

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 27, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

LEON JOHN KULASA,

Plaintiff - Appellant,

v.

WYNDHAM VACATION RENTALS
NORTH AMERICA, LLC,

Defendant - Appellee.

No. 20-1402
(D.C. No. 1:19-CV-00561-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **McHUGH, BALDOCK, and MORITZ**, Circuit Judges.

Leon John Kulasa, proceeding pro se, appeals from the district court’s grant of summary judgment to his former employer, Wyndham Vacation Rentals North America, LLC, in his suit under the Americans with Disabilities Act (ADA), the Colorado Anti-Discrimination Act (CADA), and the Colorado Wage Claim Act. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

In May 2017, Wyndham promoted Mr. Kulasa from a Guest Services Agent in Keystone, Colorado, to a P.M. Operations Manager in Breckenridge, Colorado. The Operations Manager position was new, but it was intended to involve oversight and support of several departments, including guest services, housekeeping, and maintenance. The supervisors for the position created a training program, deciding to start Mr. Kulasa at the front desk. But he was not happy there. Believing that the Operations Manager position did not require any significant front-desk duties, he complained that the work was “boring and stagnate,” R. Vol. II at 60, and “was having a negative effect on his mental condition,” *id.* at 59. For their part, his supervisors were dissatisfied with his performance and were unwilling to move him until they believed he was competent to perform the front-desk duties. After meeting with him in July regarding his work and his frustrations with the job, on July 25, they issued him a final written warning and corrective action notice.

Things did not improve in August, and Mr. Kulasa’s supervisors remained unwilling to advance him to other areas of training. Due to his mental health, Mr. Kulasa went on Family and Medical Leave Act (FMLA) leave from early September through early December. For another several weeks, he was on paid administrative leave. He had been undergoing testing, and in December, he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD).¹

¹ Years earlier, Mr. Kulasa had been diagnosed with bipolar disorder. The December 2017 report diagnosing ADHD cast doubt on that earlier diagnosis. In any

Mr. Kulasa returned to work on January 11, 2018, retaining the Operations Manager title and pay, but reporting to only one supervisor. Rather than returning him to the front desk, his supervisor initially assigned him the duties of a Housekeeping Driver, with a plan to review his duties every two weeks. Mr. Kulasa believed the assignment to be a demotion from the Operations Manager position. Within a matter of weeks, his supervisor had received multiple complaints about his performance. Wyndham terminated Mr. Kulasa's employment on March 12, 2018.

Mr. Kulasa brought suit under the ADA and the CADA, alleging discrimination, failure to accommodate, and retaliation because of his ADHD. In an amended complaint, he added a claim for unpaid compensation and reimbursement under the Colorado Wage Claim Act. Wyndham moved for summary judgment. During briefing, Mr. Kulasa further suggested he might have a claim for retaliation in violation of the FMLA.

The district court—a magistrate judge presiding by consent—granted summary judgment to Wyndham on all claims. Because Mr. Kulasa failed to controvert Wyndham's statement of undisputed facts, it considered those facts to be undisputed pursuant to Fed. R. Civ. P. 56(e)(2). Regarding the disability claims, the district court held that Mr. Kulasa failed to establish a violation of the ADA or the CADA. He failed to establish that he has a disability, because he merely alleged that he had

event, we do not consider bipolar disorder because Mr. Kulasa's amended complaint identified his disability as ADHD. And consistent with the pleadings, the district court considered only ADHD in evaluating disability.

ADHD without showing how it substantially affected a major life activity. Further, he failed to present evidence that he ever notified Wyndham of his ADHD, or that he ever requested a reasonable accommodation to assist him with his ADHD. As for retaliation, he failed to identify any protected activity under the ADA or the CADA.

Regarding the potential FMLA retaliation claim, the district court noted that Mr. Kulasa's amended complaint did not plead such a claim. But giving him the benefit of liberal construction, the court considered it anyway. It held Mr. Kulasa failed to show he was demoted upon his return in January 2018. And Wyndham identified several legitimate, non-discriminatory and non-retaliatory reasons for terminating his employment.

Finally, the district court held the Wage Claim Act claims were subject to a two-year limitations period. Some claims thus were untimely. As for the timely claims, the evidence showed that Wyndham paid Mr. Kulasa for the overtime and on-call time he worked before becoming the P.M. Operations Manager (which was an exempt position), and he failed to submit evidence to support his allegations that he was not reimbursed for cell phone and vehicle expenses.

DISCUSSION

We review the district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to Mr. Kulasa as the non-moving party. *See Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016). 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."

Fed. R. Civ. P. 56(a). We afford Mr. Kulasa's pro se filings a liberal construction. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). But we do not act as his counsel, and he must "follow the same rules of procedure that govern other litigants." *Id.* (internal quotation marks omitted).

Mr. Kulasa argues that the district court improperly considered the summary judgment materials (including deeming the facts as undisputed under Rule 56(e), failing to review his summary judgment brief and exhibits, and failing to provide him notice of what evidence he needed to introduce). Regarding the merits, he asserts that the district court erred in determining: (1) he was not demoted upon his return to work in January 2018, and he had not established a FMLA retaliation claim; (2) he failed to establish he has a disability; (3) Wyndham showed it terminated his employment for legitimate, non-discriminatory and non-retaliatory reasons; (4) he failed to show that he requested a reasonable accommodation; and (5) the wage and reimbursement claims were time-barred in part and meritless in remaining part. We disagree that the district court erred either procedurally or substantively.

The district court gave Mr. Kulasa, as a pro se party, a great deal of latitude. For example, it allowed him to belatedly supplement his summary judgment materials, and it analyzed the FMLA retaliation claim he raised during the summary judgment proceedings, even though his amended complaint did not present that claim. Given that Mr. Kulasa did not properly controvert Wyndham's statement of facts, the court acted within the rules in deeming those facts admitted. *See Fed. R. Civ. P. 56(e)(2)* ("If a party . . . fails to properly address another party's assertion of

fact . . . the court may . . . consider the fact undisputed for purposes of the [summary judgment] motion.”). The court was not required to act as Mr. Kulasa’s counsel and advise him how to support his case. *See Garrett*, 425 F.3d at 840. And contrary to Mr. Kulasa’s accusation that the court ignored his materials, the summary judgment order repeatedly referred to his arguments and exhibits.

As for the merits arguments, the district court did not err in holding that Mr. Kulasa failed to establish he has a disability, a required element of his discrimination and failure to accommodate claims, *see Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1192, 1204 (10th Cir. 2018).² Mr. Kulasa argues that the district court did not apply the updated standards of the ADA Amendments Act of 2008 (ADAAA). Under those standards, however, to proceed under the actual disability prong he must show that he has “a physical or mental impairment that substantially limits one or more major life activities,” 42 U.S.C. § 12102(1)(A); *see also Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 995 (10th Cir. 2019). He failed to adequately establish any limitations arose out of his ADHD. Further, although Mr. Kulasa argues that he can proceed under the alternate “record of” and “regarded as” definitions of disability, *see* 42 U.S.C. § 12102(1)(B), (C), he did not make those arguments in the district court, *see* R. Vol. II at 317 n.2 (“Mr. Kulasa does not contend that he had a record of an impairment or that Wyndham regarded him as

² Noting that the ADA and the CADA apply the same standards, the district court analyzed the claims under both statues together. The parties do not challenge that approach.

impaired.”). We do not consider arguments not made, or made only fleetingly, before the district court. *See Truman v. Orem City*, 1 F.4th 1227, 1244 (10th Cir. 2021).

We also see no error in the district court’s determinations that there was no genuine issue of material fact as to whether Wyndham demoted Mr. Kulasa upon his return in January 2018 and whether it terminated his employment for reasons unconnected to his FMLA leave; that the wage and reimbursement claims were subject to a two-year limitations period; and that the timely wage and reimbursement claims could not survive summary judgment.

CONCLUSION

We affirm the judgment for substantially the reasons set forth in the district court’s order filed on October 8, 2020. We deny Mr. Kulasa’s motion to file a corrected/substitute opening brief, but we grant his motion to proceed without prepayment of costs and fees.

Entered for the Court

Bobby R. Baldock
Circuit Judge