FILED
United States Court of Appeals
Tenth Circuit

April 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC SMITH,

Plaintiff - Appellant,

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS,

Defendants - Appellees.

No. 22-6131
(D.C. No. 5:21-CV-00737-F)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **MORITZ**, Circuit Judges.

Plaintiff Eric Smith appeals the dismissal of his employment discrimination suit against Defendants, the United States Department of Veterans Affairs (the VA) and its Secretary, Denis McDonough, for failure to state a claim. Smith, a longtime employee of the VA, filed this action under Title VII and the Rehabilitation Act to challenge alleged discriminatory conduct by the VA based on Smith's color (Black), national origin (African American), sex/gender (male), and disability (post-traumatic stress disorder or PTSD). Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

The United States District Court for the Western District of Oklahoma granted the motion and dismissed Smith's amended complaint with prejudice. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's dismissal of Smith's claims.

I. BACKGROUND

A. Factual Background

Smith is a longtime employee of the Oklahoma City VA, where he works as a Laundry Foreman. According to Smith, he was diagnosed in 2007 with PTSD. He identifies as Black, African-American, and male.

On or about August 31, 2017, Smith was granted permission to work a "detail" in California. Aplt. App., Vol. I at 25. Smith traveled to California on September 6, 2017. Although the detail was slated to last 120 days, the VA terminated it early on September 30, 2017, for "performance reasons," namely that "[Smith] failed to complete important job duties before he left [for California]." *Id.* at 27; *see* Aplt. Br. at 4. These performance issues included Smith's failure to complete a "COOW Report" on laundry operations, an "Inventory Report," a "Textile Report" on the income earned on the laundry's contracts, and certain annual performance reviews for employees Smith supervised. Aplt. App., Vol. I at 25. According to Smith, however, these reports "were not able to be completed by anyone in the required time because they covered a future time period." *Id.* For example, COOW Reports, Textile Reports, and employee reviews are not due until the end of the VA's fiscal year (i.e., October 31), and the VA terminated Smith's California detail on September 30, 2017—leaving a month of data yet to be collected for the reports.

Similarly, Inventory Reports "[are] performed each year in the week before Thanksgiving in November." *Id.* Smith states that it would have been impossible for him to have completed these reports prior to the termination of his detail on September 30, 2017, but that he "did complete all tasks possible within the time parameters of his detail." *Id.*

According to Smith, he needed the California detail in order to become eligible for a permanent promotion to the California VA. He alleges that he experienced "open workplace threats" to his transfer to California by his first-level supervisor, Darryl Lynch, who is also a Black male. *Id.* at 27. Specifically, Smith states that Lynch told another employee that he "would put a stop to [Smith's] transferring to California." *Id.* Smith believes that Lynch "was displeased [Smith] was in California with Mr. Lynch's ex-girlfriend." *Id.* In addition, Smith alleges that he either experienced or learned about the following comments and actions by Lynch:

- Smith was told by another employee that Lynch stated that he "was going to pull the rug out from under Mr. Smith, he was treading water as far as his job was concerned";
- Lynch gave Smith the "silent treatment" and would communicate with Smith only through email;
- In an unfriendly tone, Lynch told Smith that "the work environment was a dictatorship, not a democracy";
- Lynch told another employee that he "was going to ask management to fire [Smith]";
- Lynch yelled at Smith and other supervisors at a meeting about job performance; and
- Lynch "physically assaulted and battered" Smith while handing him disciplinary reports by "plac[ing] his hand heavily on [Smith's] right shoulder and squeez[ing] his shoulder"; Smith states that he required medical attention and medication for pain and swelling caused by this physical contact.

Id. at 27–29 (internal quotation marks omitted).

Smith alleges that he complained about Lynch's behavior on several occasions to Oklahoma City VA Medical Center Director Wade Vlosich, EEO Secretary Sharon Shaffer, Chief of Environmental Management Services Claude Rivers, and Josh Brown. As a result of these incidents, Smith alleges that he was punished—not Lynch—in the form of a three-day suspension, reassignment to different job duties, the issuance of disciplinary reports, and, as discussed, early termination of his California detail.

Finally, in his complaint, Smith compares his workplace treatment to that of his colleagues to contend that he was treated less favorably. For example, Smith states that Lynch often granted leave to Kim Brewer (a female employee), which resulted in three-day weekends for Brewer. Brewer could also request annual leave "not from [Smith, her supervisor,] but from Mr. Lynch directly," which caused Smith to be unaware that Brewer was on leave until she did not show up for her shift. *Id.* at 30. Additionally, Smith states that Lynch gave Brewer favorable assignments by not requiring her to perform certain laundry tasks because "she is a woman." *Id.* Smith alleges that although Brewer posted threatening comments toward him on her public blog (e.g., that she would "get her goons to f-up Eric Smith"), she was never suspended or discharged but was only told by Lynch to remove the posts. *Id.* Smith states that other male employees, both Black and white, were granted their leave requests months in advance and that one employee in

particular, Mark Smith[1] (a white male), was allowed to take any time off that he wanted because his spouse was sick. Smith notes, however, that he was able to "stagger[] time off on those employees so the laundry facility was never short staffed." *Id.* at 26.

B. Procedural History

After the United States Equal Employment Opportunity Commission entered judgment in favor of the VA, Smith filed suit in the United States District Court for the Western District of Oklahoma against the VA and Secretary McDonough. Therein, he asserted the following causes of action against Defendants: (1) "discrimination based on sex or gender," in violation of 42 U.S.C. § 2000(e)-2(a) (Title VII); (2) "hostile work environment," in violation of Title VII; (3) "discrimination based on handicap[p]ing conditions," in violation of 29 U.S.C. § 791, *et. seq.* (the Rehabilitation Act); and (4) "discrimination based on national origin and color," in violation of Title VII. *Id.* at 6–20 (capitalization omitted). Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), which the district court granted while also granting Smith leave to amend.[2]

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[1] To avoid confusion with the appellant, Smith, we refer to Mark Smith using his full name.

[2] In this first order, the district court determined that Smith could not maintain suit against the VA. *See* Aple. Br. at 1–2 n.3 (citing 42 U.S.C. § 2000e-16(c) (noting that Title VII requires naming "the head of the department, agency, or unit" as the defendant in a civil suit)). Both below and on appeal, Smith has not challenged this conclusion.

In his amended complaint, Smith reasserts the same four claims. Defendants again moved to dismiss under Rule 12(b)(6). The district court granted the motion for failure to state a claim and entered an order dismissing Smith's complaint with prejudice. Smith timely appealed.

II. STANDARD OF REVIEW

"We review de novo a district court's grant of a motion to dismiss for failure to state a claim." *Est. of Burgaz v. Bd. of Cnty. Comm'rs for Jefferson Cnty.*, *Colo.*, 30 F.4th 1181, 1185 (10th Cir. 2022). Under Federal Rule of Civil Procedure 8, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).[3] In conducting our review, we accept all well pleaded facts as

[3] Smith argues that "[d]ismissal [is] proper only if it appears beyond reasonable doubt that the [plaintiff] can prove within such allegations no set of facts in support of the claim which would entitle him to relief." Aplt. Br. at 19 (quoting *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir. 1990)) (cleaned up). However, the Supreme Court has expressly rejected the "no set of facts" test articulated in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated by Twombly*, 550 U.S. 544. *See Twombly*, 550 U.S. at 546 ("The 'no set of facts' language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.").

(cont'd)

true, view them in the light most favorable to the non-moving party, and draw all reasonable inferences in their favor. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). Importantly, "[w]hile the 12(b)(6) standard does not require that [a plaintiff] establish a prima facie case in [his or her] complaint, the elements of each alleged cause of action help to determine whether [the plaintiff] has set forth a plausible claim." *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012).

III. DISCUSSION

On appeal, Smith argues that the district court erred in dismissing his claims at the pleadings stage. However, we affirm the district court's dismissal because Smith's complaint does not plausibly allege that the conduct or actions complained of were discriminatory in violation of Title VII and the Rehabilitation Act, nor has his briefing on appeal bridged that gap.

A. Title VII

Title VII allows a plaintiff "[to] prove discrimination in several different ways, including proof of a hostile work environment or disparate treatment." *Throupe v. Univ.*

Smith also questions whether the district court stated and applied the correct standard of review because its order "did not apply, weigh, consider or even make any reference to [Federal Rule of Civil Procedure] 8." Aplt. Br. at 16. This argument fails to acknowledge that a motion to dismiss pursuant to Rule 12(b)(6) operates to test the substantive sufficiency of a complaint and not just whether the complaint satisfies Rule 8's baseline drafting requirements. *See Twombly*, 550 U.S. at 555. The district court stated the correct standard of review under Rule 12(b)(6). *See* Aplt. App., Vol. I at 39–40 (discussing the plausibility test under *Iqbal*, 556 U.S. at 678). Thus, the district court's lack of explicit reference to Rule 8 is immaterial.

of Denver, 988 F.3d 1243, 1251 (10th Cir. 2021). Smith attempts to plead claims under both alternatives. To establish a prima facie disparate-treatment claim under Title VII, a plaintiff must demonstrate that "(1) [he or she] belongs to a class protected by Title VII, (2) [he or she] suffered an adverse employment action, and (3) the challenged action took place under circumstances giving rise to an inference of discrimination." *Id.* at 1252. To establish a prima facie hostile-work-environment claim under Title VII, a plaintiff must demonstrate that "(1) he was discriminated against because of his [membership in a protected group], and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of his employment." *Id.* at 1251. This case turns on whether Smith has adequately alleged facts that support an inference of discrimination.

Title VII does not establish a "general civility code for the American workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75 (1998). Its protections are "directed at discrimination *because of* [membership in a protected group]." *Id.* (emphasis added). "General harassment if not racial or sexual is not actionable." *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994). Thus, Smith's pleadings on his disparate treatment and hostile work environment claims "must include enough context and detail to link the allegedly adverse employment action to a discriminatory or retaliatory motive with something besides sheer speculation." *Bekkem v. Wilkie*, 915 F.3d 1258, 1274–75 (10th Cir. 2019) (internal quotation marks and citation omitted). Smith may do so with allegations about "actions or remarks made by decisionmakers, preferential treatment given to employees outside the protected class, or more generally, upon the timing or

sequence of events." *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 505 (10th Cir. 2012) (internal quotation marks and citation omitted). Smith has failed to plausibly allege any facts to support an inference of discrimination.

Smith compares his treatment to that of other employees in an attempt to demonstrate an inference of discrimination. *See Luster v. Vilsack*, 667 F.3d 1089, 1095 (10th Cir. 2011) ("One method by which a plaintiff can demonstrate an inference of discrimination is to show that the employer treated similarly situated employees more favorably."). Comparators are considered "similarly-situated" to a plaintiff "when they deal with the same supervisor, are subjected to the same standards governing performance evaluation and discipline, and have engaged in conduct of 'comparable seriousness.'" *E.E.O.C. v. PVNF, L.L.C.*, 487 F.3d 790, 801 (10th Cir. 2007) (citation omitted). Here, for example, the amended complaint alleges that Brewer (a female employee) and Mark Smith (a white, male employee) were allowed to take nearly unlimited leave days. However, comparing these employees who requested and were granted leave to Smith's treatment in the workplace does not give rise to an inference of discrimination. This is especially true here where Smith does not allege that he was denied leave when requested, or that the grant of leave requests to Brewer and Mark Smith affected his or other employees' ability to get laundry work completed.[4]

[4] The district court (and Defendants on appeal) concluded that Brewer and Mark Smith are not comparable to Smith because they were Smith's subordinates. However, it (cont'd)

In addition, Smith cites other examples of Brewer's preferential treatment. He alleges that, despite Brewer's online threats aimed at Smith, "Brewer never received any suspension or discharge because of her gender." Aplt. App., Vol. I at 30. He also cites Lynch's alleged statement that Brewer was not required to perform certain laundry duties because "she is a woman." *Id.* (purporting to quote Lynch). Where a plaintiff brings a "reverse discrimination" claim, he "must, in lieu of showing that he belongs to a protected group, establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1201 (10th Cir. 2006) (quoting *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992)). "Alternatively, a plaintiff may produce facts 'sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred.'" *Id.* (quoting *Notari*, 971 F.2d at 590). Based on the allegations in his complaint, it appears that even if Lynch treated Brewer more favorably than Smith with respect to leave, conduct, and discipline, Brewer also received more favorable treatment than other female employees. Smith's allegations are undercut by his statement that "[s]uch gender discrimination [in favor of Brewer] was not done for other female employees or for [Smith], but only for Ms. Brewer." Aplt. App., Vol. I at 30. Thus, based on Smith's

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appears that Smith, Brewer, and Mark Smith were all subordinate to Lynch, who made decisions about time-off requests. Thus, they all "deal[t] with the same supervisor," at some level. *PVNF, L.L.C.*, 487 F.3d at 801.

complaint, any special treatment received by Brewer and not by Smith appears to be unique to her—not because she is a woman.[5]

Smith also alleges that "Mr. Lynch was displeased [Smith] was in California with Mr. Lynch's ex-girlfriend." *Id.* at 27. However, Smith makes no specific argument to the district court or this court to show how this fact supports a theory of reverse gender discrimination under either test discussed in *Argo*, 452 F.3d at 1201. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief.").

Finally, Smith's complaint notes that the VA's decision to reassign Smith rather than punish Lynch for "assault and battery" "departed from normal process." Aplt. App., Vol. I at 29. Smith cites *Plotke v. White* for the proposition that "procedural irregularities regarding [a plaintiff]'s [adverse employment action] constitute relevant evidence of pretext going to the termination decision." 405 F.3d 1092, 1105 (10th Cir. 2005). However, this court made that statement in the context of the three-step burden-shifting framework on summary judgment, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973). In step one, the plaintiff must "raise a genuine issue of

[5] Smith does not address reverse discrimination or the district court's conclusion on the issue at all on appeal, nor does he explain how his allegation supports an inference of discrimination based on *any* protected characteristic, including disability, color, or national origin.

material fact on each element of the prima facie case, as modified to relate to differing factual situations"; at step two "the burden then shifts to the employer to offer a legitimate nondiscriminatory reason for its employment decision"; then, at step three, "the burden shifts back to the plaintiff to demonstrate that the employer's explanations were pretextual—i.e., unworthy of belief." *Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202, 1215 (10th Cir. 2022) (internal quotation marks and citations omitted). It is at step three, *Plotke* instructs, that a plaintiff may cite procedural irregularities as evidence of pretext. The present case is on appeal from a motion to dismiss on the pleadings, and we use the prima facie elements of a claim—step one of *McDonnell Douglas*—to assist us in testing the sufficiency of a complaint. *See Khalik*, 671 F.3d at 1192 ("While the 12(b)(6) standard does not require that [a plaintiff] establish a prima facie case in [his or her] complaint, the elements of each alleged cause of action help to determine whether [the plaintiff] has set forth a plausible claim."). Accordingly, Smith's reliance on *Plotke* is misplaced.

For those reasons, we conclude that Smith's amended complaint fails to state a claim under Title VII for discrimination based on sex, gender, national origin, or color. Smith has not plausibly alleged that any adverse actions and harassment by Defendants were motivated by discriminatory intent.

B. The Rehabilitation Act

For similar reasons, Smith has failed to adequately plead a cause of action under the Rehabilitation Act. The Rehabilitation Act prohibits discrimination against qualified

individuals "solely by reason of her or his disability." 29 U.S.C. § 794(a). Thus, to establish a prima facie claim under the Rehabilitation Act, a plaintiff must demonstrate "(1) that he is a 'handicapped individual' under the Act, (2) that he is 'otherwise qualified' for the [benefit] sought, (3) that he was [discriminated against] solely by reason of his handicap, and (4) that the program or activity in question receives federal financial assistance." *Cohon ex rel. Bass v. N.M. Dep't of Health*, 646 F.3d 717, 725 (10th Cir. 2011) (alterations in original) (quoting *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1492 (10th Cir. 1992)); *see also Rakity v. Dillon Cos.*, 302 F.3d 1152, 1164 (10th Cir. 2002) (discussing the elements of a prima facie case of disability discrimination for failure to promote under the Americans with Disabilities Act (the ADA)).[6]

Smith's complaint alleges that he "suffered adverse action because of a disability and was passed over for promotion based on that disability." Aplt. App., Vol. I at 33. This sole conclusory statement does not plausibly allege a claim of discrimination based on Smith's PTSD diagnosis. Smith has alleged no facts that plausibly demonstrate that Defendants treated him differently based on his disability. Further, although Smith states that successful completion of the California detail was a prerequisite for being promoted to a permanent posting in California, he never alleges that he had applied for such a

[6] Although *Rakity*, as cited by the district court and Defendants on appeal, was decided under the ADA, this court "typically evaluate[s] claims identically under the ADA and Rehabilitation Act." *Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 1312 (10th Cir. 2021).

promotion. Accordingly, based on the allegations in Smith's complaint, Defendants could not have denied Smith a promotion that he never formally sought. We conclude that Smith has failed to allege any facts that support an inference that Defendants discriminated against him based on his PTSD diagnosis.

IV. CONCLUSION

Smith has not plausibly alleged that Defendants discriminated against him because of his sex, gender, national origin, color, or disability. Accordingly, we AFFIRM the district court's grant of Defendants' motion to dismiss for failure to state a claim.

Entered for the Court

Mary Beck Briscoe
Circuit Judge