IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
October 30, 2019

Lyle W. Cayce
Clerk

No. 19-20239
Summary Calendar

GUADALUPE A. WELSH,

Plaintiff - Appellant

v.

FORT BEND INDEPENDENT SCHOOL DISTRICT,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Appellant, Guadalupe A. Welsh ("Appellant" or "Ms. Welsh"), alleges that her employer, Appellee Fort Bend Independent School District ("Appellee" or "FBISD"), discriminated against her and retaliated against her when she complained of said discrimination. Welsh brought claims under Title VII and the Age Discrimination in Employment Act ("ADEA") for discrimination on the basis of her national origin, sex, and age. The district court granted summary judgment in favor of FBISD. We affirm.

I

On August 15, 2012, Welsh filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that FBISD discriminated against her on the basis of her national origin, sex, and age; subjected her to a hostile work environment; and retaliated against her. The EEOC issued a right-to-sue letter on June 30, 2014, signaling that Welsh had exhausted her administrative remedies. Welsh sued in state court on September 26, 2014. That suit was dismissed as time-barred on January 9, 2015.

One week after her state lawsuit was dismissed, Welsh filed a second complaint against FBISD with the EEOC. Welsh made the same allegations, but she supplemented her complaint with additional factual details that were "representative of the continuous retaliation" she alleged she suffered after filing her first EEOC complaint. The EEOC issued another right-to-sue letter on May 12, 2015, at which time Welsh brought the instant suit. The district court granted FBISD's motion for summary judgment, holding that res judicata barred Welsh's claims. Welsh appealed that decision to this court, and this court vacated the district court's decision and remanded. On remand, the district court reached the merits of Welsh's claims. The district court granted summary judgment in favor of FBISD because, among other reasons, Welsh could not prove that FBISD took any adverse employment action against her.

II

Welsh is a long-time teacher at FBISD. Welsh began working for FBISD in 1971 and has been employed by FBISD at all times relevant to this lawsuit. At the time the lawsuit was filed, Welsh was still an aquatic science teacher at Dulles High School.

This court has previously articulated the incidents that Welsh contends form the basis for her employment discrimination and retaliation claims as follows:

> (1) On April 3, 2014, she was placed under a "Teacher in Need of Assistance" ("TINA") Plan for reasons that were fabricated;
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> (2) On April 29, 2014, she received a Professional Development and Appraisal System, Summative Annual Report ("PDAS"), which stated that she had been placed on a TINA Plan and FBISD "would not remove the disparaging memoranda";
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> (3) On July 9, 2014, Welsh requested a letter of recommendation from the principal but received no response;
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> (4) During "the Fall semester of 201[3],"[1] FBISD deliberately failed to provide her with accommodation information for her students as a means of fabricating another reprimand against her;
>
> (5) On September 16, 2014, Welsh filed a grievance requesting that the TINA Plan be removed from her file, that all mentions of the grievance be removed from her file, and that the school comply with PDAS standards; and
>
> (6) On December 19, 2014, Allison Pike "made humiliating remarks" to Welsh in front of others.

Welsh v. Fort Bend Ind. Sch. Dist., 860 F.3d 762, 764 (5th Cir. 2017). We briefly explore the details underlying each of these incidents.

A

Welsh alleges that the discrimination against her began in the fall of 2013. One of Welsh's students required special education services. However, Welsh claims that she did not receive a copy of the student's individualized education plan ("IEP"), which describes the accommodations required by the student. As a result, Welsh alleges she did not know what accommodations the

[1] Although Appellant's EEOC complaint refers to the fall semester of "2014," Appellant intended to refer to 2013.

student required.[2] Because the student did not receive proper accommodations, the student's academic performance suffered and the student's parents complained. Upon receiving the complaint, Dr. Terra Smith, an associate principal at FBISD, began investigating the parents' concerns. Dr. Smith explained to Welsh, in a detailed letter, her conclusion that Welsh was aware of the need for accommodations and failed to properly document the student's special education needs. Dr. Smith's letter also documented various other transgressions: (1) Welsh failed to respond to emails from a parent of an IEP student; (2) Welsh failed to timely respond to an oral request from a parent; (3) Welsh failed to respond to Dr. Smith explaining why she assigned a student to detention. After following up with two additional letters, and "[i]n accordance with District policy," Dr. Smith placed Welsh on a Teacher In Need of Assistance Plan ("TINA"). In the course of these discussions, Welsh also responded with rebuttal letters attempting to explain or deny the alleged transgressions.

The TINA required Welsh to attend an hour and forty minutes of training on the areas where she needed improvement, namely how to implement and document IEPs. Following this training program, Welsh's accommodation logs were monitored by supervisors. Welsh completed the TINA successfully. The TINA ended on March 17, 2014, one month after it was implemented.

A reference to Welsh's successful completion of the TINA was included in Welsh's 2013-2014 annual review. The entry on her review read: "Mrs. Welsh was on a [TINA] from February 17, 2014 to March 17, 2014. The TINA

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[2] Although Welsh did not raise the point before the district court, Welsh now alleges that she was "reprimanded for allegedly making improper notations about activities in addition to codes on the district's accommodations and modifications logs." Because this argument was not preserved before the district court, and because Welsh has not properly explained her argument on this issue, we decline to entertain it.

was successfully completed by March 17, 2014." Welsh was unhappy with this notation and filed an administrative grievance with FBISD requesting that the reference to the TINA be removed. An assistant superintendent, Xochitl Rodriguez, reviewed and investigated Welsh's grievance. Rodriguez denied Welsh's request to remove reference to the TINA after concluding that there was evidence that supported the TINA.

B

On July 9, 2014, Welsh requested a recommendation letter from her campus principal, Mr. Edwards. Welsh admitted at deposition that she requested this recommendation letter during a conversation in a hallway. Soon after, Welsh emailed Edwards with a written request for a recommendation letter. Welsh never received a recommendation letter or a response to her request, but she concedes that she never followed up to remind Edwards about her request.[3]

C

Because Welsh is an aquatic science teacher, she is responsible for maintaining 14 to 15 tanks of fish in her classroom, caring for the fish, and feeding the fish. On December 19, 2014, as faculty departed for the end of the semester, an associate principal, Allison Pike, made a statement that Welsh contends humiliated her. Pike told Welsh, in front of other coworkers, "Ms. Welch [*sic*], you need to take care of your fish." Welsh appears to have concluded that Pike was criticizing Welsh's work ethic by implying that Welsh should not rely on FBISD's maintenance staff to feed the fish during the winter break. Welsh hypothesizes that, because Pike is younger, Pike decided to "poke fun at her."

[3] For the first time on appeal, Welsh also claims that she requested a recommendation letter from Dr. Faust. We do not entertain Welsh's new factual assertion, which was not raised in her EEOC complaint, state court complaint, or at any time before the district court.

D

At the time she was deposed in April 2018, Welsh remained employed as a teacher at FBISD. Indeed, Welsh's salary increased after the events described above. Although Welsh applied for various administrative positions in FBISD before 2013, she developed the "mind-set" that she was incapable of being promoted to these roles following the incidents described above. Therefore, Welsh stopped applying to these roles and has not applied to any of these roles since before 2013.

III

"This court reviews a district court's grant of summary judgment de novo, applying the same legal standards as the district court." *Tradewinds Envtl. Restoration, Inc. v. St. Tammany Park, LLC*, 578 F.3d 255, 258 (5th Cir. 2009) (quoting *Condrey v. SunTrust Bank Ga.*, 429 F.3d 556, 562 (5th Cir. 2005)). "Summary judgment is appropriate when '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.'" *United States v. Nature's Way Marine, L.L.C.*, 904 F.3d 416, 419 (5th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). The court reviews all evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

IV

Welsh bases her discrimination claim on circumstantial rather than direct evidence. Therefore, Welsh must prove that she: (1) is a member of a protected group; (2) was qualified for the position at issue; (3) suffered some adverse employment action by the employer; and (4) was treated less favorably than other similarly situated employees outside the protected group. *See McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007); *Bienkowski v.*

Am. Airlines, Inc., 851 F.2d 1503, 1504–05 (5th Cir. 1988). If Welsh carries this burden, the burden then shifts to FBISD to articulate a legitimate, non-discriminatory rationale for its actions. *McCoy*, 492 F.3d at 557. If FBISD meets this burden, the burden shifts back to Welsh to show that there is a genuine question of material fact precluding summary judgment on the basis of FBISD's stated rationales. *See id.*

Here, FBISD has never contested that Welsh is a member of each of the protected classes she alleges (race, sex, national origin). FBISD also has never contested that Welsh is qualified for the position she holds. Welsh, therefore, satisfies the first two prongs of the test. FBISD argues that Welsh's claim falters on the third prong because Welsh cannot prove that FBISD imposed an adverse employment action. We agree.

A

"Adverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating." *McCoy*, 492 F.d 551 (5th Cir. 2007). "[A]n employment action that 'does not affect job duties, compensation, or benefits' is not an adverse employment action." *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004) (quoting *Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir.2003)). While a "mere 'loss of some job responsibilities' does not constitute an adverse employment action," *Williams v. U.S. Dep't of Navy*, 149 F. App'x 264, 269–70 (5th Cir. 2005), in certain cases, "a change in or loss of job responsibilities . . . may be so significant and material that it rises to the level of an adverse employment action," *Thompson v. City of Waco, Tx.*, 764 F.3d 500, 504 (5th Cir. 2014) (collecting cases).

Certain of our cases have held that "reprimands" can constitute adverse employment actions, but mere "criticism" cannot. *Compare Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) *with Harrington*, 118 F.3d at 366

and Benningfield v. City of Houston, 157 F.3d 369, 377 (5th Cir. 1998). Other cases have held that "reprimands[] do not constitute ultimate employment decisions." *See Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 657–58 (5th Cir. 2002), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *see also Washington v. Veneman*, 109 Fed. App'x 685, 689 (5th Cir. 2004).

However, we need not reach the question of whether reprimands are properly viewed as constituting adverse employment actions because Welsh never received a reprimand. Instead, Welsh was placed in a growth plan that sought to improve upon her weaknesses. 19 Tex. Admin. Code § 150.1004. According to Dr. Smith, the TINA was an effort to improve Welsh's job performance. An employer's decision to place an employee on a performance improvement plan is not an adverse employment action. *Turner v. Novartis Pharma. Corp.*, 442 F. App'x 139, 141 (5th Cir. 2011) (holding that placing an employee on a performance improvement plan is "not an ultimate employment decision."). Even if the TINA is characterized as a poor performance review, Welsh has failed to allege an adverse employment action. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997) (holding that "disciplinary filings, supervisor's reprimands, and . . . poor performance by the employee" do not constitute adverse employment actions), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53; *Douglas v. DynMcdermott Petroleum Operations, Co.*, 144 F.3d 364, 373 n.11 (5th Cir. 1998) (low performance ratings not considered adverse employment actions).

The TINA and associated record of the TINA in Welsh's file also did not result in a material loss of job responsibilities. *See Thompson*, 764 F.3d at 504. FBISD did not revoke any of Welsh's privileges or responsibilities; FBISD did

not transfer or demote Welsh; and Welsh's title, hours, salary, and benefits did not suffer as a result of the TINA.[4]

Welsh contends that having a TINA in her record hindered her opportunity for promotion within FBISD. She points to no facts to support this claim. Welsh was placed on the TINA plan on February 17, 2014. The last time Welsh applied for a promotion to an administrative role at FBISD was "before 2013." This means that Welsh has failed to identify any tangible job application that was negatively impacted by the TINA.

Welsh contends that having a TINA in her record creates a bar to promotion, which discouraged her from applying for a promotion at all. Welsh's claim is unsupported by the record. In Texas, principals are hired using certain statutory criteria, including: (1) instructional leadership; (2) administration, supervision, and communication skills; (3) curriculum and instruction management; (4) performance evaluation; (5) organization; and (6) fiscal management. Tex. Educ. Code § 21.046(b)(1)-(6). Performance evaluations, then, are just one of several criteria used when making promotion decisions. And, other than the TINA, Welsh has received positive performance reviews. Welsh's sole piece of evidence that a TINA bars her from future promotions is a single quote taken from Dr. Smith's deposition testimony. Dr. Smith agreed that a TINA would not "be a good thing for a teacher to have . . . in their record" and that she "wouldn't want a TINA in [her] record" "because [she] would have to explain why [she] ha[s] a TINA in [her] record" "[t]o anyone that would ask." Dr. Smith also emphasized that whether an applicant has been placed on a TINA "may or may not" come up during an interview, depending on the specific campus' hiring practices and that she had never inquired about whether a

[4] Although Welsh speculates that she would have earned more money but for the TINA, her assertion is rebutted by uncontradicted testimony from Dr. Smith that compensation at FBISD is based solely on years of experience rather than performance.

potential candidate had been placed on a TINA. The mere fact that FBISD might require an applicant to explain a TINA does not approach a bar to promotion. *Dollis v. Rubin*, 77 F.3d 777, 781–82 (5th Cir. 1995) ("Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions."). Even if it did, Welsh has still failed to identify a position to which she applied or was discouraged from applying after she was placed on the TINA.

For these reasons, FBISD's decision to place Welsh on the TINA, FBISD's performance review of Welsh, and FBISD's refusal to remove reference to the TINA in the performance review are not activities that can form the basis for a viable discrimination claim.

B

Welsh also argues on appeal that Dr. Edwards's failure to provide her with a recommendation letter constituted an adverse employment action. Welsh made one written request for a recommendation letter from Dr. Edwards. Welsh did not receive a response to this request, but also did not follow up with Dr. Edwards to remind him of the request. Welsh asserts that recommendation letters are necessary for advancement with FBISD. Welsh's suggestion that Dr. Edwards intentionally refused to respond to her request for a recommendation letter is speculative, however. It is just as reasonable to conclude that Dr. Edwards inadvertently overlooked Welsh's single email or forgot about Welsh's request. Unsupported speculation does not create a genuine issue of material fact. *See Grissom v. Patterson*, 14 F.3d 52, 1993 WL 560256, at *2 (5th Cir. 1993) (holding that unsupported speculation does not create a genuine issue of material fact); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (per curiam) (en banc) (holding that a mere scintilla of evidence does not create a genuine issue of material fact).

C

Finally, Welsh contends that Pike humiliated her when she told Welsh to "feed [her] fish" during the winter break. Welsh argues that Pike's command constituted an adverse employment action. Title VII "does not set forth 'a general civility code for the American workplace.'" *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68 (quoting *Oncale v. Sundowner Offshore Servs.*, Inc., 523 U.S. 75, 80 (1998)). This court has previously held that "allegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions as discrimination or retaliation." *King v. Louisiana*, 294 Fed. App'x 77, 85 (5th Cir. 2008). At best, Welsh's humiliation as a result of Pike's comment is an unpleasant workplace experience, not an adverse employment action.

D

Because Welsh cannot identify any adverse employment action, she has not met her initial burden. For these reasons, we AFFIRM the district court's grant of summary judgment in favor of FBISD with respect to Welsh's employment discrimination claim.

V

Welsh asserts a retaliation claim against FBISD based on many of the same allegations underlying her discrimination claim. For the same reasons articulated by the district court, we agree that Welsh's retaliation claim fails as a matter of law. Hence, we AFFIRM the district court's summary judgment ruling in favor of FBISD on Welsh's retaliation claim.

A litigant who alleges retaliation arising from allegations of discrimination in the workplace must establish (1) that he or she engaged in activity protected by Title VII; (2) that the employer took adverse action against him or her; and (3) that a causal connection exists between the

protected activity and the adverse action. *Zamora v. City of Houston*, 798 F.3d 326, 331 (5th Cir. 2015). For purposes of Title VII's anti-retaliation provision, the Supreme Court has held that an adverse employment action is defined slightly more broadly than the term is defined in the employment discrimination context. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 67–68. Specifically, a plaintiff seeking to establish a retaliatory adverse employment action "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (cleaned up).

Title VII's anti-retaliation provisions do not protect employees from "petty slights, minor annoyances, and simple lack of good manners." *Id.* However, retaliatory adverse employment actions also need not rise to the level of ultimate employment decisions. *Id.*; *Donaldson v. CDB Inc.*, 335 Fed. App'x 494, 506 (5th Cir. 2009). As the district court noted, when determining whether an allegedly retaliatory action is materially adverse, courts "look to indicia such as whether the action affected 'job title, grade, hours, salary, or benefits' or caused 'a diminution in prestige or change in standing among . . . co-workers.'" *Paul v. Elayn Hunt Corr. Ctr.*, 666 F. App'x 342, 346 (5th Cir. 2016) (quoting *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 332 (5th Cir. 2009)).

Here, there is no dispute that Welsh engaged in protected conduct when she filed her discrimination complaints with the EEOC. The only issues are whether Welsh has alleged a cognizable adverse employment action and, if so, whether there is a causal relationship between the protected activity and the adverse employment action.

Welsh engaged in protected activity on three occasions. Once in August 2012 when she filed her first complaint with the EEOC, once in June 2014 when she amended that complaint, and once in January 2015 when she filed a

second complaint with the EEOC. Of note, there is no evidence in the record that Dr. Smith, Pike, or Dr. Edwards knew of Welsh's protected activity until Welsh revealed it to them in a series of letters in late 2013.[5] Welsh also points to a November 25, 2013 letter she alleges she sent to Dr. Edwards stating that "I have recently experienced some incidents that have created a hostile work environment for me." Welsh alleges that she attached to this letter another letter to the Fort Bend Human Resource Department stating that she had "concern[s] that discrimination, retaliation and harassment still continues [*sic*] against me at this campus." But neither of these letters was presented at any deposition or at summary judgment, neither of these letters refers to the EEOC complaint or any protected activity, and the allegations contained in these letters were not pled as part of this lawsuit. For these reasons, we do not find the letters germane.

A

Welsh alleges that being placed on a TINA was a retaliatory adverse employment action. We need not decide whether the TINA was a retaliatory adverse employment action because there is no causal relationship between the TINA and Welsh's protected activities. This court has repeatedly held that gaps of eight to ten months between the protected activity and the alleged adverse employment action break a causal chain. *Atkins v. Se. Cmty. Health Sys.*, 712 F. App'x 388, 391 (5th Cir. 2017) (ten-month gap); *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 479 (5th Cir. 2015) (eight- to ten-month gap); *Bryan v. Chertoff*, 217 F. App'x 289, 293 (5th Cir. 2007) (four-month gap insufficient to establish causal nexus where personnel who suspended plaintiff

[5] Welsh speculates that Dr. Faust, the principal at the time Welsh filed her 2012 complaint, communicated with Dr. Smith about Welsh's complaint when Dr. Smith took over Dr. Faust's role. There is no evidence to support Welsh's speculation. Indeed, Dr. Smith denied having any discussions at all with Dr. Faust about specific teachers at FBISD.

were unaware of complaint and legitimate, non-discriminatory reasons undergirded the suspension). Here, Welsh lodged her EEOC complaint in August 2012. Nineteen months later, in April 2014, she was placed on a TINA. Thus, even if the TINA were a retaliatory adverse employment action (and we do not hold that it is), the extended gap between the protected activity and the TINA severs the causal nexus between the two in the absence of evidence to the contrary.

B

Welsh also alleges that four other incidents constituted retaliatory adverse employment actions: (1) Dr. Edwards's failure to respond to a request for a recommendation letter; (2) Pike's command that Welsh "feed [her] fish"; (3) refusal to remove the TINA from Welsh's record; and (4) "changing [Welsh's] curriculum yearly and giving [Welsh] classes with the 'at risk and special needs' students."

We have already concluded that the first three of these accusations do not meet the adverse employment action standard applicable in the context of employment discrimination claims. We similarly hold that the definition applied to retaliatory adverse employment actions still does not encompass any of these allegations.

We have not yet considered Welsh's fourth allegation of a retaliatory adverse employment action. Welsh asserts, for the first time on appeal, that changes to the curriculum and assignment to classes with "at risk and special needs" students constituted retaliatory adverse employment actions. Not only has Welsh forfeited this argument, but curriculum changes are a reality of being a teacher and Welsh fails to explain how or why being assigned to work with students who are "at risk and special needs" is an adverse employment action. Indeed, a reasonable administrator may decide to assign only their best teachers to educate students with "special needs." Far from being an adverse

action, working with "special needs" students may actually reflect well on the teacher assigned to do so.

Welsh identifies no material, factual dispute as to whether FBISD took a retaliatory adverse employment action. We affirm the district court's grant of summary judgment in favor of FBISD on Welsh's retaliation claim.

VI

Welsh also argues that she was constructively discharged from her position as a teacher at FBISD because "constructive discharge involves the feeling and desire to resign." Welsh's claim fails as a matter of law. Constructive discharge occurs when an employee is forced to involuntarily resign. *Haley v. Alliance Compressor LLC*, 391 F.3d 644, 649 (5th Cir. 2004) (holding that constructive discharge occurs when "the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation" (quoting *Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990)); *see also McCoy*, 492 F.3d at 557–58.

VII

Accordingly, the district court's decision is AFFIRMED in its entirety.