FILED
United States Court of Appeals
Tenth Circuit

August 2, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SARAH LEWIS,

Plaintiff - Appellant,

v.

PEABODY ROCKY MOUNTAIN SERVICES, LLC,

Defendant - Appellee.

No. 22-1349
(D.C. No. 1:20-CV-00615-PAB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MATHESON**, and **EID**, Circuit Judges.

Sarah Lewis sued her former employer, Peabody Rocky Mountain Services, LLC, after being terminated from her position as a beltman at Twentymile Mine. She alleged she was terminated because she is a woman, because of a perceived disability, for exercising her rights under the Family Medical Leave Act, and in violation of Colorado public policy. She voluntarily dismissed her family leave and public policy claims, and the district court granted summary judgment in favor of Peabody on the remaining claims. Lewis appeals, and exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I.

Peabody Rocky Mountain Services, LLC, operates Twentymile Mine near Craig, Colorado. In 2000, Peabody hired an outside contractor to perform an evaluation of mine safety and to recommend qualification requirements for its employees. The contractor recommended requiring any employee in an "underground" position to pass a Fit for Duty Exam ("FFDE"). The FFDE included, per the contractor's recommendation, that all underground employees be able to lift eighty pounds above their heads. Peabody instituted the policy, requiring the eighty-pound lift test upon hire and reserving the right to "request a physical capability assessment and/or return to work authorization" if an employee was absent for ninety days or more for a medical reason. App'x at 80, 86.

Sarah Lewis worked at Peabody as a rock duster and then a beltman.[1] Both were underground positions, and therefore Lewis was required to pass the FFDE by showing she could lift eighty pounds at the time she was hired. She could. Once on the job, she noted she did not frequently have to lift eighty pounds, but she understood the requirement was a safety issue. In addition to her beltman duties, Lewis occasionally filled in for other employees, including as the above-ground facility technician and in haul-truck and wash-plant positions.

Lewis went on medical leave beginning in December 2017. Over the next few months, she had three separate surgeries on both her shoulders, her elbow, and a

[1] Lewis refers to herself as a beltman. App'x at 48.

wrist. She was treated by Dr. Sisk. The first six months of her leave were covered by short-term disability, and after that she was placed on long-term medical leave. Lewis and Dr. Sisk discussed the FFDE, but he did not administer one. In May 2018, Dr. Sisk cleared her to return to work "as long as she [wore] her [right] wrist brace to off load the [right] elbow." *Id.* at 116.

But before she resumed work as a beltman, Lewis had to pass the FFDE again because she had been out of work for over ninety days. Lewis took the test with Dr. Scherr, a workers' compensation doctor who contracted with Peabody, though he did not personally administer the test. Over the course of several months, Lewis attempted seven times to lift eighty pounds in Dr. Scherr's office. The most she could ever lift in Dr. Scherr's office was seventy pounds. In August, Lewis recorded a video of herself lifting eighty pounds in her garage and sent the video to Barbara Binetti, head of Human Resources at Peabody. Lewis acknowledged this was not an adequate stand-in for the FFDE, and she would have to pass the test in Dr. Scherr's office before returning to work.

Drs. Scherr and Sisk both expressed skepticism that Lewis would ever be able to lift eighty pounds over her head and resume her previous occupation. Lewis alleges Dr. Scherr also twice expressed his opinion that women should not work underground in the mine.

After a while, because she had not passed the FFDE, Lewis began to look at other open positions at Peabody that did not have the eighty-pound lift requirement. Open positions at the mine were posted publicly. Peabody employees could complete

and submit an application for any open job for which they believed they were qualified. Lewis inquired about other positions at the mine, including a facility technician position, a position in human resources, and one in accounting. None of these jobs required her to lift eighty pounds. But there was no open human resources position at the time, and Lewis admits she was not qualified to be an accountant. She was not hired as a facility technician because, even though she had filled in for other employees a few times over the years, the open position now required EMT certification, which Lewis did not have.[2] Peabody ultimately hired a facility technician who had EMT certification.

In March 2019, Peabody terminated Lewis's employment after failing to find an open position for which she was qualified. Lewis filed a complaint with the EEOC and received her right-to-sue letter. She sued Peabody under Title VII for sex discrimination, 42 U.S.C. § 2000e *et seq.*; under the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.* (the "FMLA"), for retaliation; under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. (the "ADA"), for disability discrimination; and under Colorado public policy for workers' compensation retaliation. She voluntarily dismissed her FMLA and public policy claims. The district court granted summary judgment in favor of Peabody on her Title VII and ADA claims. Lewis appeals.

[2] There is no evidence in the record Lewis requested or filled out an application for the facility technician position. For the purposes of this appeal, to the extent an application was required, we will consider her inquiry about the job an application.

II.

We review a district court's grant of summary judgment de novo, applying the same standard as the district court. *Hickey v. Brennan*, 969 F.3d 1113, 1118 (10th Cir. 2020). We will uphold a grant of summary judgment if, after reviewing the record, "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[3] *Holub v. Gdowski*, 802 F.3d 1149, 1154 (10th Cir. 2015) (quoting Fed. R. Civ. P. 56(a)).

In considering a motion for summary judgment, we view all disputed material facts in the light most favorable to the non-moving party, *Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280, 1287 (10th Cir. 2022), "but only if a genuine dispute exists as to those facts," *Norwood v. United Parcel Serv., Inc.*, 57 F.4th 779, 790 (10th Cir. 2023). A party resisting summary judgment must "cit[e] to particular parts of materials in the record, including affidavits or declarations" to show a material fact is genuinely disputed. *Felkins v. City of Lakewood*, 774 F.3d 647, 650 (10th Cir. 2014) (internal alteration omitted) (quoting Fed. R. Civ. P. 56(c)(1)). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the

[3] Lewis suggests we review the district court's order according to Federal Rule of Civil Procedure Rule 50(a) (Judgment as a Matter of Law in a Jury Trial) and should reverse if she has presented sufficient evidence such that a reasonable jury could find in her favor. However, because this case comes to us at the summary judgment stage and there was no jury trial, we decline to abandon our well-established precedent and will apply Rule 56 accordingly.

affiant or declarant is competent to testify on the matters stated." *Id.* at 650 (quoting Fed. R. Civ. P. 56 (c)(4)).

We also make all reasonable inferences in the light most favorable to the non-moving party. But these inferences must be *reasonable* and based on facts in the record; they cannot be based on mere speculation. *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1205 (10th Cir. 2022). "Importantly, in opposing a motion for summary judgment, the non-moving party 'cannot rest on ignorance of facts, on speculation, or on suspicion.'" *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016) (quoting *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988)); *see also Self v. Crum*, 439 F.3d 1227, 1230 (10th Cir. 2006) ("To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." (quoting *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004)). "Unsupported conclusory allegations do not create a genuine issue of fact." *Annett v. Univ. of Kansas*, 371 F.3d 1233, 1237 (10th Cir. 2004) (internal alterations omitted) (quoting *L & M Enters., Inc. v. BEI Sensors & Sys. Co.*, 231 F.3d 1284, 1287 (10th Cir. 2000)).

a.

We apply the *McDonnell Douglas* burden-shifting framework to Title VII sex discrimination claims when the plaintiff has no direct evidence of discrimination. *Young v. Dillon Co., Inc.*, 468 F.3d 1243, 1249 (10th Cir. 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973)). Under this standard, the plaintiff must first raise an inference of discrimination by showing "(1) [s]he belongs

to a protected class; (2) [s]he was qualified for h[er] job; (3) despite h[er] qualifications, [s]he was discharged; and (4) the job was not eliminated after h[er] discharge." *Singh v. Cordle*, 936 F.3d 1022, 1037 (10th Cir. 2019). If she does so, the burden shifts to the employer to offer a nondiscriminatory reason for the termination. *Id.* Then, the employee must come forward with evidence that the employer's proffered reason is pretextual. *Id.*

We assume without deciding that Lewis made a prima facie case and turn to whether Peabody had a legitimate, nondiscriminatory reason for terminating her employment. Peabody says it terminated Lewis because she was not qualified to return as a beltman because she could not pass the FFDE. This, as Lewis concedes, constitutes a legitimate, nondiscriminatory reason for termination. *See E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1193 (10th Cir. 2000). Peabody also says Lewis was not qualified to return as a facility technician because she did not have the required EMT certification. Lewis's argument—that the certification was not actually required—relates to pretext and is discussed below. Peabody's assertion that Lewis did not have the necessary qualifications to perform the job is sufficient at this stage.

In response, Lewis argues Peabody's stated reason for her termination is pretextual. An employee bears the burden of showing the employer's proffered reasons for her termination are "not the true reason for the employment decision." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981); *see also Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1167 (10th Cir. 2007) (at

this stage, "the plaintiff [] carries the full burden of persuasion to show that the defendant discriminated on the illegal basis of gender." (alterations omitted) (quoting *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005))). Absent direct evidence that the employer's stated reasons are false, the employee may produce circumstantial evidence "demonstrating '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 nondiscriminatory reasons." *Swackhammer*, 493 F.3d at 1167 (quoting *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005)). When evaluating pretext, "'we examine the facts as they appear *to the person making the decision*,' and 'do not look to the plaintiff's subjective evaluation of the situation.'" *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 971 (10th Cir. 2017) (emphasis in original) (quoting *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1044 (10th Cir. 2011)). At this stage, the relevant inquiry is whether the employee has created a genuine issue of material fact as to whether the employer honestly believed its proffered reasons and "acted in good faith upon the beliefs." *Swackhammer*, 493 F.3d at 1170 (quoting *Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 924–25 (10th Cir. 2004)); *see also Litzsinger*, 25 F.4th at 1287 ("The plaintiff 'must come forward with evidence that the employer didn't really believe its proffered reasons for action and thus may have been pursuing a hidden discriminatory agenda.'" (quoting *Johnson v. Weld Cnty.*, 594 F.3d 1202, 1211 (10th Cir. 2010))).

To meet this burden, Lewis points to evidence showing (1) she was able to lift eighty pounds at home; (2) Binetti saw her lift eighty pounds in a video; and (3) Dr. Scherr did not think women should be working underground.[4] Lewis argues a reasonable jury could piece together these facts and come to the conclusion that Dr. Scherr and the managers at Peabody conspired to prevent her from passing the FFDE and returning to work because she is a woman. Therefore, she argues, the district court erred in finding Peabody's proffered reasons were not pretextual.

We disagree. One cannot connect these dots and picture such a conspiracy without relying on unsupported speculation to fill the gaps. For example, Lewis does have evidence Binetti was aware she could lift eighty pounds above her head, but, as Lewis acknowledged, lifting eighty pounds at home was not a substitute for the FFDE. Per Peabody policy, Lewis was not qualified to return to work until she passed the FFDE with Dr. Scherr. Binetti and other Peabody decision-makers knew she had not passed the test with Dr. Scherr. Therefore, even if Binetti knew Lewis had once lifted eighty pounds at home, nothing in the record contradicts Peabody's assertion that it knew Lewis had not actually passed the FFDE and was therefore not qualified to return. Additionally, nothing in the record indicates Dr. Scherr was aware that Lewis had lifted eighty pounds at home. The record actually indicates Dr. Scherr had never seen Lewis lift more than seventy pounds. Absent evidence, at the very least, that Dr. Scherr knew Lewis *could* pass the FFDE, it is not reasonable

[4] We assume for the purposes of this opinion that Dr. Scherr's alleged statements are admissible non-hearsay. *See* Fed. R. Evid. 801(d)(2)(D).

to infer he purposefully sabotaged her efforts to prevent her from passing. Finally, nothing in the record connects any Peabody decision-maker with Dr. Scherr's alleged statements. Therefore, it is not reasonable to infer that a Peabody decision-maker conspired with Dr. Scherr to have Lewis fail the test because she is a woman. Of course, one could speculate that is what happened, but unsupported speculation is insufficient to defeat an otherwise properly supported motion for summary judgment.

Lewis also argues that the EMT certification requirement for the facility technician position was pretextual. She correctly points out that it is unclear from the record when Peabody added that requirement. However, whether Peabody added the requirement six months or six days before Lewis inquired about the position, it is undisputed that it existed when she did. Peabody hired a facility technician who had EMT certification. Therefore, it is not reasonable to infer Peabody added the EMT requirement specifically to prevent Lewis from qualifying for the job because of her sex.

Finally, Lewis argues she was qualified for the other above-ground positions because she had previously performed them on an ad hoc basis. However, evidence that an employee received some training or performed a position on a temporary basis is not proof the employee was qualified for a full-time role. *See E.E.O.C. v. Wiltel, Inc.*, 81 F.3d 1508, 1515-16 (10th Cir. 1996) (although plaintiff received training to perform the duties of a customer service representative when needed, she "did not possess the posted minimum qualifications"). Further, while the record does indicate there were other open positions, there is nothing to indicate that Lewis

inquired about, let alone applied for, these jobs. Therefore, it is not reasonable to infer she did not get these jobs because of her sex.

Lewis has not put forward any evidence that calls into question Peabody's stated justification for her termination: that she was not qualified for the job. Therefore, the district court did not err in granting Peabody summary judgment on her Title VII sex discrimination claim.

b.

The district court also granted summary judgment in favor of Peabody on Lewis's ADA claim. In her opening brief, Lewis does not address this claim and does not indicate to us where she believes the district court erred. Therefore, the issue is waived, and we will not address it. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived.").

III.

For the reasons stated above, we AFFIRM the district court's grant of summary judgment in favor of Peabody.

Entered for the Court

Allison H. Eid
Circuit Judge