FILED
United States Court of Appeals
Tenth Circuit

April 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DOROTHY BARRETT-TAYLOR,

Plaintiff - Appellant,

v.

BIRCH CARE COMMUNITY, LLC,

Defendant - Appellee.

No. 22-1013
(D.C. No. 1:19-CV-02454-MEH)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BALDOCK**, and **CARSON**, Circuit Judges.

Ms. Dorothy Barrett-Taylor sued Birch Care Community, LLC under the Americans with Disabilities Act, claiming disability discrimination, failure to provide a reasonable accommodation, and retaliation. The claims ultimately turned on Ms. Barrett-Taylor's refusal to perform the demands of her job. She blamed Birch Care for imposing duties beyond her physical

---

* The parties haven't requested oral argument, and it would not help us decide the appeal. So we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

restrictions, and the district court granted summary judgment to Birch Care. Ms. Barrett-Taylor appeals, challenging the grant of summary judgment and the denial of a motion to compel discovery. We affirm.

I. Birch Care requires Ms. Barrett-Taylor to work in the dining hall, and she objects.

Ms. Barrett-Taylor worked as an after-hours receptionist for Birch Care at a skilled nursing facility. She fell at work and obtained treatment at Concentra Medical Centers. One of Concentra's treatment providers, Jordan Maas, imposed work restrictions on Ms. Barrett-Taylor's ability to stand, lift, push, pull, and remain in the same position. Ms. Barrett-Taylor informed Birch Care of these restrictions.

Birch Care insisted that Ms. Barrett-Taylor work in the dining hall. But Ms. Barrett-Taylor refused, citing her injury. When a supervisor complained about Ms. Barrett-Taylor's refusal to work in the dining hall, another treatment provider (Jim Keller) softened the work restrictions. Ms. Barrett-Taylor later reported increased right hip pain, so Mr. Keller enhanced the work restrictions to excuse any work in the dining hall. But weeks later, Mr. Keller again relaxed the work restrictions to allow Ms. Barrett-Taylor to lift, push, and pull items that weighed up to five pounds. With relaxation of the work restrictions, Birch Care determined that Ms. Barrett-Taylor could work in the dining hall because she would

not need to (1) feed, adjust, transfer, or lift residents or (2) perform strenuous activity.

Ms. Barrett-Taylor disagreed and met with Birch Care's office manager, Ms. Julie Trujillo. Although the parties disagree on what was said, Ms. Barrett-Taylor

- admits that she left the facility at the end of the meeting and
- does not deny that she was asked if she was quitting and that she replied: "take it up with corporate." R. at 148–49 (internal quotation marks omitted).

She never returned to the job.

II. The district court grants summary judgment to Birch Care.

Ms. Barrett-Taylor sued Birch Care, which moved for summary judgment. The district court granted this motion based mainly on three conclusions:

1. Work in the dining hall was an essential function of the job. So if Ms. Barrett-Taylor's injury prevented her from working in the dining hall, she could not perform an essential function of her job.

2. Ms. Barrett-Taylor voluntarily quit, so the termination of her employment wouldn't constitute discrimination or retaliation.

3. Ms. Barrett-Taylor lacked evidence of a failure to provide a reasonable accommodation, as Birch Care had shown efforts "to adjust [Ms. Barrett-Taylor's] dining hall job duties in a way compatible with the clinic's work restrictions." *Id.* at 167.

III. The district court didn't err in granting summary judgment or ruling on the discovery.

We conduct de novo review of the grant of summary judgment. *May v. Segovia*, 929 F.3d 1223, 1234 (10th Cir. 2019). Summary judgment is appropriate "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 examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty.*, 546 F.3d 1299, 1306 (10th Cir. 2008) (internal quotation marks omitted).

Because Ms. Barrett-Taylor proceeds pro se, we liberally construe her arguments; but we "cannot take on the responsibility of serving as [her] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

Giving Ms. Barrett-Taylor the benefits from liberal construction, we interpret her opening brief to contain seven arguments: (1) genuine disputes existed on material facts; (2) the district court erred in concluding that Ms. Barrett-Taylor had voluntarily quit; (3) the district court erred in concluding that work in the dining hall was an essential function of the job; (4) Birch Care acted improperly in its handling of the injury and communication with the treatment providers; (5) the district court should

have conducted oral argument and compelled production of documents; (6) Birch Care had decided to fire Ms. Barrett-Taylor soon after it learned of her work restrictions; and (7) the magistrate judge was biased.

Ms. Barrett-Taylor asserts that the court erroneously granted summary judgment while acknowledging disputed fact-issues. Although the court did identify five issues of fact as "disputed," *see* R. at 149–50, Ms. Barrett-Taylor does not explain the materiality of these disputes.

Ms. Barrett-Taylor also urges a genuine issue of material fact on whether she quit or was fired. In urging a fact issue, she relies primarily on documents from the Colorado Department of Labor, where Birch Care said that it had "terminated" her employment. But as the district court concluded, "[t]he record does not support the inference that [Ms. Barrett-Taylor's] employment [had] ended because [Birch Care] *fired* her *before* she had left (even if it later may have terminated her for job abandonment). To the contrary, [Ms. Barrett-Taylor's] argument that she was constructively discharged implies that *she decided to leave*." R. at 160–61 (second and third emphasis added). And Ms. Barrett-Taylor does not challenge the court's rejection of her "constructive discharge" argument on appeal, so we do not consider it further. *See Folks v. State Farm Mut. Auto. Ins. Co.*, 784 F.3d 730, 737 (10th Cir. 2015).

Ms. Barrett-Taylor not only urges genuine issues of material fact but also denies that her essential duties included work in the dining hall. When

determining whether a job function is essential, we consider "the employer's judgment as to what functions of a job are essential." 42 U.S.C. § 12111(8).

Ms. Barrett-Taylor points out that her job description didn't include work in the dining hall. But that job description called for the receptionist to "perform other duties as requested," R. at 157; and Birch Care presented evidence that it had expected the after-hours receptionist to help in the dining hall because (1) after-hours receptionists often had down time, (2) the dining hall was short-staffed, and (3) other employees were also asked to help in the dining hall. We give substantial weight to Birch Care's business judgment on which job functions are essential, *Hawkins v. Schwan's Home Serv., Inc.*, 778 F.3d 877, 888 (10th Cir. 2015), and Ms. Barrett-Taylor did not present evidence to overcome that judgment.

Ms. Barrett-Taylor questions not only her physical ability to work in the dining hall but also Birch Care's communications with Concentra. For example, Ms. Barrett-Taylor argues that Birch Care shouldn't have communicated with the medical providers at Concentra to seek clarification of the work restrictions. But she cites no supporting authority. If Concentra shouldn't have modified the work restrictions to allow work in the dining hall, the liability would fall on Concentra—not Birch Care.

Ms. Barrett-Taylor also criticizes Birch Care for causing her injury and reporting it to a carrier of workers' compensation insurance. But these

criticisms do not appear pertinent to Ms. Barret-Taylor's claims involving discrimination, retaliation, or failure to provide a reasonable accommodation.

Ms. Barrett-Taylor not only contests the availability of summary judgment, but also raises broad challenges to procedural rulings involving discovery disputes and the unavailability of oral argument. For example, she argues that the district court shouldn't have (1) ruled on summary judgment before deciding whether to extend the discovery deadline and (2) limited the scope of documents that Birch Care had to produce.

We review such challenges for an abuse of discretion. *See Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1169 (10th Cir. 2000). Ms. Barrett-Taylor has not shown an abuse of discretion. Birch Care denied possession of the disputed documents; and Ms. Barrett-Taylor did not present any contrary evidence, describe the inaccessible documents, or say how they would have affected the ruling on summary judgment.

Ms. Barrett-Taylor also asserts that the district court erred in granting summary judgment without conducting oral argument. But "[a] formal evidentiary hearing with oral argument . . . is not necessarily required. Rather, the parties' right to be heard may be fulfilled by the court's review of the briefs and supporting affidavits and materials submitted to the court." *Geear v. Boulder Cmty. Hosp.*, 844 F.2d 764, 766

(10th Cir. 1988) (citation omitted). The district court undertook such a review before granting summary judgment here.

Ms. Barrett-Taylor also challenges rejection of her retaliation claim based on Birch Care's decision to terminate her soon after learning of her work restrictions.[1] For this challenge, Ms. Barrett-Taylor argues that

- Birch Care said on a form (Personnel Change Notice) that the effective date of the termination was September 1, 2017, and
- this was soon after Birch Care learned of Ms. Barrett-Taylor's work restrictions.

But Ms. Barrett-Taylor didn't preserve this argument, and it's invalid on the merits.

In district court, Ms. Barrett-Taylor didn't rely on the Personnel Change Notice or argue that Birch Care had decided on September 1, 2017, to fire her. So we can't reverse on this basis. *Tele-Commc'ns, Inc. v. Comm'r*, 12 F.3d 1005, 1007 (10th Cir. 1993).

In any event, the Personnel Change Notice does not say that the termination had an effective date of September 1, 2017. To the contrary, the document says that on September 1, 2017, Birch Care changed her status from "part time" to "full" time" and gave her a "merit increase." The document gives the termination date as October 4, 2017—the day after her

[1] We liberally construe these challenges because Ms. Barrett-Taylor is pro se. *See* p. 2, above.

confrontation with supervisors. So we would reject this argument even if it had been preserved.

Finally, Ms. Barrett-Taylor alleges bias on the part of the magistrate judge. But Ms. Barrett-Taylor didn't seek recusal in district court. Even if she had, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves . . . , they cannot possibly show reliance upon an extrajudicial source [of bias]; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (citation omitted). So the district court didn't err in failing to order the magistrate judge's recusal.

Affirmed.[2]

Entered for the Court

Robert E. Bacharach
Circuit Judge

[2] We also

- grant leave to proceed in forma pauperis and
- deny all Ms. Barrett-Taylor's other pending motions.