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United States Court of Appeals
Tenth Circuit

October 4, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENNIS BATEMAN,

Plaintiff - Appellant,

v.

NEXSTAR MEDIA GROUP, INC.,

Defendant - Appellee.

No. 20-4114
(D.C. No. 2:18-CV-00815-DBB)
(D. Utah)

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Dennis Bateman, pro se,[1] appeals the district court's order granting Nexstar Media Group, Inc.'s motion for summary judgment on his claims for discriminatory discharge and retaliation under the Americans with Disabilities Act (ADA). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Bateman was represented by counsel in the district court.

I. BACKGROUND

Nexstar owns and operates ABC 4 Utah, a local television news station in Salt Lake City, Utah. Bateman, who has several disabilities, was hired by the station as a photographer/editor in December 2014. Specifically, Bateman "is a left-leg, below-knee amputee; has post-traumatic stress disorder, which causes him insomnia; and has a cholesteatoma of the left ear, which required surgery resulting in hearing loss and a speech impediment." R., Vol. 1 at 696 (footnotes omitted).

Not long after Bateman was hired, two photographers quit their jobs and the chief photographer, Todd Petersen, needed to adjust the remaining staff's work schedules. "Bateman requested that his schedule not include any 'turnarounds' (late shift one day and early shift the following day), and that he have two consecutive days off." *Id.* at 697. In February or March 2015, Bateman received a schedule that "gave him two consecutive days off, including Sundays based on [Petersen's] understanding that Bateman enjoyed watching NASCAR, but had him working one turnaround shift." *Id.* (footnote omitted).

Several months later, in July 2015, Bateman complained to human resources that he had been denied a reasonable accommodation for his disabilities because the new schedule included a turnaround shift. His complaint was relayed to Petersen, who met with Bateman and memorialized their meeting in a letter dated August 4. The letter "addressed Bateman's concerns about his schedule, including explaining why there was a need for Bateman to work a turnaround shift." *Id.* Petersen went on to note the "positive efforts Bateman had made in the news department and that he

was pleased with many aspects of Bateman's work." *Id.* (brackets and internal quotation marks omitted).

In mid-November 2015, Petersen gave Bateman "a disciplinary write-up, based on [his] understanding that Bateman had complained after being assigned an editing task, slammed the door in the face of the Assistant News Director and Managing Editor, and left work with only half of the task completed." *Id.* at 698. Bateman denied slamming the door and maintained there was a problem with the video tape that prevented him from completing the assignment on time.

"Also in November 2015, Bateman requested a personal day to spend time with his mother." *Id.* Petersen told him that he would need to find coverage for his shift to take a personal day. But Bateman did not find coverage; instead, he "called in sick on the requested day, citing trouble with his prosthesis." *Id.* Petersen issued Bateman a disciplinary write-up for "his improper use of a sick day in violation of Nexstar's attendance policy." *Id.* Again, Bateman disputed Petersen's characterization of what occurred and maintained that "his sick day was for legitimate medical reasons." *Id.* (internal quotation marks omitted).

Bateman's December 2015 "employee evaluation contain[ed] positive and negative comments about his performance." *Id.* at 699. "For example, [it] noted that [he] was a hard worker most of the time and had a good knowledge of his job, [but] had challenges effectively communicating his needs and frustrations with some co-workers and managers." *Id.* (footnote and internal quotation mark omitted).

"In January 2016, after the station hired an additional photographer, Bateman received notice that he would be working a new schedule that met all of his requests—one with no turnarounds and two consecutive days (Saturday and Sunday) off." *Id.* And in April 2016, he received a favorable employee evaluation.

Bateman's work remained on a positive trajectory until "August 2016, [when] a third-party complained about [his] unprofessional conduct as a photographer." *Id.* According to Bateman, his conduct "did not violate company policy, but . . . in order to avoid any appearance of unprofessionalism, he apologized to the complainant." *Id.* at 699-700 (internal quotation marks omitted).

In March 2017, Bateman received a disciplinary write-up and one-day suspension because he damaged some equipment and lost a camera. Bateman did not dispute that he lost the camera but asserted that a supervisor was to blame for the equipment damage. In response to Bateman's objection, the news director sent an email explaining the reasons for the disciplinary action but also included several positive comments about his job performance.

Bateman's April 2017 performance evaluation contained mostly positive comments, "but also some "complaints about cigarette smell, concerns with damaged and lost property, and the need to maintain a positive attitude." *Id.* at 701.

"In May 2017, [a different] third-party complained about Bateman, this time alleging that he appeared to be under the influence of alcohol while working an event. The employee counseling form noted that two complainants reported that Bateman smelled of alcohol, slurred his words, and stumbled." *Id.* (footnote

omitted). "It also stated that a station employee reported that Bateman had missed another assignment because he was hungover," and "further noted that Bateman smoked regularly and often smelled of cigarette smoke." *Id.* (footnote, brackets, and internal quotation marks omitted).

Bateman was placed on a 30-day probation and given goals to "improve his personal appearance and hygiene—dress professionally for his assignments in clean appearing and smelling clothing and . . . [to] perform at an exemplary standard without complaints from colleagues, subjects of his assignments or management." *Id.* at 701-02 (brackets and internal quotation marks omitted). A week after he was placed on probation, Bateman "gave notice that he would resign [in two weeks]. Bateman completed his final two weeks—half of the probation period—without incident." *Id.* at 702 (footnote omitted).

"On June 1, 2017, less than two weeks after he resigned, Bateman asked for his job back." *Id.* In an email to the news director, he explained that the decision to resign had been difficult and stressed how grateful he would be to return to the station. The news director told Bateman that his former position had been filled and included a link to a job posting for an available part-time position. But Bateman did not apply for that position; instead, in October 2017, Bateman filed a charge of discrimination with the Equal Employment Opportunity Commission and the Utah Antidiscrimination and Labor Division. After receiving notice of his right to sue, he filed suit under the ADA for discriminatory discharge and retaliation. Following

discovery, Nexstar moved for summary judgment. The district court granted the motion. Bateman appeals.

II. STANDARD OF REVIEW

"The court shall grant 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). "We review the district court's grant of summary judgment de novo, reviewing the evidence in the light most favorable to the nonmoving party." *Kilcrease v. Domenico Transp. Co.*, 828 F.3d 1214, 1218 (10th Cir. 2016) (brackets and internal quotation marks omitted).

III. ANALYSIS

A. Discriminatory Discharge

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . the . . . discharge of employees." 42 U.S.C. § 12112(a). "ADA discrimination claims are generally subject to the [three-step] *McDonnell Douglas* burden-shifting framework adapted from Title VII discrimination caselaw." *Kilcrease*, 828 F.3d at 1220.

At step one, "a plaintiff carries the burden of raising a genuine issue of material fact on each element of his prima facie case." *Id.* (internal quotation marks omitted). To establish a prima facie case of discriminatory discharge under the ADA, "a plaintiff must demonstrate: (1) that [he] is . . . disabled . . . within the meaning of the ADA; (2) that [he] is . . . able to perform the essential functions of the job, with or without reasonable accommodation; and (3) that the employer terminated [his]

employment under circumstances which give rise to an inference that the termination was based on [his] disability." *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (citations omitted). "In order to establish [the third] element, the plaintiff must present some affirmative evidence that disability was a determining factor in the employer's decision. This burden is not onerous, but it is also not empty or perfunctory." *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1259 (10th Cir. 2001) (citation and internal quotation marks omitted).

"Even if an employee resigns, the plaintiff may still satisfy the [termination] requirement by demonstrating that he was constructively discharged." *Fischer v. Forestwood Co.*, 525 F.3d 972, 980 (10th Cir. 2008). "A claim of constructive discharge has two basic elements: First that the plaintiff was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign. Second, that he actually resigned." *Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 761 (10th Cir. 2020) (ellipses, brackets, and internal quotation marks omitted). As to the first element, "[e]ssentially, a plaintiff must show that [he] had *no other choice* but to quit. The conditions of employment must be objectively intolerable." *Id.* (brackets and internal quotation marks omitted). But "[i]f an employee resigns of [his] own free will, even as a result of the employer's actions, that employee will not be held to have been constructively discharged." *Id.* (internal quotation marks omitted).

At step two, "[i]f plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate nondiscriminatory reason for its employment

decision." *Kilcrease*, 828 F.3d at 1220 (internal quotation marks omitted). And at step three, "[i]f defendant articulates a nondiscriminatory reason [for its actions], the burden shifts back to plaintiff to show a genuine issue of material fact as to whether the defendant's reason for the adverse employment action is pretextual." *Id.* (internal quotation marks omitted).

Nexstar conceded that Bateman satisfied the first two elements of a prima facie case—he was disabled and qualified to do his job. As to the third element, the district court found that Bateman failed to present any evidence that his disability was a factor in any of the actions taken by Nexstar—in other words, he failed to establish an inference of discrimination. The court further found that even if Bateman established a prima facie case, Nexstar articulated nondiscriminatory reasons for each of its disciplinary actions at step two of the *McDonnell Douglas* analysis, and Bateman did not prove pretext at step three. But the court also articulated another reason why Bateman could not survive summary judgment which we find dispositive—he was not constructively discharged.

The record establishes, as the district court found, that no reasonable employee in Bateman's shoes would have felt compelled to resign; instead, Bateman freely decided to quit his job two weeks into a 30-day probationary period. As explained previously, the district court found that Bateman was provided with two specific goals for his probationary period, which "indicates that there was indeed some way Bateman could successfully complete probation, meaning that he had an option other than to resign." R., Vol. 1 at 711.

We further agree that Bateman failed to present any other evidence showing that his working conditions were so intolerable that a reasonable person in his position would have felt compelled to resign. Any such argument is negated by the fact that Bateman asked for his job back. As the district court explained, "[h]ad the alleged discrimination been so egregious that a reasonable person would have felt compelled to resign, it does not follow that a reasonable person would then, almost immediately, ask for that job back." *Id.* Summary judgment was therefore proper on Bateman's claim for discriminatory discharge.

B. Retaliation

When a plaintiff "attempts to prove his retaliation claim using circumstantial evidence, the analytical framework pronounced in *McDonnell Douglas* . . . [also] guides our review." *Foster v. Mountain Coal Co.*, 830 F.3d 1178, 1186 (10th Cir. 2016) (brackets and internal quotation marks omitted). "Under this framework, once the plaintiff establishes a prima facie case of retaliation, the employer has the burden of showing it had a legitimate, nondiscriminatory reason for the adverse action." *Id.* (internal quotation marks omitted). "To establish a prima facie case of ADA retaliation, a plaintiff must prove that (1) he engaged in a protected activity; (2) he was subjected to an adverse employment action subsequent to or contemporaneous with the protected activity; and (3) there was a causal connection between the protected activity and the adverse employment action." *Id.* at 1186-87 (brackets and internal quotation marks omitted). "If the employer can do so, the burden of production shifts back to the plaintiff to prove pretext, which requires a showing that

the proffered nondiscriminatory reason is unworthy of belief." *Id.* at 1186 (brackets and internal quotation marks omitted).

To support his retaliation claim, Bateman maintains that he engaged in protected activity when he complained in July 2015 to Nexstar's human resources department about his work schedule. And he contends that the disciplinary actions taken by Nexstar in November 2015, March 2017, and May 2017 were adverse employment actions that were causally connected to his July 2015 complaint. For purposes of summary judgment, Nexstar did not dispute that Bateman engaged in protected activity when he raised an objection to his work schedule in July 2015.

The district court found that Bateman could not assert a retaliation claim based on the November 2015 disciplinary actions because he failed to timely file an administrative charge. We agree. To maintain a retaliation under the ADA, a plaintiff "must have filed an administrative charge within 300 days *of the challenged employment action* and have filed suit in federal court within ninety days of receiving the agency's right-to-sue letter." *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1206 (10th Cir. 2007) (emphasis added). This means that Bateman was required to file his administrative claim regarding the November 2015 employment actions no later than mid-September 2016. He failed to do so; instead, he waited until more than a year later, in mid-October 2017, to file an administrative charge.

But the district court found that Bateman could maintain a retaliation claim based on the March 2017 and May 2017 disciplinary actions, which it determined were adverse employment actions, because he filed an administrative claim within

300 days. We do not decide whether these were adverse employment actions because we agree with the court's further finding that Bateman's retaliation claim failed for the lack of a causal connection.

"A retaliatory motive may be inferred when an adverse action closely follows protected activity. However, unless the termination is *very closely* connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." *Piercy v. Maketa*, 480 F.3d 1192, 1198 (10th Cir. 2007) (internal quotation marks omitted). Specifically, a plaintiff is not entitled to such an inference based upon "an adverse employment action that happened more than three months after the protected activity." *Id.* Although "the passage of time does not necessarily bar a plaintiff's retaliation claim," for the claim to survive in the absence of temporal proximity, a plaintiff must present "*additional* evidence [that] establishes the retaliatory motive." *Id.* at 1198-99. But Bateman failed to come forward with any additional evidence.

First, discounting the November 2015 disciplinary actions as time-barred, the gap between the July 2015 protected activity and the suspension and probation in 2017 is too large to create a presumption of causation. Second, even if the November 2015 disciplinary write-ups are considered, Bateman received them more than three months after the July 2015 protected activity, which also defeats any presumption. Last, the district court found that Bateman failed to come forward with additional evidence to establish a causal connection. To the contrary, the court found that "there were several intervening positive events such as performance reviews with

positive feedback, a desired schedule change, and other positive feedback from Bateman's supervisors that undercut the claim of retaliation." R., Vol. 1 at 716. Therefore, summary judgment was proper on Bateman's retaliation claim.

IV. CONCLUSION

The judgment of the district court is affirmed. We deny Bateman's motion to proceed without prepayments of costs and fees.

Entered for the Court

Nancy L. Moritz
Circuit Judge