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No. 17-6303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL LAND, Plaintiff-Appellant, v. SOUTHERN STATES COOPERATIVE, INC. Defendant-Appellee.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Before: BOGGS, SILER, and SUTTON, Circuit Judges.

SILER, Circuit Judge. In this employment-discrimination case, plaintiff Michael Land challenges the district court's decision to grant summary judgment in favor of his former employer, Southern States Cooperative, Inc. Land challenges the district court ruling on two counts: (1) disability discrimination and (2) retaliation. For the following reasons, we affirm the judgment below.

Factual and Procedural History

In 2011, Southern States hired Land as an assistant manager for its retail store in Richmond, Kentucky. Land worked in this same role, as an at-will employee, for approximately three years prior to his termination on March 21, 2014. At that time, Land was fifty-eight years old. His job performance record was mixed, with some poor evaluations noted as early as 2011.

The Richmond store sells goods and services from all aspects of Southern States's business. On several occasions, Land's superiors asked him to spend less time in his office and more time

on the store floor. However, Land believed he could "generate more money for the company as a sales person than as a warehouse stock person." Management discussed Land's failure to maintain the showroom, storefront, and outside lot areas to company standards. Land often clashed with his district managers, describing one as "a bully" and calling another, Michael Hash, a "micromanager."

During a December 2013 meeting with approximately a dozen employees, Hash analogized to a scene from the movie *War Horse* in which a group of horses attempted to pull an object up a hill, and a struggling horse was shot and replaced with a different horse. Hash then said: "I'm not saying we're going to shoot you, but we're going to make it to the top of the hill with or without you." Hash never expressly mentioned Land's name, but Land felt that Hash made eye contact with him. Land had seen the movie and perceived Hash's comment as a threat because the horse to which Hash referred was older.

In June 2013, Land missed a month of work as the result of a knee replacement surgery and complications from that operation. Southern States granted Land's request for leave under the federal Family Medical Leave Act ("FMLA"). When Land returned to work on July 2, 2013, he used a cane to walk and was subject to several months of restrictions on lifting and standing. For his first month back at work, Land's physician, Dr. Jeffrey Selby, restricted him to four hours of work per day, with no lifting and no more than an hour of standing at a time. Nonetheless, Land often stayed at the store for more than four hours, believing that customers needed his help. In late July, Dr. Selby reduced Land's restrictions and permitted him to work six-hour days for two weeks and then eight-hour days with lifting restricted to twenty-five pounds and a two-hour limit on standing. Occasionally Land ignored these restrictions, but he never informed his supervisors that he was working in excess of his doctor's orders. On October 23, 2013, Dr. Selby released him

from all work restrictions, and Land did not request any further accommodations from human resources. He once again lifted fifty-pound sacks of feed per his job description. Land suffered from back and hip pain, yet he did not raise these concerns with his supervisors other than his store manager.

Meanwhile, Land continued to receive some poor performance reviews. In a 2013 evaluation, his superiors observed that Land would benefit from "spending more time at the counter and walking the sales floor" and that the housekeeping of the store needed to improve. Land often chafed under directives from his managers. For example, when instructed to assist with the opening of a garden center, Land adamantly disagreed, voicing his opinion that a garden center was a bad business decision.

On January 31, 2014, Hash met with Land and outlined a forty-five day Performance Improvement Plan ("PIP"). In the first paragraph of the PIP, Hash noted his concern about Land's "ability to grasp and grow in the position he was hired for." The PIP reiterated Land's job duties and described ways in which Land could improve his work. In closing, Hash wrote,

> Over the next 45 days I will be reviewing [Land]'s performance as it related [sic] to the above responsibilities. What I'm looking for is a level of understanding, follow thru, sense of urgency and completion of duties as asked. If after 45 days [Land] doesn't show the needed improvement to continue in this position I will take further disciplinary action up to and possibly including termination.

Land drafted lengthy written objections that he planned to submit to the Southern States corporate office. One letter was addressed to Donna Garcia, a manager in the Southern States human-resources department. Another substantively similar but shorter letter was addressed to Anne Clingenpeel, a Southern States Vice President. After speaking with Garcia and conferring with his store manager, Land agreed to sign the PIP and initially refrained from submitting his letters to the corporate office. Nonetheless, on March 10, 2014, a week before the end of his 45-

day PIP period, Land sent his letters to Garcia and Clingenpeel. In his letters, Land detailed his dissatisfaction with his managers and his position, as well as the obstacles he believed prevented him from improving under the PIP. Although Land complained of "discrimination" and a "hostile work environment," he did not specifically identify a protected class or activity as the basis for this discrimination. However, Land articulated numerous grievances with Southern States—including his belief that the district manager "is set on my termination," citing Hash's war horse analogy as an example of alleged harassment. Upon receiving Land's letter, Garcia sent it to Hash. Eleven days later, on March 21, 2014, Hash personally fired Land.

Land filed a charge with the EEOC, alleging employment discrimination and retaliation based on age and disability under the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). The EEOC found no violation and issued Land a right-to-sue letter. Land filed an action in state court, later removed to federal court. In his complaint, Land raised claims of disability discrimination under the ADA and the Kentucky Civil Rights Act ("KCRA"); age discrimination under the ADEA and KCRA; retaliation for being a member of a protected class with respect to disability, age, and Title VII and/or his use of FMLA leave and/or his requests for reasonable accommodations under the ADA, ADEA, and KCRA; denial of requests for reasonable accommodations and subjection to a hostile work environment in violation of the ADA and KCRA; and breach of an employment contract. However, on appeal, Land abandoned all claims except for the disability discrimination and retaliation claims.

The district court granted Southern States's motion for summary judgment, finding insufficient evidence to support Land's prima facie disability-discrimination and retaliation claims. Specifically, the district court held that Land could not establish a prima facie case of disability discrimination because, "as a matter of law, he was not disabled at the time of his

discharge and, to the extent that Land was disabled at that time, Southern States did not have knowledge of any disability." Moreover, the district court found that the reason Southern States articulated for firing Land—poor job performance and conflicts with upper management—constituted a "reasonable and legitimate business decision" and, therefore, was not mere pretext.

On the retaliation claim, the district court rejected Land's assertion that he was fired in response to taking FMLA leave for his knee surgery and seeking accommodation for his post-surgical issues. Nearly five months had passed between Land's unrestricted return to work and his termination. Thus, the district court held that Land's knee surgery was too distant in time from his termination to constitute protected activity. The district court also summarily dismissed Land's retaliation claim with respect to his letters to corporate headquarters. "If anything, he wrote a letter on March 10, 2014, asserting that he was the subject of unspecified 'discrimination,' but the record evidence demonstrates that the decisionmakers were already planning to terminate his employment."

Discussion

We review a district court's grant of summary judgment de novo. *Donald v. Sybra, Inc.*, 667 F.3d 757, 760 (6th Cir. 2012). Disability-discrimination claims under the KCRA are analyzed in the same manner as disability-discrimination claims brought under federal law. *Bryson v. Regis Corp.*, 498 F.3d 561, 574 (6th Cir. 2007). Likewise, retaliation claims under the KCRA are evaluated under the same standard as this court uses to evaluate federal Title VII claims. *Montell v. Diversified Clinical Servs., Inc.*, 757 F.3d 497, 504 (6th Cir. 2014). Both federal and state claims are subject to the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

I. Disability Discrimination

With respect to his claim of disability discrimination, Land argues that his supervisors "wanted to run [him] off because they regarded him as disabled." However, Land failed to show he was disabled at the time of his cited adverse employment action, his termination. Further, even assuming Land had presented a prima facie case of disability discrimination, Land's poor job performance and his personality conflicts with upper management constituted a legitimate, nondiscriminatory reason for the termination.

a. No Prima Facie Case of Disability Discrimination

The ADA provides that it is unlawful for an employer to "discriminate against a qualified individual on the basis of disability in regard to . . . discharge of employees . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Land's last known disability accommodation ended on October 23, 2013, when he was released to work without restrictions. The record contains no other evidence of restrictions or accommodation requests after that date. Nearly five months passed between Land's unrestricted release to work and his discharge. We have held that only a close proximity in time, less than three months, will allow an inference of discriminatory treatment under the FMLA. *See Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 283 (6th Cir. 2012).

Moreover, no reasonable juror could conclude that Southern States knew or should have known that Land was still disabled at the time of his termination in March 2014. Land only told store manager Rick Winn, his direct supervisor, of his continued knee, hip, and lower back pain. Yet, Winn was not a decision-maker and played no role in the termination process. *See E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 768 (6th Cir. 2015) (en banc) ("Actions by nondecisionmakers cannot alone prove pretext. . . . Neither can decisionmakers' statements or actions outside of the

decisionmaking process."). Here, there was no evidence that anyone involved in the termination decision—district manager Hash, human resources manager Garcia, or the regional manager—had any information regarding Land's possible back surgery or any alleged requests for accommodation that Land made with respect to his back and hip. Consequently, Land did not establish that a decision-maker knew of his alleged disability, and the district court did not err when it granted summary judgment for Southern States on Land's claim of disability discrimination.

b. No Evidence of Pretext

Even if Land had somehow presented a prima facie case of disability discrimination, the legitimate nondiscriminatory reason offered by Southern States was not pretext. If a plaintiff succeeds in presenting a prima facie case of discrimination, the employer must proffer a legitimate, nondiscriminatory reason for its actions. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 720 (6th Cir. 2008) (citing *E.E.O.C. v. Avery Dennison Corp.*, 104 F.3d 858, 862 (6th Cir. 1997)). If the employer makes this showing, the burden then shifts to the plaintiff to demonstrate by a preponderance of evidence that the reason given by the employer was pretextual. *Id.* (citing *Avery Dennison*, 104 F.3d at 862).

Here, Southern States discharged Land for poor job performance. Although Land disagreed with the negative assessments of his performance, focusing instead on positive comments from non-decision-makers such as his direct supervisor, "the law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons." *Browning v. Dep't of Army*, 436 F.3d 692, 698 (6th Cir. 2006) (quoting *Hartsel v. Keys*, 87 F.3d 795, 801 (6th Cir. 1996)).

A mere conflict in personality and managerial style is a valid reason for discharge by an employer. *See Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982) (holding a subjective personality conflict is a legitimate, nondiscriminatory reason for termination).

The district court correctly held that Land failed to demonstrate pretext. Southern States articulated a legitimate, nondiscriminatory reason for Land's termination—his poor job performance and continuing conflicts with management—and Land cannot establish that this reason was a mere pretext for disability discrimination.

II. Retaliation

Title VII prohibits employers from "discriminat[ing] against . . . [an employee] . . . because [the employee] has opposed any . . . unlawful employment practice . . . or because [the employee] has made a charge" that the employer has engaged in an unlawful employment practice. 42 U.S.C. § 2000e–3(a). To establish a prima facie case of retaliation, the plaintiff must show that "(1) he . . . engaged in protected activity, (2) the employer knew of the exercise of the protected right, (3) an adverse employment action was subsequently taken against the employee, and (4) there was a causal connection between the protected activity and the adverse employment action." *Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 435 (6th Cir. 2009) (alteration in original) (quoting *Niswander*, 529 F.3d at 720).

Land argues that Southern States violated Title VII and retaliated against him by firing him just eleven days after he formally complained, in writing, to the corporate office. Land claims he "clearly complained of a hostile work environment" and was terminated in direct response to his March 10 correspondence. However, as the district court correctly held, Land's letter did not establish a prima facie case of retaliation. The record contains no evidence that Land alleged

specific discriminatory employment practices in his discussions with decision-makers or his letters to Southern States.

Title VII does not protect an employee if his opposition is merely a "vague charge of discrimination." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989); *see also Fox v. Eagle Distrib. Co.*, 510 F.3d 587, 592 (6th Cir. 2007) (asserting that plaintiff's vague charge that management was "out to get him" was insufficient to constitute opposition to an unlawful employment practice). Here, the allegations of discrimination contained in Land's lengthy letters were vague, at best. The letters sharply criticized the PIP but contained no assertion that Land was the subject of disability-based discrimination or that Southern States had failed to reasonably accommodate his physical or mental needs. Land alleged unspecified "discrimination," but did not tie the alleged discrimination or hostile work environment to any protected class or activity.

Additionally, Land failed to present a causal connection between his alleged protected activity—the March 10 letter—and his termination. Southern States had already begun to consider terminating Land several days before he submitted the letter. Moreover, Southern States management documented its concerns with Land's job performance nearly two months before his termination when Hash, in his role as district manager, initiated the PIP on January 31, 2014. By the time Land submitted his letter on March 10, more than a month had elapsed, and Land had failed to demonstrate improvement under the PIP.

Even if a causal connection existed between Land's letter and his termination, the retaliation claim still fails for lack of proof of pretext. Southern States proffered a legitimate, nondiscriminatory reason for terminating Land—namely, his poor job performance and his conflicts with management. Land then failed to provide facts sufficient to lead a reasonable juror

to conclude that Southern States's proffered reason for his termination was pretext for retaliation. Accordingly, the district court did not err when it granted summary judgment in favor of Southern States on Land's retaliation claim.

AFFIRMED.