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United States Court of Appeals
Tenth Circuit

October 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARY F. CUMMINGS,

Plaintiff - Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant - Appellee.

No. 20-7066
(D.C. No. 6:18-CV-00231-RAW)
(E.D. Okla.)

ORDER AND JUDGMENT*

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

Mary F. Cummings, proceeding pro se, appeals from the district court's grant of summary judgment to her former employer, the United States Postal Service (USPS), in her suit alleging breach of a collective bargaining agreement, employment discrimination, and violations of due process. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

BACKGROUND

Ms. Cummings is a Native American female who is older than 50. She worked temporary USPS positions for nearly two years, including a full term as a Postal Support Employee (PSE). On May 14, 2016, USPS converted her to a career position in Vian, Oklahoma. The 2015-2018 collective bargaining agreement (the CBA) went into effect on July 8, 2016, while Ms. Cummings was employed at Vian. It provided for a 90-day probation period for new employees. Notwithstanding her USPS work history, in light of the conversion USPS classified and treated Ms. Cummings as a probationary employee when she started at Vian.

Ms. Cummings had not received any disciplinary reports in her prior positions. But her supervisor at Vian, Postmaster Carla Milosav, was dissatisfied with her performance and rated her as "unsatisfactory" in all categories at 30-day and 60-day reviews. Ultimately, Ms. Milosav terminated Ms. Cummings' employment on July 25, 2016. In the termination letter, she stated that Ms. Cummings, as a probationary employee, did not have access to the CBA's grievance procedure.

A few days after Ms. Milosav terminated Ms. Cummings' employment, USPS and the union signed a document addressing various issues arising out of the CBA. The "Clerk Craft Questions & Answers Re: POStPlan, Filling Residual Vacancies, and Travel" (Q&A) answered the question "When converted to career, does a PSE have to serve a probationary period?" by stating, "Clerk Craft PSEs who have already served one full term as a PSE will not be required to serve a probationary period . . . after conversion to career." R. Vol. II at 28. Ms. Cummings asserts that after the

Q&A was signed, she filed union grievances regarding the termination of her employment. The record does not reveal what happened with those grievances.

In 2017, Ms. Cummings unsuccessfully applied for several positions with Oklahoma post offices. In January, she was not selected for a PSE position in Whitesboro; in August, she was not selected for a PSE position in Howe; and in September, she was not selected for a PSE position in Muse.

In July 2018, she filed suit in the district court. As relevant to this appeal, she alleged violations of the CBA and the Q&A; discrimination on the basis of sex, race, and age, as well as retaliation, in the termination of her employment at Vian and her non-selection for the positions in Whitesboro, Howe, and Muse; and deprivation of a property interest without due process. The district court denied Ms. Cummings' motion for entry of default and USPS' motion to dismiss, but then granted USPS' motion for summary judgment. Ms. Cummings appeals.

DISCUSSION

I. Motion for Entry of Default

Ms. Cummings challenges the district court's denial of her motion for entry of default. We review the decision for abuse of discretion. *Cf. Harvey v. United States*, 685 F.3d 939, 945 (10th Cir. 2012) (reviewing denial of motion for default judgment for abuse of discretion).

The district court did not abuse its discretion in declining to find a default. Ms. Cummings alleged that USPS had failed to file an answer. But as the district court noted, Fed. R. Civ. P. 55(a) allows entry of default where a party "has failed to

plead or otherwise defend." Before Ms. Cummings filed her motion, USPS had filed a motion to dismiss, which qualifies as "otherwise defend[ing]" against the suit.

Ms. Cummings asserts that USPS' motion to dismiss was untimely, but she did not make that argument in her motion for entry of default. Moreover, she did not file her motion for entry of default until four months after the date she alleges USPS should have filed its answer. By that time, the parties had completely briefed the motion to dismiss, further undermining any conclusion that USPS had defaulted.

II. Summary Judgment

A. Standard of Review

We review a grant of summary judgment de novo, viewing the facts in the light most favorable to Ms. Cummings as the non-moving party. *See Foster v. Mountain Coal Co. LLC*,830 F.3d 1178, 1186 (10th Cir. 2016). 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 read Ms. Cummings' pro se filings liberally, but she must "follow the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted). We "cannot take on the responsibility of serving as [her] attorney in constructing arguments and searching the record." *Id.*

B. Consideration of Summary Judgment Materials

Ms. Cummings raises several challenges to the district court's consideration of the summary judgment materials, including its resolution of evidentiary issues.

She complains that the district court "did not give [her] an opportunity to properly support or address the fact[s]" and that she "was not aware or warned of her obligation to submit reply affidavits in response to a motion for summary judgment." Aplt. Opening Br. at CM/ECF p. 24. But Fed. R. Civ. P. 56(c) put her on notice of the requirements for disputing facts for purposes of summary judgment. Moreover, when USPS objected that her evidence was not in proper form, the district court nevertheless considered the evidence. The court was not required to act as her counsel and advise her how to present her case. *See Garrett*, 425 F.3d at 840.

She further argues that the district court precluded her from using discovery responses to establish genuine issues of material fact. She does not explain, however, which discovery responses the court did not allow her to use. And although USPS sought exclusion of unauthenticated evidence, its argument did not apply to its own discovery responses. *See* R. Vol. IV at 3-4 ("All of Plaintiff's exhibits attached to her Response *except potentially, Exhibits 7 and 9, Defendant[']s discovery responses*, should not be considered as they have not been properly supported by affidavits, they have not been authenticated or identified . . . ." (emphasis added)).

Ms. Cummings also challenges the district court's denial of her motion in limine to exclude the declaration of a USPS employee who tracks employment complaints from the region including Oklahoma. We review decisions regarding motions in limine for abuse of discretion, *see Sundance Energy Okla., LLC v. Dan D. Drilling Corp.*, 836 F.3d 1271, 1279 (10th Cir. 2016), and here there was no abuse. Ms. Cummings contended that the employee was improperly testifying as an expert,

but as the district court concluded, the employee was a fact witness. She now argues that the declaration was based on hearsay, but she does not establish how the testimony constituted hearsay. Contrary to her assertion in her reply brief, the fact that a declaration is made out of court does not make the declaration itself inadmissible hearsay.

Finally, Ms. Cummings complains that the district court allowed USPS to use declarations that were not made on personal knowledge and did not state the declarants "will testify as a live witness on the matters stated, pursuant to Fed. R. Civ. P. 56(c)(4)." Aplt. Reply Br. at CM/ECF p. 13. There is no indication, however, that the witnesses were not competent to testify to the matters discussed in their declarations. And Rule 56(c)(4) does not require a declaration affirmatively to state that a witness intends to testify at trial.

C. Claims Arising from the CBA and Q&A

Ms. Cummings alleges that USPS violated the CBA and the Q&A by treating her as a probationary employee and terminating her employment without just cause and without affording her the protections granted by the CBA, including the ability to grieve the discharge. She argues that because she completed a full term as a PSE before beginning work at Vian, she was not properly subject to a probationary period.

The district court held that she had not established a genuine issue of material fact as to her probationary status, and under the CBA, a probationary employee was not entitled to grieve a termination. While recognizing that the Q&A "did away with the probationary period which had applied to employees such as [Ms. Cummings],"

R. Vol. IV at 24, the court held that it was not signed until after her employment was terminated, and she had not established a genuine issue of material fact as to whether it was effective before the signing.

The CBA provides "[t]he probationary period for a new employee shall be ninety (90) calendar days." R. Vol. II at 24. It does not appear that the CBA defines "new" employee for purposes of the probationary period. We are not persuaded, however, that a reasonable factfinder could conclude that USPS breached the CBA by classifying Ms. Cummings as a probationary employee.

USPS had treated converting employees as subject to a 90-day probationary period before the CBA. *See, e.g., Printemps-Herget v. Brennan*, No. 3:18-CV-00476-MO, 2019 WL 4580484, at *1 (D. Or. Sept. 19, 2019); *Johnson v. U.S. Postal Serv.*, No. 1:17-CV-01385, 2019 WL 3202196, at *1 (M.D. Pa. July 15, 2019); *Bryant v. U.S. Postal Serv.*, No. 17-2244-CM, 2019 WL 2473787, at *1 (D. Kan. June 13, 2019). Ms. Cummings started at Vian before the CBA became effective, and classifying her as a probationary employee under the CBA was consistent with prior practice. Further, there is no showing that the other party to the CBA (the union) objected to USPS' interpretation. It was evident from the beginning of Ms. Cummings' employment at Vian that USPS was treating her as a probationary employee. Yet neither Ms. Cummings nor the union objected at any time before the signing of the Q&A, when Ms. Cummings filed grievances with the union. But even then, the record does not show that the union challenged USPS' handling of Ms. Cummings' employment.

The Q&A explicitly provided that employees such as Ms. Cummings were not subject to the probationary period. As the district court noted, however, the parties signed the Q&A after Ms. Cummings' employment ended. Ms. Cummings argues that the Q&A was intended to aid in interpreting the CBA, and thus its provisions should reach back to July 8, 2016, the CBA's effective date. But there is no indication that the parties intended the Q&A to apply retroactively to undo an already-effective termination.

Because Ms. Cummings was a probationary employee, USPS did not breach the CBA by terminating her employment or by informing her that she was not eligible to file a grievance regarding the termination. The CBA explicitly provides that USPS had "the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto." R. Vol. II at 24.

Ms. Cummings also cites various provisions of the CBA that offer protections against layoffs. These provisions do not apply here, however, because USPS terminated her employment because of her performance, not in a layoff. *See* R. Vol. III at 257 ("The term 'layoff' . . . refers to the separation of . . . employees . . . because of lack of work or other legitimate, non-disciplinary reasons.").

D. Discrimination Claims

Ms. Cummings further alleges that USPS (1) discriminated against her on the basis of sex, race, and age in terminating her employment, and (2) discriminated against her on the basis of sex, race, and age and retaliated against her in refusing to

hire her into the positions in Whitesboro, Howe, and Muse. The district court held that she had failed to exhaust her administrative remedies.

1. Title VII Claims

"Federal employees alleging discrimination or retaliation prohibited by Title VII . . . must comply with specific administrative complaint procedures in order to exhaust their administrative remedies." *Hickey v. Brennan*, 969 F.3d 1113, 1118 (10th Cir. 2020) (internal quotation marks omitted). The exhaustion requirement is not jurisdictional, but is an affirmative defense that the court must enforce if the employer raises it. *See id.* Here, USPS raised the affirmative defense.[1]

For the Title VII claims, the administrative process required Ms. Cummings to initiate an informal complaint within 45 days of the alleged discriminatory personnel action. *See* 29 C.F.R. § 1614.105(a)(1); *Hickey*, 969 F.3d at 1119. After completing informal counseling, she had 15 days to file a formal complaint. 29 C.F.R. § 1614.106(b).

With regard to both the termination and the failure to hire her for the open positions, Ms. Cummings contacted the National Equal Employment Opportunity Investigative Services Office (NEEOISO) and completed informal counseling forms. In both instances, NEEOISO responded, informing her it had processed her informal complaints and, if she wished to proceed with her claims, she should file formal complaints. But Ms. Cummings never filed formal complaints. Thus, she did not

[1] Ms. Cummings asserts exhaustion is not appropriate for decision on summary judgment, but that is not the rule in this circuit. *See, e.g., Hickey*, 969 F.3d at 1118.

exhaust her administrative remedies for her Title VII claims. The district court correctly enforced the affirmative defense on these claims.

2. Age Discrimination Claims

As with Title VII, failure to exhaust administrative remedies for a claim under the Age Discrimination in Employment Act (ADEA) is a non-jurisdictional affirmative defense. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1185 & n.10 (10th Cir. 2018). Unlike her Title VII claims, however, for her ADEA claims, Ms. Cummings was not required to file a formal complaint with NEEOISO. Instead, she could file suit in federal district court after giving the Equal Employment Opportunity Office at least 30 days' written notice of her intent to sue. *See* 29 U.S.C. § 633a(d); 29 C.F.R. § 1614.201(a). Notice can be sent by mail, personal delivery, or facsimile. *See* 29 C.F.R. § 1614.201(a).

Ms. Cummings produced evidence of two facsimiles she sent to the facsimile number NEEOISO provided for notices of intent to sue. The facsimiles were timely sent with regard to the termination and the non-selection for the Howe and Muse positions, although not the Whitesboro position. *See* 29 U.S.C. § 633a(d) (requiring notice to be sent within 180 days of the complained-of action). Affording Ms. Cummings the benefit of all reasonable inferences, they create a genuine issue of material fact as to whether she exhausted her administrative remedies regarding the termination and non-selection for the Howe and Muse positions. Arguably, therefore, the district court erred in granting summary judgment because of failure to exhaust administrative remedies on those claims.

Nevertheless, we may affirm a grant of summary judgment on other grounds supported by the record, *see Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011), and we do so here. Ms. Cummings has shown neither a prima facie case nor pretext under the burden-shifting scheme applicable to ADEA discrimination claims. *See Bennett v. Windstream Commc'ns, Inc.*, 792 F.3d 1261, 1266 (10th Cir. 2015) (describing the burden-shifting framework).

"A prima facie case generally requires a plaintiff to show, by a preponderance of the evidence, that she is a member of a protected class, she suffered an adverse employment action, and the challenged action occurred under circumstances giving rise to an inference of discrimination." *Id.*[2] Ms. Cummings established she is a member of a protected class (at least 40 years old) and she suffered an adverse employment action (termination of her employment and non-selection for other positions). But she did not create a genuine issue of material fact as to whether the circumstances give rise to an inference of age discrimination.

Regarding the termination, Ms. Milosav declared that she was not aware of Ms. Cummings' age and denied that age played a role in the termination decision. In response, Ms. Cummings neither identified any evidence to contradict those statements nor set forth evidence establishing that a reasonable factfinder could conclude that Ms. Milosav held any animus on the basis of age. To be sure, the

[2] The courts have set forth varying, but similar, iterations of the prima facie case. *See Bennett*, 792 F.3d at 1266 n.1.

complaint had alleged certain ageist remarks and stated, without elaboration, that younger workers were not disciplined. But Ms. Cummings could not avoid summary judgment by relying on unsupported allegations in her complaint. *See* Fed. R. Civ. P. 56(c) (requiring a party to support an assertion that a fact is genuinely disputed); *Kelley v. Goodyear Tire & Rubber Co.*, 220 F.3d 1174, 1177 (10th Cir. 2000) ("[T]he nonmoving party cannot rely solely on the allegations in the pleadings and must supply evidence of a question of fact for the case to go to the jury.").

Regarding the non-selections for the Howe and Muse positions, the record fails to show the ages of the persons USPS hired.[3] Further, USPS offered evidence denying that Ms. Cummings' age was a factor in filling the positions. As with the termination decision, Ms. Cumming did not offer any contradictory evidence.

Moreover, even if Ms. Cummings had established a prima facie case, USPS offered legitimate, non-discriminatory and non-retaliatory reasons for its actions—her performance (for the termination) and the relative qualifications of other candidates (for the non-selections). For the same reasons discussed above, the record is insufficient to establish these reasons were pretext for discrimination. *See Bennett*, 792 F.3d at 1267 (plaintiff can establish pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in proffered reasons such "that a reasonable factfinder could rationally find them unworthy of

[3] In her appellate reply brief, Ms. Cummings states that the persons selected for the Howe and Muse positions were younger than her. But she does not provide a record cite to support those assertions.

credence" (internal quotation marks omitted)). Particularly, a plaintiff's own subjective opinion of her performance does not establish pretext. *See Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000) (the relevant pretext inquiry is how facts appeared to the decision maker, not the employee); *Kelley*, 220 F.3d at 1178 (employee's opinion of his interview "is simply irrelevant").

Accordingly, although we give Ms. Cummings the benefit of favorable inferences regarding exhaustion of her administrative remedies for her ADEA claims, we nevertheless affirm the grant of summary judgment to USPS on those claims.

E. Due Process/Property Interest

In two claims, Ms. Cummings asserted that USPS violated her constitutional rights by depriving her of a property interest without due process. The district court held it lacked jurisdiction over those claims, in part due to sovereign immunity.

USPS is "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201. As such, it is entitled to sovereign immunity, except to the extent Congress has waived it. *See U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744 (2004). In examining whether USPS is entitled to immunity, "[w]e ask first whether there is a waiver of sovereign immunity for actions against the Postal Service. If there is, we ask the second question, which is whether the substantive [provisions of the cause of action] apply to an independent establishment of the Executive Branch of the United States." *Id.* at 743 (citing *FDIC v. Meyer*, 510 U.S. 471, 483-84 (1994)).

We resolve the first question in Ms. Cummings' favor. USPS is subject to a sue-and-be-sued clause, found at 39 U.S.C. § 401(1), which "waives immunity, and makes the Postal Service amenable to suit, as well as to the incidents of judicial process," *Flamingo Indus.*, 540 U.S. at 744.

Nevertheless, Ms. Cummings cannot proceed with her constitutional claims. "An absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity." *Id.* The remedy for constitutional violations committed by federal officials is an action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But the Supreme Court has held that a *Bivens* action is not available against a federal agency. *See Meyer*, 510 U.S. at 486. In these circumstances, USPS is not subject to liability for Ms. Cummings' constitutional claims. *See Flamingo Indus.*, 540 U.S. at 746-47; *Meyer*, 510 U.S. at 486; *see also Tapia-Tapia v. Potter*, 322 F.3d 742, 746 (1st Cir. 2003) (in light of *Meyer*, "the appellant cannot rewardingly direct his constitutional claims against the Postal Service").

CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Gregory A. Phillips
Circuit Judge