FILED
United States Court of Appeals
Tenth Circuit

October 18, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JANA GARCIA,

Plaintiff - Appellant,

v.

WYOMING DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Defendant - Appellee.

No. 20-8052
(D.C. No. 2:19-CV-00159-SWS)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **LUCERO**, Senior Circuit Judge, and **MATHESON**, Circuit Judge.

Jana Garcia worked as a public health nurse for the Wyoming Department of Health (the "Department"). She clashed with her supervisors when they sought to resolve mistakes she was making at work. The Department placed her on administrative leave pending a fitness-for-duty evaluation. When the evaluation concluded she was incapable of performing her job, the Department fired her. Ms. Garcia then sued the Department, alleging that the Department fired her based on her disability, religion, and race. The district court granted the Department's motion for summary judgment.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Ms. Garcia appeals the district court's ruling on her disability-and religious-discrimination claims.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

The district court provided a detailed account of the facts. We provide a summary of the facts relevant to this appeal.

Ms. Garcia has been diagnosed with anxiety and post-traumatic stress disorder. She worked as a public health nurse for the Department in Glenrock, Converse County, from March 2016 until the termination of her employment in February 2018. For the bulk of this time, she was the only nurse in the Glenrock office. She had no blemishes on her record during the first 18 months of her employment. In two instances, Ms. Garcia, who practiced Messianic Judaism, was asked to participate in two Christian holiday events.[2] She also alleged that her colleagues called her "not normal." App., Vol 4 at 36.

In September 2017, one of Ms. Garcia's colleagues asked her to reconcile the vaccine inventory in the Glenrock office. Although she agreed, she responded negatively to the request. Over the next month, she failed to input her time and tasks in the Department's system, missed scheduled trainings and workdays, and failed to follow safety protocols regarding the disposal of used needles during a flu vaccine clinic. After the flu clinic incident, her supervisor removed her from patient-care services but allowed

[1] Ms. Garcia does not appeal the dismissal of her race-discrimination claim.

[2] The parties dispute whether attendance at these events was mandatory. Ms. Garcia attended one of the events.

her to perform administrative work. When her supervisor explained that this step was taken to avoid her making an error with a patient, Ms. Garcia asked whether the supervisor had considered that this decision might cause Ms. Garcia to harm herself.

A few days later, Ms. Garcia and her supervisors exchanged several text messages. When her supervisors failed to respond for a few hours, Ms. Garcia sent another message berating them for failing to respond, accusing them of differential treatment because she is "a Hispanic middle eastern Jewish woman with a medical condition," and telling them she would "be contacting a civil rights attorney." App., Vol. 1 at 118-19. That day, Ms. Garcia also received a completed physician certification form requesting that she be permitted to close her office door to accommodate her disabilities. She sent the form to human resources.

Two days later, after concluding that Ms. Garcia's behavior posed a risk to patient safety, the senior administrator of Ms. Garcia's division and a human resources administrator placed her on administrative leave pending a fitness-for-duty evaluation by a physician.

In December 2018, Dr. Gerald Post, the physician who examined Ms. Garcia, submitted his evaluation to the Department. He concluded she was not fit to perform her job duties. Dr. Post wrote that Ms. Garcia could not satisfy "[b]asic minimum standards of abilities and behaviors in order to perform employment in almost any setting." App., Vol. 3 at 178-79. He concluded that "it appeared to be unlikely that Ms. Garcia[] would quickly recover from her condition" in part because "[s]he clearly underestimated the impact of her symptoms on her ability to perform her job." *Id.* at 179.

In January 2018, the director of the Department sent Ms. Garcia a notice of intent to dismiss her based on Dr. Post's evaluation. The notice offered Ms. Garcia an opportunity to respond and to dispute the evaluation. In her response, she failed to address the evaluation and instead accused her coworkers and supervisors of discriminating against her. After considering her response, the director terminated her employment.

Ms. Garcia filed this action alleging disability, race, and religious discrimination. The first paragraph of her complaint cited the Rehabilitation Act of 1973, but the cause of action alleging disability discrimination cited only the Americans with Disabilities Act of 1990 (the "ADA"). She also brought retaliation and discrimination claims under Title VII of the Civil Rights Act of 1964.

The Department moved for summary judgment, which the district court granted. The court determined the Department was entitled to sovereign immunity as to the ADA claim. Even though the court concluded that Ms. Garcia did not plead a Rehabilitation Act claim, it analyzed Ms. Garcia's disability discrimination claim anyway. It held that she failed to establish a prima facie case and failed to show that the Department's nondiscriminatory reason for firing her was pretext. Turning to the Title VII claims, the court held Ms. Garcia had failed to show pretext for her retaliation claim. Finally, the court ruled in the Department's favor on the religious discrimination claim after it held that Ms. Garcia failed to make out a prima facie case or establish pretext.

Ms. Garcia timely appealed.

II. **DISCUSSION**

A. ***Standard of Review***

We review a district court's grant of summary judgment de novo, applying the same standards as the district court under Federal Rule of Civil Procedure 56(a). *See Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 730 (10th Cir. 2020). We draw all reasonable inferences and resolve factual disputes in favor of Ms. Garcia. *See Yousuf v. Cohlmia*, 741 F.3d 31, 37 (10th Cir. 2014). We will affirm "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).

B. ***Ms. Garcia's ADA Claim***

Ms. Garcia brought a disability discrimination claim under the ADA. We agree with the district court that the Department is entitled to sovereign immunity.

"The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). This guarantee is subject to three exceptions, *see Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012), but the only relevant exception here is whether the State has waived its sovereign immunity under the ADA.

Ms. Garcia argues the State waived its sovereign immunity under the ADA when it accepted Rehabilitation Act funds. But we rejected this argument in *Levy v. Kansas Department of Social and Rehabilitation Services*, 789 F.3d 1164, 1170-71 (10th Cir. 2015). We explained that, despite the close link between the ADA and the Rehabilitation

Act, "the close relationship between the two statutes is not sufficient to conclude that the Rehabilitation Act's waiver provisions apply by implication to the ADA." *Id.* at 1170; *see also Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("[W]e will find waiver only where stated by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." (quotations omitted)). The Department is therefore entitled to sovereign immunity on Ms. Garcia's ADA claim.[3]

C. ***Ms. Garcia's Title VII Claims***

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "on the basis of race, color, religion, sex, or national origin." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). Employers cannot discriminate "in hiring, firing, salary structure, promotion and the like." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 342 (2013). Nor can they retaliate against employees "on account of an employee's having opposed, complained of, or sought remedies for, unlawful workplace discrimination." *Id.*

Ms. Garcia alleged two Title VII violations—that the Department (1) retaliated when it placed her on administrative leave after she told her supervisors that she would

[3] Ms. Garcia argues that her complaint also alleged a Rehabilitation Act claim. But her one claim of disability discrimination cites only the ADA and does not mention the Rehabilitation Act. App., Vol. 1 at 12-13. We agree with the district court that Ms. Garcia "did not base any of her causes of actions on" the Rehabilitation Act, even though she mentioned it in the opening paragraph of her complaint. App, Vol. 5 at 61 n.6. On appeal, Ms. Garcia does not address the district court's conclusion that she did not plead a Rehabilitation Act claim, so she waived this argument.

Even assuming Ms. Garcia pled a claim under the Rehabilitation Act, we agree with the district court's analysis of that claim and would likewise affirm.

contact a civil rights attorney, and (2) discriminated when it fired her because of her religion.

We apply the *McDonnell Douglas* burden-shifting framework to Ms. Garcia's Title VII claims. *See Ibrahim v. Alliance for Sustainable Energy, LLC*, 994 F.3d 1193, 1196 (10th Cir. 2021); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). First, Ms. Garcia must establish a prima facie case of discrimination by showing that (1) she belongs to a protected class, (2) she suffered an adverse employment action, and (3) the challenged action took place under circumstances giving rise to an inference of discrimination. *EEOC v. PVNF, LLC*, 487 F.3d 790, 800 (10th Cir. 2007). Once she makes this showing, "the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action." *Id.* If the Department makes this showing, the burden shifts back to Ms. Garcia, who must "show that there is a genuine issue of material fact as to whether the employer's proffered reasons are pretextual." *Id.*

1. **Retaliation Claim**

Ms. Garcia appears to base her retaliation claim on her text message to her supervisors accusing them of differential treatment because she was "a Hispanic middle eastern Jewish woman with a medical condition," and telling them that she would "be contacting a civil rights attorney." App., Vol. 1 at 118-19. She argues the Department retaliated against her by removing her from patient services shortly after receiving this message.

The district court granted the Department's motion for summary judgment because she failed to show pretext. The court assumed she had made out a prima facie case. It determined that the Department's proffered reason for putting her on administrative leave—patient safety—was nondiscriminatory.[4] The court then held that Ms. Garcia failed to show the proffered reason was pretextual. We agree.

The Department placed Ms. Garcia on administrative leave after it determined that she posed a safety risk to her patients. By failing to point to any portion of the record to suggest pretext, she inadequately briefed this issue and has thus waived her argument. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019). In any event, Ms. Garcia has not demonstrated that this reason was pretextual. She fails to direct us to "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Fye v. Oklahoma Corp. Com'n*, 516 F.3d 1217, 1228 (10th Cir. 2008) (quotations omitted).

2. **Religious Discrimination Claim**

The district court granted summary judgment to the Department on Ms. Garcia's religious discrimination claim. It concluded that, for the purposes of this claim, Ms. Garcia's firing was the only adverse employment action. The court determined that Ms.

[4] For retaliation claims, an adverse employment action "is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006).

Garcia did not make out a prima facie case because she failed to link the alleged discrimination—the Department's request that she participate in Christian holiday events—with the termination of her employment. The court also held she failed to establish pretext.

Ms. Garcia argues she satisfied her burden to make a prima facie case of discrimination. But even if that were true, she has failed to show that the Department's nondiscriminatory justification for her firing—that Dr. Post found her not fit for duty—was pretextual. The only evidence Ms. Garcia musters is her testimony that (1) her supervisors allegedly forced her to participate in Christian holiday events and (2) her colleagues called her "not normal."

In evaluating pretext, we "look at the facts as they appear to the person making the decision to terminate." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000). The decisionmaker here—the director of the Department—was unaware of the alleged behavior of Ms. Garcia's supervisors and colleagues. He was not made aware of Ms. Garcia's religion until she responded to the notice of intent. We thus do not see a triable issue regarding whether his proffered reason for the termination of her employment was pretextual.

III. **CONCLUSION**

We affirm.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge