FILED
United States Court of Appeals
Tenth Circuit

March 30, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CLARA R. FULLER,

Plaintiff - Appellant,

v.

STATE OF KANSAS DEPARTMENT OF CHILDREN AND FAMILIES; STEPHANIE HENDERSON; LEWIS KIMSEY; LISA LOCKE; SANDRA KIMMONS,

Defendants - Appellees.

No. 19-3221
(D.C. No. 2:16-CV-02415-DDC)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **McKAY**, and **BACHARACH**, Circuit Judges.** ***

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** 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.

*** While the late Honorable Monroe G. McKay was assigned to, and participated in the disposition of, this matter before his death on March 28, 2020, his vote was not counted. *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019) (federal court may not count the vote of a judge who dies before a decision is issued). "The practice of this Court permits the remaining two panel judges if in agreement to act as a quorum in resolving the appeal." *United States v. Wiles*, 106 F.3d 1516, 1516 n. * (10th Cir.1997); *see also* 28 U.S.C. § 46(d) (noting circuit court may adopt procedures permitting disposition of an appeal where remaining quorum of panel agrees on the

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Pro se plaintiff Clara Fuller appeals from the district court's judgment in favor of Defendants on her claims involving employment discrimination.

Plaintiff is a black woman over age 55 who was employed by Defendant Kansas Department of Children and Families ("DCF") in its Low Income Energy Assistance Program ("LIEAP"). The individual Defendants are all DCF employees involved in the LIEAP program. Plaintiff sued the individual Defendants[1] in their official and personal capacities for race, sex, and age discrimination, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, and brought a claim under 42 U.S.C. § 1983. Plaintiff alleges that Defendants discriminated against her during the hiring process by requesting that she provide a written evaluation from a previous employer before she could be employed, a request she says Defendants did not impose on other applicants. Plaintiff also alleges discrimination in Defendants' decision to terminate her employment. She asserts that she and another employee, who is also a black woman over age 55, were terminated based on their race, sex, and age and that Defendants' proffered reason for their termination—subpar performance—was pretext. On Defendants' motion, the district court dismissed,

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disposition). The remaining panel members have acted as a quorum with respect to this Order and Judgment.

[1] Plaintiff initially named DCF as the sole defendant, but she later amended her complaint and named only the individual Defendants.

pursuant to Fed. R. Civ. P. 12(b)(6), all but one of Plaintiff's claims and later granted Defendants' motion for summary judgment on Plaintiff's remaining Title VII claim.

On appeal, Plaintiff challenges some of the district court's rulings in its dismissal and summary-judgment orders. "We review de novo the grant of a motion to dismiss under [Rule] 12(b)(6)." *Baca v. Colo. Dep't of State*, 935 F.3d 887, 928 (10th Cir. 2019). "We must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Id.* (quotation marks and brackets omitted). "To survive a motion to dismiss, a plaintiff must plead facts sufficient to state a claim to relief that is plausible on its face." *Id.* (quotation marks omitted). "We review a district court's summary judgment ruling de novo, applying the same standard as the district court." *Evans v. Sandy City*, 944 F.3d 847, 852 (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.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). "In reviewing a motion for summary judgment, we review the facts and all reasonable inferences those facts support, in the light most favorable to the nonmoving party." *Id.* (quotation marks omitted). We evaluate Plaintiff's appeal claim-by-claim.[2]

[2] We liberally construe Plaintiff's pro se filings but must avoid the advocatory role of argument-creator. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

First, Plaintiff argues the district court erred by dismissing her § 1983 claim against the individual Defendants in their personal capacities.[3] Having reviewed Plaintiff's complaint and other filings, the court agreed with Defendants that Plaintiff had failed to identify any independent federal right underlying her § 1983 claim. *See Jones v. Norton*, 809 F.3d 564, 577 (10th Cir. 2015). On appeal, Plaintiff argues that she premised her § 1983 claim on a deprivation of her Fourteenth Amendment rights. However, Plaintiff only raises this argument in her reply brief. Even a pro se appellant like Plaintiff waives an argument by not raising it in her opening brief when she could have done so. *See McClaflin v. Burd*, 622 F. App'x 769, 770 (10th Cir. 2015). Accordingly, we do not review Plaintiff's challenge to the dismissal of her § 1983 claim.[4]

Second, Plaintiff argues the district court erred by dismissing her ADEA claim. The court ruled that Plaintiff could not maintain the claim against the individual Defendants in their personal capacities because the ADEA imposes liability only on employers, not on other employees acting in supervisory roles who do not otherwise qualify as employers. Citing Supreme Court and Tenth Circuit decisions, Plaintiff

[3] The district court ruled that sovereign immunity protected the individual Defendants from being sued under § 1983 in their official capacities. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). Even liberally construed, Plaintiff's appellate briefing does not challenge this ruling, so we do not review it. *See Phillips v. Humble*, 587 F.3d 1267, 1274 (10th Cir. 2009).

[4] Plaintiff also waited until her reply brief to raise arguments regarding the district court's denial of several of her discovery-related motions. These arguments are likewise waived.

appears to argue that the individual Defendants can be held personally liable under the ADEA because they exercised significant supervisory authority. But the decisions she cites stand only for the proposition that an employer (such as DCF) may be held vicariously liable for its agents' (such as the individual Defendants') actions, not that the agents themselves may be held personally liable. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011); *Haynes v. Williams*, 88 F.3d 898 (10th Cir. 1996); *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1125 (10th Cir. 1993). In fact, *Haynes* and *Sauers* make clear, at least for purposes of Title VII, that individual supervisors cannot be held personally liable and that personal-capacity suits against fellow employees are inappropriate. *See Haynes*, 88 F.3d at 898–99; *Sauers*, 1 F.3d at 1125. Plaintiff fails to explain why the same rule would not be equally applicable here. *Cf. Stapp v. Curry Cty. Bd. of Cty. Comm'rs*, 672 F. App'x 841, 847 (10th Cir. 2016) ("Title VII defines 'employer' in the same way as the ADEA, and hence the definitions must be read in the same fashion." (citations and quotation marks omitted)). Thus, in light of *Haynes*' and *Sauers*' treatment of this issue in the analogous Title VII context, we are not persuaded that the district court erred in concluding that the ADEA permits suit only against employers and not against supervisory employees.

The district court also ruled that, unless Congress has abrogated it, sovereign immunity protects the individual Defendants from being sued in their official capacities and that the ADEA does not abrogate sovereign immunity. Plaintiff seems to concede that sovereign immunity protects the individual Defendants in the absence

of congressional abrogation. Although she outlines some of the analytical framework for determining whether an act of Congress validly abrogates sovereign immunity, she does not apply this framework to the ADEA or seem to otherwise contend that the ADEA abrogates state sovereign immunity. And, in any event, as the district court correctly ruled, the ADEA does not validly abrogate the states' sovereign immunity. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91–92 (2000). Thus, to the extent Plaintiff contests the district court's sovereign-immunity analysis, her argument is meritless.

Third, Plaintiff argues the district court erred by dismissing portions of her Title VII claim and granting Defendants summary judgment on the remainder of the claim. The court dismissed the portion of the claim asserting discrimination in Plaintiff's hiring process because her complaint failed to allege that she suffered an adverse employment action, an element of a prima facie Title VII claim.[5] The allegations that Defendants required Plaintiff to provide a written evaluation from a previous employer before hiring her, the court explained, amount to a mere inconvenience, not an adverse employment action. On appeal, Plaintiff continues to complain of the written-evaluation requirement Defendants imposed on her. We agree with the district court, however, that these allegations do not satisfy the

[5] As with her ADEA claim, Plaintiff argues that the individual Defendants can be held personally liable under Title VII based on their supervisory authority. We conclude, however, that the district court correctly dismissed this portion of the Title VII claim on the grounds that the individual Defendants cannot be held personally liable under Title VII and that the claim against them in their personal capacity was inappropriate. *See Haynes*, 88 F.3d at 898–99; *Sauers*, 1 F.3d at 1125.

requirement to allege an adverse employment action as they amount to nothing more than "mere inconvenience." *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1316 (10th Cir. 2017); *cf. Godoy v. Habersham Cty.*, 211 F. App'x 850, 853 (11th Cir. 2006) (concluding that altering candidates' test scores did not amount to adverse employment action because the defendants ultimately hired the plaintiff).

Applying the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the district court granted Defendants summary judgment on the portion of Plaintiff's Title VII claim based on her termination. Because Defendants did not dispute that Plaintiff could establish a prima facie case of discrimination, the court turned to the second step of *McDonnell Douglas* and determined that there was no genuine dispute that Defendants had established a legitimate, non-discriminatory reason for the termination, namely subpar performance. The court explained that uncontroverted evidence showed that, although the LIEAP program did not impose a quota, DCF tracked employees' productivity in terms of registering and processing applications[6]; that, among LIEAP employees without other job responsibilities, Plaintiff had the second lowest

[6] As she did in the district court, Plaintiff insinuates that Defendants fabricated productivity reports for the purpose of litigating this matter. Unsupported speculation of this nature is not enough to withstand summary judgment. *See Jordan v. Dillon Cos.*, 618 F. App'x 926, 929 (10th Cir. 2015). Plaintiff also attacks the reports on the ground that Defendants began tracking employees' productivity before their initial training period ended. We agree with the district court, however, that this argument does not raise a dispute as to the *material* fact at issue, i.e., that Plaintiff was the second least productive employee of those without other job responsibilities.

productivity numbers for both registering and processing applications[7]; and that Plaintiff and the only other employee with worse productivity numbers were terminated on the same day. Turning to the third *McDonnell Douglas* step, the court determined that Plaintiff had failed to adduce evidence that Defendants' proffered reasons for terminating her were pretextual. Specifically, the court explained that Plaintiff's (1) subjective belief that her performance was not substandard, (2) argument that the program's lack of a quota made Defendants' reliance on her productivity illegitimate, (3) speculation regarding Defendants' motives for terminating her, and (4) characterization of Defendants' reasons for terminating her as inconsistent were all insufficient to demonstrate pretext.

On appeal, Plaintiff raises many of the same arguments she raised in the district court. She asserts that her performance was not subpar because, unlike the employees she was compared to, she had responsibilities in addition to registering and processing applications and because Defendants assigned her to processing lengthier applications than other employees processed. But we agree with the district court that Plaintiff pointed to no record evidence supporting this assertion at summary judgment, and she fails to point to any such evidence on appeal as well. Plaintiff argues that, because Defendants did not impose a quota, they could not

[7] Plaintiff argues that the district court misapprehended the productivity reports because they show that other employees registered and processed fewer applications than she did. After reviewing them, we agree with the district court that the reports show that Plaintiff had the second lowest productivity numbers of the relevant group of employees.

legitimately rely on her low productivity numbers to terminate her. But, as the district court explained, our precedent is clear that facially non-discriminatory business decisions are not pretextual or otherwise illegitimate merely because they are made without reference to a preexisting formal policy, such as a quota. *See Medlock v. United Parcel Serv., Inc.*, 608 F.3d 1185, 1192–93 (10th Cir. 2010). Plaintiff also argues she demonstrated pretext by pointing out that one of the Defendants, who, Plaintiff avers, must have been aware of the reason Plaintiff had been summoned to the meeting in which she was notified of her termination, told Plaintiff that she was not aware of the meeting's purpose. But even accepting these assertions, as the district court did, we fail to see how they amount to evidence of pretext.[8] Thus, we see no merit in Plaintiff's arguments attacking the district court's summary-judgment analysis.

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[8] Plaintiff also advances a number of arguments on appeal that she did not raise in the district court. For instance, she argues that that imposition of productivity requirements violated Kansas law, that Defendants discriminated against her by terminating her employment while merely laying off white employees, that Defendants' reliance on productivity reports was pretextual because they said the reports were intended to identify employees needing remedial training when no such training existed, and that her performance was not subpar because, based on DCF's advertisement regarding her position, processing applications amounted to only 45% of her duties. Because Plaintiff did not raise these arguments in the district court and does not attempt to satisfy the plain error standard on appeal, we do not review the arguments. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130–31 (10th Cir. 2011).

In sum, we conclude that Plaintiff's challenges to the district court's orders dismissing or granting summary judgment on her claims are either waived or meritless.[9] We therefore **AFFIRM** the district court's judgment.

Entered for the Court

Per Curiam

[9] Plaintiff also argues the district court erred by denying her motion to strike a chart summarizing the productivity reports that Defendants used in support of summary judgment. Although it denied the motion, the court declined to rely on the chart in its summary-judgment decision; thus, any error in denying the motion would provide no basis for reversal. *See Kitchen v. BASF*, ___ F.3d ___, 2020 WL 964371, at *5 (5th Cir. Feb. 28, 2020).