FILED
United States Court of Appeals
Tenth Circuit

September 6, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROY MESTAS,

Plaintiff - Appellant,

v.

TOWN OF EVANSVILLE, WYOMING,

Defendant - Appellee.

No. 17-8092
(D.C. No. 1:17-CV-00017-NDF)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

After being terminated as an employee of the Town of Evansville, Wyoming, Plaintiff-Appellant Roy Mestas sued his former employer, alleging hostile work environment and retaliation claims under the Americans with Disabilities Act (ADA) as well as hostile work environment and retaliation claims under Title VII. The district court denied Mestas's motion for partial summary judgment and instead granted summary judgment in favor of Evansville on all claims. Mestas appealed. We conclude that genuine issues of material fact exist as to Mestas's ADA claims and Title VII claims.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Accordingly, we reverse the district court's grant of summary judgment in favor of Defendant-Appellee Evansville.

I.

Mestas began his employment with the Town of Evansville, Wyoming, on September 12, 2012. He was staffed in the Public Works Department (PWD) as a sanitation truck driver. On November 26, 2012, Mestas injured his back at work after slipping on ice. He submitted documentation from his physician stating that he was unable to work until further notice. Mestas was then placed on medical leave until January 14, 2013. Mestas returned to work on January 14, 2013 with no restrictions.

All PWD employees are subject to a six-month probationary period. When Mestas returned to work in January 2013, Supervisors Dale Brown and Brian Boettcher presented a letter to Mestas stating that his probationary period would be extended to May 24, 2013, due to the "extended lost work time due to [his] injury on November 26, 2012." A.102. Mestas alleges that, after his return to work in January 2013, Supervisor Brown was upset that he was injured and had missed work and treated him more severely than other employees. This treatment included expecting Mestas to perform tasks without co-worker assistance. At least one witness testified that Supervisor Brown admonished him for helping Mestas with a task that would have otherwise been impossible to complete alone.

Mestas further alleges that Supervisor Brown repeatedly made derogatory remarks toward those of Hispanic origin. Brown frequently called subordinates, including Mestas, "beaners," "stupid beaners," and "dumb Mexican[s]." A.693–95. These

comments became so pervasive that Mestas began documenting and recording some of his conversations with Brown. On two occasions, Mestas complained to Supervisor Brown about these remarks, but they did not stop. Multiple coworkers corroborated Mestas's allegations regarding Supervisor Brown's derogatory statements. On one occasion, when Eric Reyna—the only other Hispanic employee—and Mestas were working together, Supervisor Brown told Mestas and Reyna that he did not need "you beaners going together." A.694. Supervisor Brown apologized to Reyna for the incident, but not to Mestas. Reyna testified that these comments upset Mestas. Reyna also stated that he did not complain directly to Brown or to the mayor's office because he was afraid of losing his job.

Mestas claims he reinjured his back in April 2013, but he did not inform his supervisors of any specific new injury or submit any documentation of a new injury. On April 11, 2013 Mestas informed Supervisor Brown that he had scheduled a doctor's appointment for a steroid injection to relieve his back pain, and that he would have to miss work on April 18. Brown granted the request, and Mestas was set to miss work for the appointment the following week. On April 15, Mestas reported to work to help with snow removal. During the removal, Mestas asked Supervisor Brown if he could use his own snowblower because of his back pain. Supervisor Brown denied this request, allegedly stating "that's what I have Mexicans for, to do this work," or something to that effect. A.179.

On April 16, 2013, Mestas called into work and asked Supervisor Brown if he could be excused from shoveling snow because he had reinjured his back. Supervisor

Brown hung up on Mestas. When Mestas called back, Supervisor Brown told Mestas he did not "want to hear [his] sh**." A.179. On April 17, when Mestas reported to work, Supervisor Brown fired him because "things were not working out." *Id*. Supervisor Brown said Mestas should go "take care of [his] back and whatever." *Id*. Following his termination, Mestas applied for and received Social Security Disability Insurance benefits dating back to April 16, 2013.

Mestas sued the Town of Evansville in the U.S. District Court for the District of Wyoming under the ADA and Title VII. The district court identified and considered the following four claims within Mestas's suit: (1) hostile work environment under the ADA; (2) retaliation in employment for taking medical leave for a disability in violation of the ADA; (3) hostile work environment based on discrimination under Title VII; and (4) retaliation for addressing concerns about Brown's use of offensive slang in violation of Title VII. Dis. Ct. Order at 6, 7, 11, 14. Mestas filed a motion for partial summary judgment; Evansville sought summary judgment on all claims. The district court denied Mestas's motion and granted Evansville's motion. Mestas now appeals the district court's order.

II.

This court reviews a district court's grant of summary judgment de novo. *Foster v. Mountain Coal Co., LLC*, 830 F.3d 1178, 1186 (10th Cir. 2016). When reviewing the record, "we view all evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Id.* (quotations omitted). Summary judgment is only appropriate where there are no issues of material fact and the moving party is entitled to

judgment as a matter of law. *Id.* "A fact is material only if it might affect the outcome of the suit under governing law. And a dispute over a material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bennett v. Windstream Commc'ns, Inc.*, 792 F.3d 1261, 1265–66 (10th Cir. 2015) (citations and quotations omitted).

The ADA was created to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). A person with a disability is defined as an individual who has "a physical or mental impairment that substantially limits one or more major life activities," "a record of such impairment," or "being regarded as having such an impairment." *Id.* § 12102(1). Whether a person has a substantially limiting impairment, or that they established a record of such, should be "construed broadly." 29 C.F.R. § 1630.2(j)(1)(i). And even a record of "previous[]" impairments can still entitle a person to reasonable accommodations in the work place. *See id*. § 1630.2(k)(2).

Covered employers violate the ADA when they discriminate "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). To succeed on an ADA retaliation claim, "a plaintiff need not show that []he suffers from an actual disability." *Foster*, 830 F.3d at 1186 (quotations omitted). "Rather . . . , the plaintiff need only show he had a reasonable, good-faith belief that he was disabled." *Id.* To establish a prima facie case of ADA retaliation, the plaintiff must prove that: "(1) [he]

engaged in a protected activity; (2) [he] was subjected to an adverse employment action subsequent to or contemporaneous with the protected activity; and (3) there was a causal connection between the protected activity and the adverse employment action." *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999).

A.

The district court granted summary judgment in favor of Defendant-Appellee Evansville on Mestas's ADA hostile work environment claim—because he "failed to establish" a record of disability—and on his ADA retaliation claim because he did not "establish that he engaged in a protected activity under the ADA." Dis. Ct. Order at 13, 15. We disagree with these assessments. After reviewing the record, we conclude that genuine issues of material fact exist regarding Mestas's ADA hostile work environment and retaliation claims and, accordingly, reverse the district court's determination.

First, viewing the evidence in the light most favorable to Mestas, we hold that a reasonable jury could interpret Mestas's various requests for accommodations and treatment as establishing that he had a record of disability. "Whether an individual has a record of an impairment that substantially limited a major life activity shall be *construed broadly*." *Id*. § 1630.2(k)(2) (emphasis added). The following factors can aid in "determining whether an individual's impairment" is substantially limiting: "pain experienced when performing a major life activity . . . [and] burdens associated with

following a particular treatment regimen." *Id*. § 1630.2(j)(4)(ii).[1] A reasonable jury therefore could find that Mestas established a record of disability through his physician's documentation about his injured back in November 2012, his medical leave from November 2012 to January 2013, and his requests in April 2013 to take time off for a steroid injection and to have snow-removal accommodations because of his back pain.

Second, viewing the evidence in the light most favorable to Mestas, we hold that a reasonable jury could also interpret Mestas's various requests as ADA protected activities that satisfy the first element of his ADA retaliation claim. When Mestas requested both long-term leave (from November 2012 to January 2013) and short-term leave (for the April steroid injection), he indicated to Supervisor Brown that the leave was related to his back injury. The same is true of his request to use the snowblower and his request to be excused from shoveling snow. There is no requirement that an employee use "magic words" like "ADA" or "reasonable accommodation" when making a request; the employee must only make clear that "the employee wants assistance *for his or her disability*." *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011) (quotations omitted). A reasonable jury therefore could find Mestas's requests for leave both adequate and protected. *Foster*, 830 F.3d at 1188 ("[A] request for accommodation

---

[1] In determining whether Mestas's impairment was substantially limiting, the district court considered factors from a quotation of 29 C.F.R. § 1630.2 in *McKenzie v. Dovala*, 242 F.3d 967 (10th Cir. 2001). Dis. Ct. Order at 12. But the most current version of the regulation establishes a less "demanding" standard for making such a determination. 29 C.F.R. § 1630.2(j)(1)(ii).

is adequate if it is 'sufficiently direct and specific, giving notice that [the employee] needs a special accommodation.'") (quoting *Calero–Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 23 (1st Cir. 2004)).

We also conclude that a genuine issue of material fact exists as to the second element of Mestas's ADA retaliation claim: that Mestas was subjected to adverse employment action. In this circuit, there is no "set rule regarding what constitutes an 'adverse employment action.'" *Anderson*, 181 F.3d at 1178 (quoting *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998)). Instead, we make that determination on a case-by-case basis. *Id.* Mestas alleges that Brown "extended his probation, threatened his continued employment, harassed him and fired him immediately after Mr. Mestas had engaged in protected activity." Aplt. Br. at 33. Given our flexible approach to defining adverse actions, a reasonable jury could find these acts sufficient to constitute adverse employment actions within the meaning of the ADA.

Turning to the final element of Mestas's retaliation claim, we find a material issue of fact exists there too. To prove that Evansville retaliated against Mestas because he engaged in protected activity, Mestas points to the seven-day period in April 2013 during which Mestas first requested time off to receive a steroid injection, then requested two snow-removal accommodations due to his back injury, and finally was fired. On its own, temporal proximity between protected activity and adverse employment action can establish causation. *See Anderson*, 181 F.3d at 1179. But Mestas also alleges that, in the conversation in which he fired Mestas, Brown specifically told Mestas that he "should go take care of [his] back and whatever." Viewing these allegations in a light most

favorable to Mestas, we conclude that a reasonable jury could interpret both the proximity of Mestas's termination and Brown's reference to Mestas's injury in that conversation as proof of causation.

Finally, the district court found that, on the date of his termination, Mestas was not a "qualified individual" under the ADA. *Id.* at 16. This determination was not a proper basis for finding in favor of Defendant-Appellee Evansville. Unlike a discrimination claim under the ADA, an ADA retaliation claim requires no proof that a plaintiff actually suffers from a disability. *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1264 (10th Cir. 2001). "Instead, a reasonable, good faith belief that the statute has been violated suffices." *Id.* A reasonable jury could find that Mestas had such a belief.

III.

Under Title VII, it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting 42 U.S.C. § 2000e–2(a)(1)). "[A]n employee's claims of a hostile work environment based on race or national origin discrimination" are also actionable under Title VII. *Herrera v. Lufkin Indus., Inc.*, 474 F.3d 675, 680 (10th Cir. 2007).

To survive summary judgment, a plaintiff alleging a racially hostile work environment must show "that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to . . . create an abusive working environment, and that the victim 'was targeted

for harassment because of his race or national origin.'" *Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 957 (10th Cir. 2012) (citing *Morris v. City of Colo. Springs*, 666 F.3d 654, 663–64 (10th Cir. 2012)).

"The applicable test for a hostile work environment has both objective and subjective components. A dual standard asks both whether the plaintiff was offended by the work environment and whether a reasonable person would likewise be offended, and both must be proved." *Id.* (quotations omitted). Whether a workplace has become hostile or abusive can only be determined by evaluating all the circumstances surrounding the relevant conduct, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. However, we have held that the "severity and pervasiveness evaluation" of a hostile work environment claim "is particularly unsuited for summary judgment because it is quintessentially a question of fact." *Herrera*, 474 F.3d at 680.

Retaliation is also actionable under Title VII. To establish a prima facie case of retaliation under Title VII, a plaintiff must demonstrate that (1) he engaged in protected opposition to discrimination; (2) adverse employment action was taken against him; and (3) "there exists a causal connection between the protected activity and the adverse action." *Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004).

A.

Viewing the evidence in the light most favorable to Mestas, both Mestas's hostile work environment and retaliation claims under Title VII present genuine issues of material fact. We reverse the district court's grant of summary judgment in favor of Evansville on these claims.

Turning first to the hostile work environment claim, the district court concluded that the statements made by Supervisor Brown were merely "offhand comments" and "isolated incidents." Dis. Ct. Order at 7. But as we have previously held, which comments made in the workplace rise to the level of discriminatory conduct, and whether their frequency was sufficiently pervasive, are questions a district court is not well-suited to determine on a motion for summary judgment. *Herrera*, 474 F.3d at 680.

A reasonable jury could determine that the record both objectively and subjectively demonstrates a hostile work environment. Viewing the record in the light most favorable to Mestas, Mestas has shown that Supervisor Brown and others at PWD repeatedly made derogatory remarks using racial slurs such as "beaner," "stupid beaner," and "dumb Mexican." Brown made these comments in front of Mestas and at least one other employee of Hispanic origin. Mestas's own notes, as well as Reyna's deposition testimony, show that Mestas was upset at Supervisor Brown and his use of racial slurs. Though Mestas complained to Brown about the comments, Brown's comments did not stop. Further, Reyna indicated that he declined to make any formal complaints about Brown's behavior for fear that it would trigger retaliation.

A reasonable jury could also determine that Mestas has established a prima facie case of Title VII retaliation. The record shows that Mestas approached Supervisor Brown about his use of the word "beaner" on April 1, 2013. Brown fired Mestas on April 17, 2013. "A causal connection" between protected activity and adverse employment action "may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Burrus v. United Tel. Co. of Kan.*, 683 F.2d 339, 343 (10th Cir. 1982). Those seventeen days alone could conceivably establish the causation prong of Mestas's prima facie case. *See Anderson*, 181 F.3d at 1179 ("[W]e have held that a one and one-half month period between protected activity and adverse action may, by itself, establish causation. By contrast, we have held that a three-month period, standing alone, is insufficient to establish causation." (citations omitted)).

IV.

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment in favor of Defendant-Appellant Evansville.

Entered for the Court

Allison H. Eid
Circuit Judge