FILED
United States Court of Appeals
Tenth Circuit

April 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONNIE R. ROLLAND, SR.,

Plaintiff - Appellant,

v.

AURORA RETIREMENT, LLC, d/b/a Cherry Creek Retirement Village, LLC; CENTURY PARK ASSOCIATES, LLC,

Defendants - Appellees.

No. 22-1216
(D.C. No. 1:20-CV-02338-RMR-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **BACHARACH**, Circuit Judges.

Ronnie R. Rolland, Sr., appeals the district court's order granting summary judgment in favor of his former employer, Cherry Creek Retirement Village

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

(CCRV),[1] on his claims alleging retaliation and a hostile work environment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Factual Background

Mr. Rolland, who is African American, worked as a housekeeper for CCRV. According to CCRV, beginning in July 2019, it received complaints from residents that Mr. Rolland did not properly clean their apartments. He disputed that his performance was substandard.

Mr. Rolland alleged that on August 13, 2019, his immediate supervisor, Rodney Rudolph, accused him of telling an associate that Mr. Rudolph never worked. Mr. Rolland claimed Mr. Rudolph yelled at him and threated to "get [him] back." R. at 660 (internal quotation marks omitted). Before that incident, Mr. Rolland had not had any issues with Mr. Rudolph. Mr. Rolland reported the incident to the Executive Director of the facility, Dennis Veen. Two days later, Mr. Veen met with Mr. Rolland and Mr. Rudolph to discuss Mr. Rolland's job performance and his complaints about Mr. Rudolph. This was the first time Mr. Rolland complained about Mr. Rudolph to anyone at CCRV.

According to CCRV, his job performance did not improve after the meeting. Mr. Veen met with him again to discuss the continued concerns about his job performance. On August 27, Mr. Rolland gave Mr. Veen a document titled "Title

[1] In his complaint, Mr. Rolland also named Century Park Associates as a defendant, but he did not distinguish between it and CCRV, and the motion for summary judgment referred to the defendants collectively as CCRV. The district court adopted that approach, as do we.

VII Protected Activity Complaint for Correction." R. at 780-84. He said Mr. Rudolph was aware that he had a disability, but he did not provide specifics about the disability. He claimed Mr. Rudolph yelled "in a loud aggressive man[n]er" during the August 13 incident. R. at 780. He also said Mr. Rudolph wanted him to be fired because Mr. Rudolph was having an inappropriate sexual relationship with a female employee and continuing the relationship would be easier if Mr. Rolland were gone. Finally, he complained that his work schedule had been changed.

Over the next month, CCRV managers met with Mr. Rolland three times to discuss a possible transfer to another department, his job performance issues, his relationship with co-workers and supervisor, and expectations going forward. At the third meeting, Mr. Rolland was given a corrective action form that identified performance issues and stated that he had made an inappropriate "racial comment" during a department meeting. R. at 786. The form said he was expected to improve his performance and relationships with co-workers within two weeks. Mr. Rolland denied that he had performance issues or engaged in any inappropriate conduct. According to CCRV, Mr. Rolland received additional job training, and on one occasion, Mr. Veen and Mr. Rudolph shadowed him while he cleaned apartments, offering training and suggestions for improvement, which he failed to implement.

Within a week of receiving the corrective action form, Mr. Rolland asked to review his personnel file. When he was notified of the request the next day, Mr. Veen asked Mr. Rolland to check in about the personnel-file request at the end of his shift. Mr. Rolland did not check in with Mr. Veen.

The next day, Mr. Rolland gave Mr. Veen a document titled "Second Title VII Protected Activity Complaint," asserting that he had been subjected to "retaliation and [a] hostile working environment [and] false write-up reports intentional[l]y." R. at 791. Specifically, he claimed the corrective action allegations were false and that Mr. Rudolph was harassing and retaliating against him for submitting the first document and for complaining at a department meeting that Mr. Rudolph "was being discriminatory . . . towards [Mr. Rolland] as compared to another non-Black employee that [Mr. Rudolph] was addressing at the meeting." R. at 793-95.

The following day, Mr. Veen scheduled a time for Mr. Rolland to review his personnel file. Soon after reviewing his file, Mr. Rolland resigned in a document titled "Notice of Constructive Discharge/Exiting Notice." R. at 800. He said he was "forced to quit [his] position" at CCRV because of "continued harassment, retaliation, [and] discrimination/creating a[] hostile work environment that interfere[d] with [his] performance." *Id.* He also said CCRV created an "intolerabl[e]" work environment in retaliation for his written and oral complaints and that allegations about his poor performance were unfounded. *Id.*

Mr. Rolland sued CCRV, asserting three Title VII claims: race discrimination, retaliation, and hostile work environment/harassment. Because he does not pursue his race discrimination claim on appeal, we do not address it here and focus instead only on the other two claims. For his hostile work environment/harassment claim, Mr. Rolland alleged that CCRV unlawfully harassed him and created a hostile work environment by imposing what he characterized as a baseless workplace corrective

action against him and because Mr. Rudolph falsely accused him of making racial slurs during a meeting. For his retaliation claim, Mr. Rolland alleged that CCRV retaliated against him and constructively discharged him for complaining about Mr. Rudolph at the department meeting and in the two documents he gave Mr. Veen.

CCRV filed a motion for summary judgment, which Mr. Rolland opposed. He also moved to exclude two affidavits CCRV submitted in support of its motion. A magistrate judge recommended that the district court grant the motion for summary judgment and deny the motion to exclude. On de novo review, the district court overruled Mr. Rolland's objections, adopted the magistrate judge's recommendation, granted summary judgment for CCRV, and denied the motion to exclude.

II. District Court's Order

A. Summary Judgment

In ruling on CCRV's motion for summary judgment, the district court considered Mr. Rolland's claims using the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Under that framework, Mr. Rolland had the initial burden of establishing a prima facie case of hostile work environment/harassment and retaliation. *See id.* at 802. The court held that he failed to meet his burden for either claim.

The district concluded that Mr. Rolland failed to meet his burden of showing a prima facie case because he presented no evidence of "race-based harassment, let alone harassment that rises to the level of a hostile work environment." R. at 1236 (footnote omitted); *see Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994)

(a plaintiff claiming a racially hostile work environment must show that "the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment," and that it "was racial or stemmed from racial animus"; "[g]eneral harassment" that is not race-based is not actionable (internal citations omitted)).

For his retaliation claim, Mr. Rolland alleged that CCRV retaliated against him and constructively discharged him for complaining about Mr. Rudolph at the department meeting and in the two documents he gave Mr. Veen. Construed liberally, his pleadings asserted claims under both the participation clause and the opposition clause of Title VII. The court first concluded that he failed to establish a prima facie case under the participation clause because he had not filed an EEOC claim or otherwise "participated . . . in an investigation, proceeding, or hearing under" Title VII, 42 U.S.C. § 2000e–3(a).

With respect to his claim under the opposition clause, the court held that Mr. Rolland's oral complaint and first written complaint were not protected activity that supported a Title VII claim because they did not complain about unlawful discrimination. *See Vaughn v. Epworth Villa*, 537 F.3d 1147, 1150 (10th Cir. 2008) (to establish a prima facie case of retaliation, the plaintiff must show he engaged in protected activity, he suffered an adverse employment action; and there was a causal connection between the protected activity and the adverse action). Specifically, his complaint at the meeting accused Mr. Rudolph of general harassment, not of conduct that violated Title VII. And although Mr. Rolland's first letter used the term "Title VII Protected Activity," R. at 780, referred to "retaliation" and a "hostile working

environment," *id.*, and said he has a disability, it did not identify the disability, assert that he was discriminated against based on his disability, or describe conduct that violated Title VII.[2] Instead, it alleged that Mr. Rudolph wanted Mr. Rolland to be fired so he could continue an affair with a co-worker.

The district court concluded that Mr. Rolland's second letter constituted protected activity because it asserted that Mr. Rudolph discriminated against him based on race. But the court noted that the only events that occurred after he sent the letter were (1) Mr. Veen scheduled a time for him to review his file, (2) Mr. Rolland reviewed the file, and (3) he resigned. It thus concluded the evidence did not support a reasonable inference that he suffered an adverse employment action as a result of sending that letter. In so concluding, the court held the evidence did not establish a claim for constructive discharge because, other than Mr. Rudolph's August 13 comment, Mr. Rolland did not "set forth any evidence detailing specific actions taken against him that he believes rendered the workplace environment intolerable." R. at 1229. And the court found that the corrective action form did not constitute constructive discharge because "negative performance evaluations do not establish constructive discharge without evidence that the reviews set the employee on a dead-end path towards termination," *id.* (brackets and internal quotation marks omitted), and there was no evidence that the form was the first step toward

[2] Mr. Rolland did not assert a claim under the Americans with Disabilities Act or allege that this letter constituted protected activity because it raised the issue of sex discrimination or sexual harassment against the co-worker.

Mr. Rolland's inevitable termination. *See Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 761 (10th Cir. 2020) (constructive-discharge plaintiff must show he resigned because employer discriminated against him "to the point where a reasonable person in his position would have felt . . . [he] had *no other choice* but to quit"; evidence that he resigned of his "own free will, even if as a result of the employer's actions," is insufficient to survive summary judgment (internal quotation marks omitted)); *Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1267 (10th Cir. 2004) (corrective actions and negative performance reviews are insufficient to show constructive discharge). Indeed, the court noted that the evidence suggested otherwise given that the form said he had two weeks to improve his performance and he was not terminated after that two-week period. Thus, his evidence did not raise a triable question about whether CCRV's actions made working conditions so difficult that a reasonable person in his position would have felt compelled to resign.

B. Motion to Exclude

The evidence Mr. Rolland sought to exclude was statements in two employees' affidavits and one affiant's contemporaneous notes concerning Mr. Rolland's job performance. The district court determined that disputed facts in the affidavits "may have been referenced generally in the [magistrate judge's] recitation of the statement of facts, [but] those facts were not relied on in any way by the magistrate judge in making his recommendation." R. at 1310. Accordingly, the district court adopted the magistrate judge's recommendation and denied the motion to exclude as moot.

III. Discussion

On appeal, Mr. Rolland claims the district court: (1) erred by granting summary judgment on his hostile work environment/harassment claim; (2) mistakenly required a showing of racial discrimination to support his retaliation claim; (3) improperly relied on inadmissible hearsay in granting summary judgment and erred by denying his motion to exclude; and (4) violated his right to due process by granting summary judgment without affording him the opportunity to seek punitive damages at trial.

We review de novo the district court's decision granting CCRV's motion for summary judgment. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1118 (10th Cir. 2014). "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.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

"We review a district court's evidentiary rulings at the summary judgment stage for abuse of discretion." *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006).

Because Mr. Rolland is proceeding without counsel, we construe his filings liberally. *See Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003).[3]

[3] CCRV argues that we lack jurisdiction over the appeal because Mr. Rolland's briefs do not comply with the Federal Rules of Appellate Procedure. Briefing deficiencies may result in waiver or forfeiture, *see Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005); *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225, 1232

But we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

Having considered Mr. Rolland's first three arguments under the appropriate standards of review, we discern no reversible error in the district court's decision. The district court applied the correct legal standards, and we agree with its thorough and well-reasoned analysis. We therefore affirm the grant of summary judgment and denial of the motion to exclude for substantially the same reasons stated in the district court's order of July 6, 2022, which adopted the magistrate judge's recommendation dated June 1, 2022.

We do not address Mr. Rolland's fourth argument because he did not raise the issue in district court so did not preserve it for appeal. *See Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 724 (10th Cir. 1993). We nevertheless note that where, as here, the opposing party (i.e., Mr. Rolland) had notice and an opportunity to be heard and the district court reviewed the parties' briefs and supporting materials before entering judgment, the entry of judgment without a trial does not violate either the right to due process or to a trial. *See Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001) (jury trial); *Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001) (due process).

(10th Cir. 2003), but they do not affect our jurisdiction. And Mr. Rolland's pro se briefs are sufficient to avoid waiver and forfeiture.

IV. Conclusion

The judgment is affirmed.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge