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ARKANSAS COURT OF APPEALS
DIVISION II
No. CV-21-245

MANDY JAMES

APPELLANT

V.

GEORGE'S, INC.

APPELLEE

Opinion Delivered May 25, 2022

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. 72CV-19-2687]

HONORABLE JOHN C. THREET,
JUDGE

AFFIRMED

RAYMOND R. ABRAMSON, Judge

On October 8, 2019, appellant Mandy James filed suit in the Washington County Circuit Court against appellee and separate defendant George's, Inc. (George's),¹ and separate defendant Glen Balch, seeking relief for retaliation and alleging discrimination under the Arkansas Civil Rights Act (ACRA), Title VII of the United States Code, and the Americans with Disabilities Act (ADA).² On November 13, George's filed a motion to dismiss. On December 9, James filed a response in which she abandoned her Title VII and ADA claims. George's filed a reply brief, and a hearing was held on the motion on April 5,

¹George's is a vertically integrated chicken-produce company doing business in an industry substantially impacting interstate commerce and employing more than five hundred people in the state of Arkansas.

²Balch is no longer a party in this litigation.

2021. The circuit court entered an order to dismiss with prejudice and denied James's request for leave to amend. On appeal, James argues the circuit court erred in dismissing her retaliation and disability-discrimination claims under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure and also maintains the circuit court erred in denying her motion to amend the complaint. We affirm.

The facts of the case, as alleged in James's complaint, are as follows. James worked for George's as an employment center manager and was later terminated; the complaint does not provide any dates as to when James was hired or terminated. James contends that she has Asperger's syndrome (Asperger's) and obsessive-compulsive disorder (OCD). Because of these purported conditions, she allegedly has trouble communicating with others and "obsesses" about correcting violations of the law. Another consequence of her purported conditions is that she almost never answered her phone or listened to her voicemail while she worked for George's.

On her first day working for George's, James alleges that she informed Balch, her supervisor, of her conditions, informed him of the trouble her conditions cause her in communicating with others, and informed him that her two children are on the autism spectrum. She also contends there were legal violations at work and that she informed Balch of them. The pleadings do not provide any specifics.

At some point, James allegedly asked another employee to take phone calls at night from truck-driver applicants. According to James, Balch told her that human-resources specialist Heather Teague was not allowed to be in charge of that role. James then asked an

employee from a different department to take the after-hours calls. James alleges that Balch then called James and screamed at her for doing so. James further contends that Balch asked James to send an email to all employees admitting her mistake; it is unclear from the complaint whether James ever sent such an email.

A few days later, James was fired. James contends that she was fired because she “gave out too much information” and undermined Balch’s authority. James further claims that male managers who were not disabled have committed sexual harassment without being fired or have had worse interpersonal communication skills without being fired. The circuit court’s order dismissing the case with prejudice was entered April 5, 2021, and this timely appeal followed.

We review a circuit court’s order granting a motion to dismiss de novo. *Watkins v. Ark. Dep’t of Agric.*, 2018 Ark. App. 460, at 7, 560 S.W.3d 814, 821. The facts in the complaint are treated as true and are viewed in the light most favorable to the plaintiff. *Id.* at 7–8, 560 S.W.3d at 821. Under Arkansas Rule of Civil Procedure 8(a), “[a] pleading which sets forth a claim for relief . . . shall contain (1) a statement in ordinary and concise language of facts showing that . . . the pleader is entitled to relief” Under Arkansas Rule of Civil Procedure 12(b)(6), a complaint should be dismissed if it fails to state facts upon which relief can be granted. Arkansas courts have consistently stated that Rules 8(a) and 12(b)(6) “must be read together in testing the sufficiency of the complaint; . . . facts, not mere conclusions, must be alleged.” *Ark. Dep’t of Env’t Quality v. Brighton Corp.*, 352 Ark. 396, 403, 102 S.W.3d 458, 463 (2003). Therefore, the court should look to the facts as pled to determine whether

the complaint sufficiently states a cause of action. *Perry v. Baptist Health*, 358 Ark. 238, 242, 189 S.W.3d 54, 56 (2004).

The Arkansas Supreme Court has expanded this interpretation, stating, “[W]e have made clear that we treat only the facts alleged in the complaint as true for purposes of a motion to dismiss but not the party’s theories, speculation, or statutory interpretation.” *Sanford v. Walther*, 2015 Ark. 285, at 3, 467 S.W.3d 139, 142. On appeal, the appellate court reviews a circuit court’s order denying a request to amend a complaint using an abuse-of-discretion standard. See *Cawood v. Smith*, 310 Ark. 619, 623, 839 S.W.2d 208, 210 (1992). Therefore, we have two standards of review for the instant case: (1) de novo for the granting of the motion to dismiss; and (2) abuse of discretion for the denial of the motion to amend.

Because James abandoned her Title VII and ADA claims below, all that remain are her (1) retaliation; (2) disability-discrimination; and (3) gender-discrimination claims brought under the ACRA. The ACRA prohibits an employer from retaliating “against any individual because the individual in good faith has opposed any act or practice made unlawful by this subchapter or because the individual in good faith made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” Ark. Code Ann. § 16-123-108(a) (Supp. 2021).

James asserts that her complaint states a claim for retaliation and gender and disability discrimination by providing direct evidence and meeting the requirements of the *McDonnell Douglas* test. A plaintiff may state a claim for retaliation or discrimination either by providing direct evidence or by satisfying the elements of the *McDonnell Douglas* test. *Cook v. George’s*,

Inc., 952 F.3d 935, 938–40 (8th Cir. 2020). James’s complaint fails to state a claim under both tests. An employee may establish a “direct evidence” discrimination or retaliation claim by “demonstrat[ing] that an illegitimate criterion was a motivating factor in the employment decision.” *Flentje v. First Nat’l Bank of Wynne*, 340 Ark. 563, 571, 11 S.W.3d 531, 537 (2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

A court will not find that an illegitimate criterion was a motivating factor in an adverse decision unless the plaintiff demonstrates a “specific link” between the alleged discriminatory animus or protected action and the adverse decision sufficient to demonstrate that the discriminatory animus actually motivated the adverse decision or, in a retaliation case, that the adverse decision was in retaliation for protected conduct. *See Flentje*, 340 Ark. at 572 n.3, 11 S.W.3d at 538 n.3 (quoting *Thomas v. First Nat’l Bank of Wynne*, 111 F.3d 64 (8th Cir. 1997)); *Johnson v. Windstream Commc’ns, Inc.*, 2018 Ark. App. 150, at 9, 545 S.W.3d 234, 240. It is precisely this link that is missing from James’s complaint.

If a plaintiff is unable to present direct evidence that an illegitimate criterion was a motivating factor in the defendant’s adverse decision or that an adverse action was in retaliation for a protected action, then the court must evaluate the plaintiff’s retaliation or discrimination claim under the *McDonnell Douglas* test. *Flentje*, 340 Ark. at 571, 11 S.W.3d at 537; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 16 792 (1973).

The Arkansas Supreme Court has described the *McDonnell Douglas* test in this way:

Under this test, the burden of persuasion never leaves the plaintiff, but there is a shift in the burden to come forward with evidence: (1) the plaintiff must present a prima facie case consisting of four distinct elements; (2) the defendant must rebut the prima

facie case by showing nondiscriminatory reasons for termination; and (3) the plaintiff must show the reasons are pretextual.

Flentje, 340 Ark. at 571, 11 S.W.3d at 537. Although a plaintiff is not required to establish a prima facie case of discrimination or retaliation at the motion-to-dismiss stage, the *McDonnell Douglas* elements are relevant to a Rule 12(b)(6) determination and can be used to determine whether a plaintiff has stated a claim of discrimination or retaliation. *Blomker v. Jewell*, 831 F.3d 1051, 1056 (8th Cir. 2016) (applying a variation of the *McDonnell Douglas* prima facie elements to determine whether plaintiff pled sufficient facts to state a claim for sexual harassment); *see also Cook*, 952 F.3d at 939. Under this analysis, James has failed to state a claim. The circuit court thus properly dismissed the complaint under Arkansas Rules of Civil Procedure 8(a) and 12(b)(6).

James fails to state a retaliation claim through either direct evidence or the *McDonnell Douglas* test. The complaint presented no allegations directly demonstrating that James participated in a protected activity or that discrimination was a motivating factor in George's decision to terminate her. Regarding the circumstances of her termination, the complaint states only that Balch fired her "because she could not communicate well with him, gave out too much information, and undermined his authority." There are no facts in the complaint alleging that any protected acts, James's alleged disabilities, or her gender were motivating factors in George's decision to terminate her. There is no link made between these allegations and James's alleged disabilities or gender.

James fails to establish a retaliation claim under the *McDonnell Douglas* test. The *McDonnell Douglas* test requires a plaintiff to demonstrate “(1) that she engaged in statutorily protected conduct; (2) that [her employer] took an adverse action against her; and (3) that there was a causal connection between the adverse action and the protected activity.” *Johnson*, 2018 Ark. App. 150, at 9–10, 545 S.W.3d at 241. James’s complaint fails to meet both the first and third elements of this test. Because the complaint fails to plead any facts establishing a causal connection between her alleged statutorily protected activities or her alleged disability and her termination, the circuit court properly dismissed the complaint for failure to state a claim of retaliation.

James next argues that the circuit court erred by dismissing her disability-discrimination claim under Arkansas Rule of Civil Procedure 12(b)(6). The complaint fails to state a claim of disability discrimination on the basis of either the direct-evidence standard or the *McDonnell Douglas* test. The analysis is the same for a disability claim, and no direct evidence is provided regarding the disability claim. The complaint alleges that James disclosed her Asperger’s and OCD to Balch on the first day of her employment and asked him to explain things in a different way if she did not understand him. Additionally, the complaint does not establish the date James allegedly requested an accommodation from Balch or the date she was terminated. In fact, no date, or estimated time frame is provided for either allegation.

Here, James must use the *McDonnell Douglas* test to establish a claim of disability discrimination, by showing “(1) that he or she was disabled; (2) that he or she was qualified

to do the essential job functions with or without reasonable accommodation; and (3) that he or she suffered an adverse action due to his or her disability.” *Alexander v. E. Tank Servs.*, 2016 Ark. App. 544, at 10, 505 S.W.3d 239, 245. James claims that because of her Asperger’s and OCD, she has difficulties communicating with others and complying with social conventions, and they cause her to obsess about correcting violations of the law. However, if her conditions qualify as mental impairments within the meaning of the ACRA, James does not allege facts showing that these conditions substantially limited any major life function. *See* Ark. Code Ann. § 16-123-102(3) (Supp. 2021). The complaint offers no information regarding James’s life outside the workplace, so it is impossible to infer from the complaint that her alleged disabilities limited her life activities outside of work. Therefore, we conclude that the circuit court did not err in dismissing her disability-discrimination claim by finding that James’s complaint fails to allege sufficient facts demonstrating that she was disabled pursuant to the ACRA.

James’s complaint also fails to state a claim of gender discrimination under either the direct-evidence standard or the *McDonnell Douglas* test. Again, the complaint presented only conclusory allegations regarding her qualifications. The complaint describes James’s work history prior to her time working at George’s but fails to allege any concrete facts as to how she was qualified for her job with George’s. The complaint merely concludes that “[p]laintiff performed her duties in a satisfactory manner.”

The complaint also does not establish that the male employees held the same position as James, and none of the male employees are alleged to have participated in similar conduct

as hers—i.e., complaining of violations of the law to higher-ups, disclosing her alleged disabilities, and being terminated for insubordination and inability to communicate with her supervisor. Instead, these male employees are alleged either to have made offensive remarks about James or to have committed sexual harassment, acts that James does not allege as reasons for her termination. See *Harvey*, 38 F.3d at 972 (similarly situated individuals must be accused of the same offense); *Crockett*, 85 Ark. App. at 381–82, 154 S.W.3d at 284 (finding two employees not similarly situated due to a minor difference: while plaintiff and another employee had both been accused of sexual assault, the other employee had only been accused once while the plaintiff had been accused twice and had additional complaints against him).

James also argues that the circuit court erred by denying her motion to amend the complaint. Our court will not reverse a circuit court's denial of a request to amend a complaint absent a finding of a manifest abuse of discretion. *Neal v. Sparks Reg'l Med. Ctr.*, 2012 Ark. 328, at 12, 422 S.W.3d 116, 123. A circuit court is vested with broad discretion in allowing or denying amendments to a complaint. *Stolz v. Friday*, 325 Ark. 399, 409, 926 S.W.2d 438, 444 (1996). One factor the circuit court may consider in denying a request to amend a complaint is how much time has passed since the filing of the original complaint. *Id.* (finding it significant that the amended complaint was filed nearly one year after the original complaint). Here, in compliance with Arkansas Rule of Civil Procedure 15(a), the circuit court denied James's request for leave to amend her complaint due to unreasonable delay in litigating the matter.

James first filed a nearly identical action in federal district court on June 28, 2018, and voluntarily dismissed that action on October 23, 2018. James filed her complaint in state court on October 8, 2019. She requested leave to amend her complaint on December 9, 2019, as part of her response to George's motion to dismiss but did not file a proposed amended complaint or state the substance of a proposed amendment. At no point during the litigation, including at the hearing held on March 17, 2021, did James attempt to file an amended complaint or propose how she would amend the complaint. We cannot say the circuit court abused its discretion in finding that because the incidents in the complaint occurred almost six years earlier and that James first filed her claim in federal court over three years earlier, the request for leave to amend was properly denied due to unreasonable delay in litigating the matter.

Accordingly, we affirm the circuit court's decision to dismiss the case with prejudice because James has failed to link any protected activity, disability discrimination, retaliation, or gender discrimination to her termination, and any further opportunity to continue this litigation through an amended complaint would be futile and prejudicial to George's.

Affirmed.

KLAPPENBACH and BROWN, JJ., agree.

Sutter & Gillham, P.L.L.C., by: *Luther Oneal Sutter* and *Lucien Gillham*, for appellant.

The Law Group of Northwest Arkansas LLP, by: *Gary V. Weeks*, *K.C. Dupps Tucker*, and *Kristy E. Boehler*, for appellee.