirements but should instead follow [rule] 8(a).” *Id.* (citing 5 *Wright & Miller, Federal Practice and Procedure* § 1245 (1985 Supp.)). Rule 8(a)(2) requires only that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Nothing in the federal pleading standards required Smith to set out the conduct constituting intentional infliction of emotional distress in a separate count.

Birge also responds that, even if there is no pleading requirement, the underlying tortious conduct that constituted intentional infliction of emotional distress was not sufficiently pleaded. But Birge never raised this argument in the district court. And the magistrate judge’s report (adopted by the district court) did not consider the plausibility of Smith’s intentional-infliction-of-emotional-distress allegations. Because this argument wasn’t raised below, we will not address it for the first time on appeal. *See Sterling Fin. Inv. Grp. v. Hammer*, 393 F.3d 1223, 1226 (11th Cir. 2004) (holding

that “arguments not presented in the district court will not be considered for the first time on appeal”).

CONCLUSION

We **VACATE** the judgment for Birge on the negligent-retention claim and **REMAND** for further proceedings consistent with this opinion. All other aspects of the judgment are **AFFIRMED**.

**AFFIRMED IN PART, VACATED IN PART, AND
REMANDED FOR FURTHER PROCEEDINGS.**