FILED
United States Court of Appeals
Tenth Circuit

September 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LESLIE SHANNON,

Plaintiff - Appellant,

v.

CHERRY CREEK SCHOOL DISTRICT; DARLA THOMPSON; SCOTT SIEGFRIED; KEVIN WATANABE; CHERRY CREEK SCHOOL DISTRICT BOARD OF EDUCATION; TY VALENTINE,

Defendants - Appellees.

No. 22-1304
(D.C. No. 1:20-CV-03469-WJM-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Ms. Leslie Shannon is a Black female who taught at a school in Colorado. Ms. Shannon's teaching contract included a three-year probationary period. In the third year, the school district declined to renew

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* Oral argument would not help us decide the appeal, so we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Ms. Shannon's contract. She sued, claiming racial discrimination, existence of a hostile work environment, and retaliation. The district court granted summary judgment to the defendants, and we affirm.

1. Standard for appellate review

We conduct de novo review, using the same standard that applied in district court. *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1114 (10th Cir. 2007). Under that standard, we view the evidence in the light most favorable to the nonmovant (Ms. Shannon). *Id.* Viewing the evidence favorably to Ms. Shannon, we consider whether the defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

2. Claims against the school district and its officials

Ms. Shannon claims the existence of a racially hostile work environment and the commission of racial discrimination and retaliation.[1]

2.1 Ms. Shannon waived her appellate argument involving a racially hostile work environment.

For the claim of a racially hostile work environment, liability would exist only if the racial harassment had been severe or pervasive enough to "create[] an abusive working environment" and "alter[] a term, condition, or privilege of the plaintiff's employment." *Lounds v. Lincare, Inc.*,

[1] On appeal, Ms. Shannon also alleges a denial of due process. But a claim for the denial of due process didn't appear in the complaint or Ms. Shannon's response to the motion for summary judgment. So this claim was waived. *See Somerlott v. Cherokee Nat. Distribs., Inc.*, 686 F.3d 1144, 1150 (10th Cir. 2012).

812 F.3d 1208, 1222 (10th Cir. 2015). In an effort to satisfy this standard, Ms. Shannon relies on racial stereotyping and racially insensitive programming.

Ms. Shannon's allegation of stereotyping stemmed in part from disagreement over a scheduling conflict. Ms. Shannon had scheduled an event that conflicted with the timing of a mandatory meeting with the community. The school principal admonished Ms. Shannon for planning the event at the same time as the community meeting. Ms. Shannon reacted negatively, and the principal allegedly rebuked Ms. Shannon for responding angrily and argumentatively. Ms. Shannon characterizes the rebuke as a resort to racial stereotyping of Black women.

Ms. Shannon also argues that the school's programming showed insensitivity to race by conducting

- equity-focused community meetings on "white privilege" and
- an offensive musical during Black History Month.

Ms. Shannon waived these arguments because she hadn't presented them in district court. The waiver came after the magistrate judge had recommended an award of summary judgment to the defendants. Ms. Shannon objected to the recommendation, but didn't address her claim of a hostile work environment. That omission prevents Ms. Shannon from challenging the grant of summary judgment on this claim. *See Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

2.2 Ms. Shannon failed to create a triable fact-issue on her claim of racial discrimination.

Ms. Shannon claimed not only a racially hostile work environment, but also racial discrimination from the nonrenewal of her teaching contract. On this claim, the district court concluded that Ms. Sherman hadn't presented a triable fact-issue on pretext. We agree.

To prove racial discrimination, Ms. Shannon relied on circumstantial evidence. The district court assumed that this evidence had satisfied Ms. Shannon's burden to present a prima facie showing of discrimination. With satisfaction of that burden, the defendants would have needed to present a legitimate nondiscriminatory reason for declining to renew the contract. *See Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019). The defendants satisfied this burden by pointing to concerns about Ms. Shannon's performance and the principal's confidence that a new teacher would do a better job.

The burden would thus have returned to Ms. Shannon to show pretext behind the defendants' explanation. *See id.* For pretext, Ms. Shannon argues that

- the school district lacked documentation for the concerns about her performance,
- she didn't realize that her job was in jeopardy, and
- no one had expressed concern about her performance until she complained to a federal agency.

But Ms. Shannon lacks any evidence for these arguments.

First, the summary-judgment record contains undisputed evidence of the principal's concerns regarding Ms. Shannon's performance. For example, in her first year, the principal

- rated Ms. Shannon as "basic" and "partially proficient" on most of the performance standards and
- stated how she could improve.

R. vol. II, at 87–102. Ms. Shannon appeared to acknowledge the criticisms, asking if she needed to look for a different job. Ms. Shannon obtained similar evaluations in her second and third years of teaching.

Ms. Shannon responds to this evidence by

- relying on a document that she created,
- pointing to the school's failure to create an improvement plan,
- challenging the principal's criticism of the scheduling conflict as racially based, and
- defending her frequent absences and her failure to provide lesson plans to teachers covering her classes.

Ms. Shannon contends that her performance reviews showed professional growth. For this contention, she relies on a document that she created. The district court excluded this document as unauthenticated, and Ms. Shannon does not address admissibility. We thus can't consider the document on the availability of summary judgment. *Foster v. AlliedSignal, Inc.*, 293 F.3d 1187, 1191 n.1 (10th Cir. 2002).

Apart from this document, Ms. Shannon argues that the principal should have created an improvement plan. This argument reflects a misunderstanding of the school district's policy. The policy provided principals with two codes that could apply when the principal declines to renew a probationary teacher with performance issues. One code would reflect "ineffective performance." To use this code, however, the principal had to create an improvement plan. The second code was "other."

The HR department provided principals with guidance, recommending use of the code "other" when a principal

- harbored concern over a teacher's performance and
- wanted to hire from a new pool of applicants.

The HR department suggested use of the code for "ineffective performance" only if the principal had grave concern with a teacher's effectiveness. Based on this guidance from the HR department, the principal used the code "other" when deciding not to renew Ms. Shannon's teaching contract. This code didn't require an improvement plan.[2]

[2] Ms. Shannon states that the principal coded the reason for nonrenewal as "other" and told her that "the nonrenewal was not due to performance." Appellant's Opening Br. at 2–3 (quoting R. vol. I, at 57–58).

Ms. Shannon argues that use of the "other" code undercuts the criticism of her performance. But this argument conflicts with the summary-judgment evidence, which shows that

- the school district typically used the code for "other" when concerned generally with a teacher's performance,
- the school district used the code for "ineffective performance" only when there were grave concerns with a teacher's effectiveness, and
- the school district's HR department had advised school officials to decline renewal of probationary teachers in the third year whenever there were any performance concerns.

Though Ms. Shannon characterizes the cited performance concerns as "grave," Appellant's Opening Br. at 2, she doesn't point to any evidence that the principal had considered these concerns to be "grave."

Ms. Shannon also complains about comments characterizing herself as angry and argumentative, which are negative stereotypes of Black women. These comments weren't enough to question the principal's belief that she could replace Ms. Shannon with a better teacher. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (stating that isolated, ambiguous comments are not enough to show pretext).

Finally, Ms. Shannon argues that her absences didn't violate the school district's policy. But the principal combined concerns over attendance with concern over Ms. Shannon's failure to provide lesson plans to the teachers covering her classes.

Ms. Shannon argues that she sometimes didn't have enough time to leave lesson plans with other teachers. But we view pretext based on how the facts appeared to the decision-maker, who was the school district's principal. *Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 925 (10th Cir. 2004). Though Ms. Shannon defends her failure to leave lesson plans, she doesn't question the genuineness of the principal's frustration with the burden falling on other teachers. So Ms. Shannon's explanation for her own conduct doesn't suggest pretext.

As a result, we conclude that Ms. Shannon failed to create a triable fact-issue on pretext. That failure entitled the defendants to summary judgment on the claim of race-discrimination.

2.3 Ms. Shannon failed to create a triable fact-issue on her retaliation claim.

Ms. Shannon also claims retaliation for her comments to the assistant principal and a complaint to a federal agency. The district court properly concluded that no genuine dispute of material fact existed.

On the retaliation claim, Ms. Shannon had to show a causal link between her protected activity and the adverse action. *See Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019).

Ms. Shannon allegedly complained to the assistant principal about

- the community meetings on the topic of "white privilege" and
- the content of a musical during Black History Month.

The assistant principal said that he would share this concern with the school's trainers, but Ms. Shannon asked the assistant principal not to say anything. The assistant principal testified that he had respected Ms. Shannon's request and hadn't said anything about her complaint.[3]

Ms. Shannon accuses the assistant principal of lying.

The district court rejected this accusation for two reasons:

1. The evidence was undisputed that the assistant principal hadn't disclosed these conversations to the principal, who was the decision-maker.

2. Too much time had passed between the conversations with the assistant principal and the decision not to renew the contract.

We agree with the first reason, and Ms. Shannon waived any challenge to the second reason.

The assistant principal testified that he hadn't told the principal what Ms. Shannon said, and the principal testified that no one had told her about the conversations with the assistant principal. In the face of this testimony by both the principal and assistant principal, Ms. Shannon concedes that she lacks any contrary evidence. Given this concession, any reasonable factfinder would find that the assistant principal had not disclosed these conversations to the principal.

[3] The assistant principal had no role in deciding whether to renew Ms. Shannon's teaching contract.

The court reasoned independently that a causal link couldn't be inferred because too much time had passed between Ms. Shannon's conversations with the assistant principal and the principal's decision not to renew the contract. Ms. Shannon doesn't address this rationale, which would preclude reversal on this claim even if we were to reject the district court's first reason. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1387–88 (10th Cir. 1997).

Ms. Shannon also complains that the principal gave negative comments to a prospective employer in retaliation for the complaint to a federal agency. The district court assumed that Ms. Shannon had presented prima facie evidence of a causal link. This assumption shifted the burden to the defendants to provide a legitimate nonretaliatory reason for the principal to share negative comments with the prospective employer. *See Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019). The defendants satisfied this burden by stating that the principal's usual practice was to provide a reference.[4]

The burden thus returned to Ms. Shannon to show pretext. *See id.* She says that the principal acted maliciously, but doesn't give any reason to

[4] When Ms. Shannon was notified of the nonrenewal, she was told that the principal would provide a reference but not a letter of recommendation.

doubt the principal's explanation that she was following her usual practice.[5] Ms. Shannon thus failed to create a triable fact-issue on pretext.

3. Claims against the school district's superintendent and HR director

Ms. Shannon also sued the school district's superintendent and HR director. The district court granted summary judgment to these individuals, reasoning that they had lacked personal knowledge of Ms. Shannon's employment or involvement in the principal's reference. Ms. Shannon presents no reason to question this reasoning.

4. Claim for tortious interference with contract or business relationships

Ms. Shannon also invoked state law, claiming tortious interference with contract or business relationships. On this claim, the district court declined to exercise supplemental jurisdiction. Ms. Shannon doesn't question this ruling, but she defends this claim on the merits. Because Ms. Shannon doesn't question the decision to decline jurisdiction on this claim, we have no reason to address the merits.

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[5] The principal informed the prospective employer that Ms. Shannon had missed 26 days in one school-year and had failed to submit final learning objectives for the students. But the principal also made positive comments about Ms. Shannon's work.

Affirmed.

Entered for the Court

Robert E. Bacharach
Circuit Judge