IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 17, 2020
Lyle W. Cayce
Clerk

No. 18-30987

DENEEN L. MONTGOMERY-SMITH,

Plaintiff–Appellant,

v.

DEVIN GEORGE, Individually and in his capacity as Center Director/State Registrar, Office of Public Health-Louisiana Center for Records and Statistics; DARLENE WARREN SMITH, Individually and in her capacity as Department of Health and Hospitals Vital Records Consultant to Center Director/State Registrar, Department of Health and Hospitals Office of Public Health Louisiana Center for Records and Statistics; DEPARTMENT OF HEALTH AND HOSPITALS STATE OF LOUISIANA, Office of Public Health Louisiana Center for Records and Statistics,

Defendants–Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:17-CV-5564

Before OWEN, Chief Judge, and JONES and SMITH, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Deneen Montgomery-Smith (Smith) sued the Louisiana Department of Health and Hospitals (DHH), Devin George, and Darlene Smith (collectively, Defendants), alleging violations of Title VII and several Louisiana state statutes and bringing causes of action under 42 U.S.C. §§ 1981 and 1983. The district court dismissed Smith's state-law claims, § 1981 claim, and § 1983 claim. It granted summary judgment to Defendants on her Title VII claims. On appeal, we affirm the dismissal of Smith's state law claims, her § 1981 claim, and her § 1983 claim. We also affirm the summary judgment in favor of Defendants on her Title VII retaliatory hostile work environment, racial discrimination, and retaliation claims.

I

Smith is an African-American female over the age of 40 who has been employed as a State Civil Service employee with the state of Louisiana since 1989. Devin George is a white male and the hiring manager for the positions for which Smith applied and was not promoted. Darlene Smith works in a part-time capacity as a consultant to George. DHH is a department of the Louisiana state government that administers state health programs and maintains vital records.

Smith alleges that in July 2007, after filing an employment discrimination suit against DHH, she was involuntarily transferred to the Vital Records department of DHH. This first suit was based on her first EEOC charge (Charge 1). In October of 2008, she filed a second EEOC charge (Charge 2) and discrimination lawsuit (*Montgomery-Smith II*) alleging further racial discrimination, retaliation, and a hostile work environment.[1]

[1] *See Montgomery-Smith v. La. Dep't of Health & Hosps.*, No. 08-4737 (E.D. La. Oct. 24, 2008).

In 2014, she began applying for competitive positions within DHH consistent with her education and training. Smith was not promoted to any of these positions. Smith brought a third suit (*Montgomery-Smith III*) based on a third EEOC Charge (Charge 3) in November 2015.[2] At the time *Montgomery-Smith III* was filed, she had filed a fourth EEOC Charge (Charge 4) but had yet to receive her right-to-sue letter. As a result, the court dismissed her claims related to Charge 4 for failure to exhaust administrative remedies. *Montgomery-Smith III* went to trial, and a jury found in favor of the Defendants on all remaining claims in July 2017.

Smith contends she did not receive her right-to-sue letter for Charge 4 until March 7, 2017, although the letter is dated December 1, 2015. In February 2017, she filed her fifth EEOC Charge (Charge 5) and subsequently received her right-to-sue letter for that charge. She filed the instant suit (*Montgomery-Smith IV*) in June 2017 based on both Charges 4 and 5. In Charge 4, Smith alleged age discrimination and retaliation for filing the prior lawsuits and EEOC charges, resulting in denial of promotional opportunities between July 2015 and October 2015. In Charge 5, Smith alleged she was denied two additional promotional opportunities, and the individuals selected were "younger, less qualified than [her] and one of them was white." She also alleged race and age discrimination, as well as retaliation for filing previous suits and EEOC Charges.

Defendants filed their third motion to dismiss—after two amended complaints—in December 2017. The district court granted the motion with respect to Smith's § 1981 and § 1983 claims, as well as her claims under Louisiana law. Only Smith's claims arising under Title VII remained.

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[2] *See Montgomery-Smith v. La. Dep't of Health & Hosps.*, No. 15-6369 (E.D. La. Nov. 30, 2015).

Following that ruling, Defendants filed a motion for summary judgment on the Title VII claims, which the district court granted. Smith appeals from both motions.

II

As an initial matter, we note that Smith has waived both of her state law claims because she failed to brief them. "It has long been the rule in this circuit that any issues not briefed on appeal are waived."[3] First, Smith brought claims pursuant to La. Stat. Ann. §§ 23:301-12, which makes it unlawful for an employer to engage in age discrimination. Smith concedes that she did not appeal the age discrimination claim, so we do not address it.

Smith also brought state law retaliation claims under La. Stat. Ann. § 51:2256. Smith failed to mention these claims in her initial brief. In an attempt to salvage these claims, she asserts two theories for incorporating the state law claims into the Title VII claims, which were properly appealed.

First, Smith argues that she appealed the state law retaliation claim when she referred to a "retaliation claim" in the "Statement of the Issues" section of her initial brief. This "retaliation claim" references the district court's ruling dated August 6, 2018. The August 6 ruling deals only with Title VII claims, as Smith's state law claims had been dismissed by that point. There is no logical way to read the reference to the issues in the August 6 ruling as an appeal of the state law retaliation claim, which was not discussed in the August 6 ruling. Furthermore, there are no references to the statute in question in the argument portion of her initial brief. Mentioning a claim without briefing it is tantamount to abandoning that claim.[4]

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[3] *United States v. Thibodeaux*, 211 F.3d 910, 912 (5th Cir. 2000) (citing *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993)).

[4] *See Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824, 831 (5th Cir. 1993) ("Questions posed for appellate review but inadequately briefed are considered abandoned."

Second, Smith makes an unsupported and conclusory assertion that Title VII and LA. STAT. ANN. § 51:2256 are a "mirror image," and therefore the appeal of the Title VII retaliation claim somehow incorporated the state law retaliation claim. Smith raises this argument for the first time in her reply brief, and therefore it is waived.[5] Because Smith has waived all of her state law claims, we affirm the district court's dismissal of those claims.

III

Smith appeals the district court's dismissal of her § 1981 cause of action for failure to state a claim. Relying on our holding in *Felton v. Polles*,[6] the district court concluded that the claims were improperly pleaded because Smith had not pleaded her § 1981 claims through § 1983. We agree.

"We review de novo the district court's decision to dismiss a complaint under Rule 12(b)(6)."[7] "In analyzing the claims, all well-pleaded facts are accepted as true and should be examined 'in the light most favorable to the plaintiff.'"[8] Dismissal is appropriate if a complaint fails to plead a claim that is facially plausible, that is, the "[complaint's] factual content . . . allows the court to draw the reasonable inference that the defendant is liable."[9] "We may affirm a district court's Rule 12(b)(6) dismissal on any grounds raised below and supported by the record."[10]

(first citing *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991); and then citing *Harris v. Plastics Mfg. Co.*, 617 F.2d 438, 440 (5th Cir. 1980))).

[5] *Bolton v. United States*, 946 F.3d 256, 262 (5th Cir. 2019) (quoting *Dixon v. Toyota Motor Credit Corp.*, 794 F.3d 507, 508 (5th Cir. 2015)).

[6] 315 F.3d 470 (5th Cir. 2002), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[7] *Ruiz v. Brennan*, 851 F.3d 464, 468 (5th Cir. 2017) (citing *Taylor v. City of Shreveport*, 798 F.3d 276, 279 (5th Cir. 2015)).

[8] *Stem v. Gomez*, 813 F.3d 205, 209 (5th Cir. 2016) (quoting *Bowlby v. City of Aberdeen*, 681 F.3d 215, 219 (5th Cir. 2012)).

[9] *Id.* (alterations in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009)).

[10] *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Hosein v. Gonzales*, 452 F.3d 401, 403 (5th Cir. 2006)).

In *Felton*, we noted that "the express 'action at law' provided by § 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor."[11] Devin George and Darlene Smith are both state actors because they are state employees.[12] Therefore, for Smith to recover damages from George or Darlene Smith for alleged violations of rights secured by § 1981, those claims must be asserted through § 1983. This rule applies with equal force to state entities,[13] so the § 1981 claims against DHH must also be pursued through § 1983.

Smith does not contest that her § 1981 claims must be pleaded through § 1983. Rather, Smith argues that the district court erred when it determined that she pleaded her § 1981 and § 1983 claims as separate causes of action. Specifically, Smith argues that the boilerplate incorporation language included within her § 1983 cause of action incorporated her § 1981 claim into her § 1983 claim. The language in question "realleges and incorporates herein by reference" the factual allegations in the complaint. The portion of her complaint "reallege[d] and incorporate[d]" does not include the paragraphs that set forth her § 1981 claim, and additionally, the complaint states that the paragraphs are incorporated into Cause II, which is the § 1981 claim, rather than Cause III, which is the § 1983 claim. We do not decide whether this type of boilerplate language is sufficient to plead a § 1981 claim through § 1983,

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[11] 315 F.3d at 482 (5th Cir. 2002) (emphasis omitted) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989)).

[12] *Felton v. Polles*, 315 F.3d 470, 482 (5th Cir. 2002) ("[S]tate employment is generally sufficient to render the defendant a state actor." (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982))), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[13] *Felton*, 315 F.3d at 482.

because here, the boilerplate does not properly refer to either the § 1981 or § 1983 cause of action.

We must now determine whether pleading § 1981 claims and § 1983 claims as separate causes of action is sufficient to plead a § 1981 claim through § 1983. The pleadings in this case are very similar to those found insufficient to plead a § 1981 claim through § 1983 in *Felton*. In *Felton*, the § 1981 claim and the § 1983 claim were pleaded as separate counts in the complaint and the pleadings did not specify that the § 1981 claim was brought pursuant to § 1983.[14] We determined that because the § 1981 claim was independent of the § 1983 claim, the plaintiff had "failed to invoke the only remedy available to him for the claimed deprivation of his § 1981 rights" and thus had "essentially failed to state a claim."[15] Because the pleadings here suffer from the same defect as those in *Felton*, they are insufficient to plead the § 1981 cause of action through § 1983, and therefore we affirm the district court's dismissal of Smith's § 1981 claim for failure to state a claim.

IV

Smith also appeals the district court's dismissal of her § 1983 claim. Because § 1983 does not create substantive rights but merely provides a remedy for the rights it designates, "an underlying constitutional or statutory violation is a predicate to liability under § 1983."[16] Thus, Smith's § 1983 claim can survive only if she has pleaded an underlying constitutional or statutory violation. In her initial brief, Smith contests the dismissal of her § 1983 claim only on the ground that the district court failed to address her § 1981 claim as

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[14] *Felton*, 315 F.3d at 482-83.

[15] *Id.* at 483 (emphasis omitted).

[16] *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565, 1574 (5th Cir. 1989); *see also Felton*, 315 F.3d at 479 ("It is more than well-established that, unlike § 1981, § 1983 'is not itself a source of substantive rights'; instead, it provides 'a method for vindicating federal rights *elsewhere conferred*.'" (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979))).

pleaded through § 1983. In her reply brief, Smith also contests the dismissal of her § 1983 claim on the ground that she had pleaded valid Title VII claims and other unspecified constitutional and statutory violations through § 1983. Because the arguments relating to Title VII and the other unspecified constitutional and statutory claims were not raised in Smith's initial brief and were raised for the first time in her reply brief, they are waived.[17] We will thus address her § 1983 claim only in relation to her § 1981 claim. As discussed above, Smith did not properly plead a § 1981 violation through § 1983. Accordingly, her § 1981 claim cannot save her § 1983 claim from dismissal. Without an underlying statutory or constitutional violation to support it, Smith's § 1983 claim must fail. The district court's dismissal of her § 1983 claim is affirmed.

V

The district court granted Defendants' motion for summary judgment on Smith's Title VII claims for retaliatory hostile work environment, retaliation, and race discrimination. Smith appeals the summary judgment as to all three of these claims. We review a district court's summary judgment de novo, applying the same standards as the district court.[18] We view the evidence in the light most favorable to the non-moving party and avoid credibility determinations and weighing of the evidence.[19] 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."[20] A

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[17] *Bolton v. United States*, 946 F.3d 256, 262 (5th Cir. 2019) (quoting *Dixon v. Toyota Motor Credit Corp.*, 794 F.3d 507, 508 (5th Cir. 2015)).

[18] *Bluebonnet Hotel Ventures, L.L.C. v. Wells Fargo Bank, N.A.*, 754 F.3d 272, 275-76 (5th Cir. 2014) (citing *DePree v. Saunders*, 588 F.3d 282, 286 (5th Cir. 2009), *abrogated on other grounds by Sims v. City of Madisonville*, 894 F.3d 632 (5th Cir. 2018)).

[19] *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 896 (5th Cir. 2002) (citing *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 150 (2000)).

[20] FED. R. CIV. P. 56(a).

dispute as to a material fact is genuine if a reasonable jury could return a verdict for the nonmovant.[21]

A

The district court granted Defendants' motion for summary judgment on Smith's retaliatory hostile work environment claim because it found she did not offer evidence of conduct severe and pervasive enough to establish a hostile work environment. Smith argues that the district court erred in this finding and also that it erred in failing to consider the repeated denials of promotions when it considered the conduct forming the basis of her retaliatory hostile work environment claim.

This circuit has not recognized a retaliatory hostile work environment cause of action, though twelve circuits have.[22] We need not decide today whether to recognize such a claim because we agree with the district court that Smith's allegations, even if viewed in the light most favorable to her, do not establish harassment severe and pervasive enough rise to the level of a hostile work environment.

Although we have not recognized a retaliatory hostile work environment claim, we recognize hostile work environment claims in the context of discrimination and sexual harassment, and those cases are instructive. To state a hostile work environment claim under Title VII, the plaintiff must show, among other things, that she was subjected to unwelcome harassment that affected a term, condition, or privilege of employment, and that her employer knew or should have known of the harassment and failed to take

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[21] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[22] *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 742 n.5 (5th Cir. 2017) (first citing *Bryan v. Chertoff*, 217 F. App'x. 289, 293 & n.3 (5th Cir. 2007) (collecting cases); and then citing *Gowski v. Peake*, 682 F.3d 1299, 1311 (11th Cir. 2012) (same)).

prompt remedial action.[23] Title VII is violated when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[24] "For harassment to be sufficiently severe or pervasive to alter the conditions of the victim's employment, the conduct complained of must be both objectively and subjectively offensive."[25] "To determine whether the victim's work environment was objectively offensive, courts consider the totality of the circumstances, including (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance. No single factor is determinative."[26]

The Supreme Court has cautioned against reading Title VII as a "general civility code"[27] that provides remedies for "the ordinary tribulations of the workplace."[28] Instead, the Supreme Court has "made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment."[29]

Smith claims a retaliatory hostile work environment based on the repeated denials of promotions and the following incidents: (1) Darlene Smith laughed and glared at Smith each time she was denied a promotion; (2) Smith's office was moved from the sixth floor to the fourth; (3) Smith was not invited

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[23] *E.E.O.C. v. WC&M Enterprises, Inc.*, 496 F.3d 393, 399 (5th Cir. 2007).

[24] *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)); *see also Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).

[25] *WC&M Enterprises*, 496 F.3d at 399 (citing *Harris*, 510 U.S. at 21-22).

[26] *Id.* (internal citation omitted) (citing *Harris*, 510 U.S. at 23).

[27] *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quoting *Harris*, 510 U.S. at 80).

[28] *Id.* (quoting B. LINDEMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)).

[29] *Id.*

to the 2017 Thanksgiving luncheon; (4) Smith was not asked to participate in the office's "Pink Day;" (5) Smith was isolated from her coworkers; and (6) other employees were instructed not to talk to Smith.

These incidents, even when taken together, do not amount to the type of "extreme" conduct required by the Supreme Court to make out a claim for a hostile work environment.[30] Denials of promotions, although considered adverse employment actions sufficient to support a Title VII claim for retaliation, are not offensive or harassing in the way necessary to support a hostile work environment claim. Darlene Smith's alleged laughing and glaring each time Smith was denied a promotion is also not severe and pervasive enough to establish a claim for hostile work environment. While that behavior may be rude, it is nowhere near as severe or pervasive as the conduct that we have found necessary to support a hostile work environment claim.[31] Similarly, not being invited to the Thanksgiving luncheon or asked to participate in "Pink Day" are the types of "isolated incidents" that do not amount to "discriminatory changes in the 'terms and conditions of employment.'"[32] Nor can Smith's claims of isolation form the basis of a hostile work environment claim. We have addressed claims of isolation and ostracism in the retaliation context and held that they are "minor annoyances" in the

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[30] *Faragher*, 524 U.S. at 788.

[31] *See, e.g.*, *WC&M Enterprises*, 496 F.3d at 400 (determining sufficient evidence was presented to survive summary judgment on a hostile work environment claim where a Muslim man born in India was regularly subjected to verbal harassment for one year by, among other things, being called names such as "Taliban" and told to "go back where [he] came from"); *cf. Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 330 (5th Cir. 2009) (affirming summary judgment on a hostile work environment claim because statement by a supervisor that he and the plaintiff should be "sweet" to each other and his stating that he loved her approximately six times was "at most . . . unwanted and offensive" and not "severe, physically threatening, or humiliating").

[32] *Faragher*, 524 U.S. at 788; *see also Reed v. Neopost USA, Inc.*, 701 F.3d 434, 443 (5th Cir. 2012).

workplace that are insufficient to support a claim for retaliation.[33] We will not hold that such minor annoyances can support a hostile work environment claim. Because Smith has failed to allege conduct severe and pervasive enough to form the basis of a hostile work environment claim, the district court's summary judgment on this claim is affirmed.

B

Smith also challenges the summary judgment in favor of Defendants on her retaliation claim. She argues that the district court erred when it considered only Charge 3 as forming the basis of her retaliation claim and failed to consider Charge 4 and *Montgomery-Smith III* in relation to this claim. She also argues that the district court erred when it found that she failed to establish a prima facie case of retaliation because she failed to show a causal connection between the protected Title VII activity and the adverse employment action.

To establish a prima facie case of retaliation under Title VII, the "plaintiff must establish that: '(1) the employee engaged in activity protected by Title VII; (2) the employer took adverse employment action against the employee; and (3) a causal connection exists between that protected activity and the adverse employment action.'"[34] The district court concluded that Smith satisfied the first two elements of her prima facie case but granted summary judgment in favor of Defendants, reasoning that Smith had not established a causal connection between her Title VII protected activity and the failure to promote her.

The first two prongs of the test have been met. The parties agree that the EEOC claims and the Title VII lawsuit are Title VII protected activities,

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[33] *Stewart*, 586 F.3d at 332.

[34] *Zamora v. City of Houston*, 798 F.3d 326, 331 (5th Cir. 2015) (quoting *Thomas v. Tex. Dep't of Criminal Justice*, 220 F.3d 389, 394 (5th Cir. 2000)).

and it is well established that a denial of a promotion is an adverse employment action.[35] With regard to the third prong, the district court did not err in concluding that the four-month period between the filing of Charge 3 on March 26, 2015, and the hiring on August 3, 2015 of someone other than Smith was not in sufficient temporal proximity to establish a prima facie case of retaliation.[36]

Smith maintains that there is other evidence that raises a fact question regarding Charge 3. She asserts that Hugh Eley, who was Deputy Secretary of DHH between 2015 and 2016 and who allegedly consulted with and supervised the people directly responsible for promotional decisions, told Smith in 2007 she "would never advance after having filed a lawsuit and a grievance involving him." The district court mentioned this statement in a footnote, but, citing to *National Railroad Passenger Corporation v. Morgan*,[37] noted that although acts that occurred outside the statutory time period may serve as "relevant background evidence in a proceeding in which the status of a current practice is at issue,' 'discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period.'"

The proposition quoted from *Morgan* is taken from *United Air Lines, Inc. v. Evans*,[38] which this court has interpreted many times. However, our prior interpretations of *Evans* have arisen in cases involving allegations of racial discrimination.[39] In *Morgan*, the Supreme Court drew a distinction between

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[35] *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (noting that promotions are one of the "ultimate employment decisions" that are considered adverse employment actions under Title VII (quoting *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995))), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[36] *See, e.g.*, *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001).

[37] 536 U.S. 101 (2002).

[38] 431 U.S. 553 (1977).

[39] *See Crawford v. W. Elec. Co.*, 614 F.2d 1300, 1314 (5th Cir. 1980) ("While some or most of this evidence may concern time-barred conduct, it is relevant and may be used, in

allegation of discrete acts, such as retaliation, and allegations of racial discrimination. Actions taken over a long period of time may ultimately, in the aggregate, constitute racial discrimination. That is not the case with a discrete act of retaliation. Smith cannot use a statement made in 2007 to create a fact question as to whether a failure to promote her years later was retaliatory.

Smith asserts that the district court nevertheless erred in granting summary judgment as to her retaliation claims because she alleged retaliatory conduct in response to Charge 4 and *Montgomery-Smith III*. For reasons that are unclear to us, the district court concluded that the only relevant charge was Charge 3. However, "this court may affirm the district court's judgment on any grounds supported by the record."[40] Because we are entitled to review the district court's decision in its entirety, we are empowered to affirm its judgment on any ground the record supports. Here, the record supports granting summary judgment on Smith's retaliation claims relating to Charge 4 and *Montgomery-Smith III*.

Smith's claims of retaliation in response to Charge 4 and *Montgomery-Smith III* fail for the same reason her claims in response to Charge 3 fail: The alleged retaliatory acts are too far removed temporally from her protected activity to establish causation. Charge 4 was filed on November 5, 2015 and *Montgomery-Smith III* was filed on November 30, 2015. The only adverse employment actions after the filing of Charge 4 and *Montgomery-Smith III*

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conjunction with statistics, to illuminate current practices which, viewed in isolation, may not indicate discriminatory motives." (internal citations omitted) (citing *United Air Lines v. Evans*, 431 U.S. 553 (1977))); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 540 (5th Cir. 1980) (determining that where "prior practices were considered relevant to show independently actionable conduct occurring within the statutory period" and were not viewed "as constituting the actionable wrongs upon which relief was based," the district court did not err in taking those prior practices into consideration (citing *Evans*, 431 U.S. at 558)).

[40] *Sobranes Recovery Pool I, LLC v. Todd & Hughes Const. Corp.*, 509 F.3d 216, 221 (5th Cir. 2007) (internal quotation marks omitted) (quoting *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir.1992)).

were the cancellation of the Program Monitor Supervisor job on May 22, 2016, the promotion of Lauren Tran to Program Monitor Supervisor on September 7, 2016, and the promotion of Jemimah Mickel to Program Manager II on September 20, 2016. DHH did not cancel the Program Monitor Supervisor job until more than five months after *Montgomery-Smith III* was filed and DHH did not promote Lauren Tran and Jemimah Mickel to the Program Monitor Supervisor and Program Manager II positions until more than a year later. That amount of elapsed time, without more evidence that the past protected activity formed the basis for the adverse employment action, is insufficient to establish a prima facie case of retaliation. We affirm the summary judgment on Smith's retaliation claims.

C

Finally, Smith appeals the summary judgment in favor of Defendants on her racial discrimination claim. Smith alleges racial discrimination in the decisions to promote Omar Khalid, a white male, and Lauren Tran, a white female, instead of Smith. The district court granted Defendants' motion for summary judgment on Smith's racial discrimination claim because it determined that even if Smith could make out a prima facie case of racial discrimination, Defendants had articulated legitimate, race-neutral reasons for not promoting Smith.

Smith has alleged only circumstantial evidence in support of her racial discrimination claim, so we evaluate her claim under the *McDonnell Douglas* burden-shifting framework.[41] Under this framework, Smith must first "present a prima facie case of discrimination by showing that she: '(1) is a

[41] *Roberson-King v. La. Workforce Comm'n, Office of Workforce Dev.*, 904 F.3d 377, 380-81 (5th Cir. 2018) (first citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); and then citing *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007) (per curiam)).

member of a protected group; (2) was qualified for the position at issue; (3) was discharged or suffered some adverse employment action by the employer; and (4) was replaced by someone outside [her] protected group or was treated less favorably than other similarly situated employees outside the protected group.'"[42] Once Smith has established her prima facie case, "the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the employment decision."[43] "If the [employer] articulates a legitimate reason, the burden shifts back to the plaintiff to show the reason is 'merely pretextual.'"[44] "In conducting a pretext analysis, the court does not 'engage in second-guessing of an employer's business decisions.'"[45]

Defendants concede that Smith has established a prima facie case of employment discrimination; however, Defendants also assert that they have provided legitimate and non-discriminatory reasons for promoting Khalid and Tran over Smith. Defendants rely on George's testimony that Khalid was selected because of his prior experience as a field rep, a Field Services Manager, and in legislative and governmental affairs; his work on the Vital Records website; his knowledge of the Louisiana Electronic Event Registration System (LEERS) and its functionality; and because he was the person George went to for "presentations, reports, and legislative impacts." As for Tran, George testified that she had been recommended by an interview panel of which he was not a part, she was very motivated and a team player, she was the impetus for Vital Records creating a call center, she had the best knowledge of LEERS for when funeral homes call, and she had previously worked with

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[42] *Roberson-King*, 904 F.3d at 381 (alteration in original) (quoting *Morris v. Town of Indep.*, 827 F.3d 396, 400 (5th Cir. 2016)).

[43] *Id.* (quoting *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010)).

[44] *Id.* (quoting *Moss*, 610 F.3d at 922).

[45] *Id.* (quoting *LeMaire v. La. Dep't. of Transp. & Dev.*, 480 F.3d 383, 391 (5th Cir. 2007)).

Ochsner Health System in performance improvement. This testimony meets Defendants' burden of production for articulating legitimate business reasons for not promoting Smith.[46] At this stage, we do not assess the credibility of this testimony.[47]

The burden therefore shifts back to Smith to show that Defendants' asserted reasons are pretextual. "A plaintiff can demonstrate pretext through evidence that she was 'clearly better qualified (as opposed to merely better or as qualified)' than the chosen employee."[48] To do this, the plaintiff "must present evidence from which a jury could conclude that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'"[49] "A plaintiff may also establish pretext 'by showing that the employer's proffered explanation is false or unworthy of credence.'"[50] "[P]retext cannot be established by mere 'conclusory statements' of a plaintiff who feels [s]he has been discriminated against."[51]

As to the promotion of Omar Khalid, Smith claims that she was better qualified. Specifically, Smith cites the fact that Khalid had less supervisory experience than she did and that he has only an undergraduate degree whereas she has a master's degree. Additionally, she notes that she has worked in Vital Records since 2007, while Khalid started in 2011. These

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[46] *See Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 566-67 (5th Cir. 1983) ("*McDonnell Douglas* is not a vehicle that permits a plaintiff to cast the burden of persuasion on the defendant and compel him to prove that his actions were nondiscriminatory." (citing *Bd. of Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 24-25 (1978))).

[47] *See Roberson-King v. La. Workforce Comm'n, Office of Workforce Dev.*, 904 F.3d 377, 381 (5th Cir. 2018) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000)).

[48] *Id.* (quoting *EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1444 (5th Cir. 1995)).

[49] *Moss v. BMC Software, Inc.*, 610 F.3d 917, 923 (quoting *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999)).

[50] *Roberson-King*, 904 F.3d at 381 (internal quotation marks omitted) (quoting *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003)).

[51] *E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967, 976 (5th Cir. 1984) (quoting *Elliott v. Grp. Med. & Surgical Serv.*, 714 F.2d 556, 566 (5th Cir. 1983)).

allegations are insufficient to establish that Smith is clearly better qualified than Khalid. "[A]n employee's 'better education, work experience, and longer tenure with the company do not establish that [s]he is clearly better qualified.'"[52] Additionally, George's testimony listed reasons for choosing Khalid unrelated to his level of education, supervisory experience, and tenure at Vital Records. We have recognized that "an employer may discount both years of service and general experience in favor of specific qualifications."[53] In fact, "employers are generally free to weigh the qualifications of prospective employees, so long as they are not motivated by race."[54] Smith has not presented evidence such that a jury could conclude that no reasonable person exercising impartial judgment could have chosen Khalid over Smith. Therefore, we cannot say that Smith was clearly more qualified than Khalid.

Smith's claim that she is clearly more qualified than Tran rests on similar allegations. Smith alleges she had more supervisory experience than Tran, that Tran consulted Smith regarding questions posed by law enforcement and governmental agencies, and that Tran is less educated than Smith. This is not enough to establish that Smith is clearly more qualified than Tran. Tran was recommended by the interview panel and possesses specific skills that George claims are helpful for the position to which she was promoted. Smith has not presented sufficient evidence for us to determine that these explanations are "false or unworthy of credence."[55] "Employment discrimination laws are 'not intended to be a vehicle for judicial second-guessing of business decisions, nor . . . to transform the courts into personnel

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[52] *Martinez v. Tex. Workforce Comm'n-Civil Rights Div.*, 775 F.3d 685, 688 (5th Cir. 2014) (quoting *Price v. Fed. Exp. Corp.*, 283 F.3d 715, 723 (5th Cir. 2002)).

[53] *Id.* (citing *Moss*, 610 F.3d at 923-24).

[54] *Martinez*, 775 F.3d at 688 (emphasis omitted).

[55] *Roberson-King v. La. Workforce Comm'n, Office of Workforce Dev.*, 904 F.3d 377, 381 (5th Cir. 2018) (quoting *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003)).

managers.'"[56] We decline to engage in such second-guessing here. The summary judgment in favor of Defendants on Smith's racial discrimination claim is affirmed.

* * *

We AFFIRM the district court's dismissal of Smith's state law claims, her claims under § 1981 and § 1983, and its summary judgment in favor of Defendants on her Title VII retaliatory hostile work environment, retaliation, and racial discrimination claims.

[56] *Bryant v. Compass Grp. USA Inc.*, 413 F.3d 471, 478 (5th Cir. 2005) (alteration in original) (quoting *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988)).