FILED
United States Court of Appeals
Tenth Circuit

November 9, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CARINA M. GONZALEZ,

Plaintiff - Appellant,

v.

ENGLEWOOD LOCK AND SAFE, INC.,

Defendant - Appellee.

No. 23-1073
(D.C. No. 1:20-CV-03686-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

Carina Gonzalez appeals from the district court's midtrial grant of judgment as a matter of law in favor of her former employer, Englewood Lock and Safe, Inc. (ELSI), in her suit alleging sex discrimination, hostile work environment, constructive discharge, and retaliation in violation of Title VII of the Civil Rights Act of 1964. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. BACKGROUND

Ms. Gonzalez worked as a locksmith and field technician for ELSI from October 2017 to December 2018. During that time she was ELSI's only female field technician. She filed this lawsuit against ELSI in December 2020. Her amended complaint alleged that ELSI violated Title VII by (1) paying her less and giving her different terms, conditions, and privileges of employment than her male colleagues with comparable experience; (2) subjecting her to a hostile work environment; (3) constructively discharging her; and (4) retaliating against her. For relief, she sought monetary damages and injunctive relief.

In February 2023 the district court held a jury trial on her claims. After Ms. Gonzalez rested her case, ELSI orally moved for judgment as a matter of law (JMOL) on all four claims. The district court granted the motion and entered judgment in ELSI's favor. On appeal Ms. Gonzalez argues the district court erred in entering JMOL, and requests that we reverse and remand for a new trial.

II. DISCUSSION

A district court may enter JMOL if "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). In other words, "[w]hen a defendant seeks judgment as a matter of law, the controlling question is whether the plaintiff has arguably proven a legally sufficient claim." *Bay v. Anadarko E&P Onshore LLC*, 73 F.4th 1207, 1215 (10th Cir. 2023) (internal quotation marks omitted).

Ms. Gonzalez represents herself, so we construe her filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). We review de novo a district court's disposition of a motion for JMOL. *See Arnold Oil Props. LLC v. Schlumberger Tech. Corp.*, 672 F.3d 1202, 1206 (10th Cir 2012). In doing so, we draw all reasonable inferences in favor of the nonmoving party; we do not weigh the evidence or assess witness credibility. *Bay*, 73 F.4th at 1215.

At the outset we note that our ability to review the district court's disposition is limited because Ms. Gonzalez did not provide a trial transcript. *See Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1238 (10th Cir. 1999) ("An appellant's failure to provide a necessary transcript . . . raises an effective barrier to informed, substantive appellate review." (internal quotation marks omitted)). We will therefore presume the district court's discussion of the trial evidence is accurate and conduct our review accordingly.

A. Discrimination

Title VII proscribes employment discrimination with respect to "compensation, terms, conditions, or privileges of employment" based on an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

Regarding Ms. Gonzalez's pay-discrimination claim, the district court found that the record lacked evidence of her male comparator's pay. The court also determined that even if Ms. Gonzalez had demonstrated a pay disparity, there was insufficient evidence to support a finding that the disparity was motivated by her sex.

On her related claim of disparate terms, conditions, and privileges of employment, the district court noted Ms. Gonzalez's testimony that she had to beg her colleague for an oil change for her company vehicle but determined "there was no evidence to suggest that it was because of her sex." Suppl. R. at 21. The court also found relevant Ms. Gonzalez's testimony that although a male colleague commented "that she would be a better man than him if she made it into fieldwork within six months," she was given the opportunity to perform fieldwork, and received "a significant raise" as a result. *Id.* at 18–19. The court similarly noted Ms. Gonzalez's testimony that she wanted to work on safes and that she perceived the opportunity she was given to work on a safe as an attempt to placate her. The court concluded Ms. Gonzalez's own testimony was "objective evidence" that she was afforded that opportunity. *Id.* at 19.

On appeal Ms. Gonzalez has not shown that a reasonable jury would have had sufficient grounds to find that the disparities she alleged were because of her sex. We therefore uphold the district court's disposition of her discrimination claims.

B. Hostile Work Environment

"A plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Delsa Brooke Sanderson v. Wyo. Highway Patrol*, 976 F.3d 1164, 1174 (10th Cir. 2020) (brackets and internal quotation marks omitted). To sustain a hostile-work-environment claim, "a plaintiff must show (1) that she was discriminated against because of her sex; and (2) that the discrimination was sufficiently severe or

pervasive such that it altered the terms or conditions of her employment and created an abusive working environment." *Id.* (internal quotation marks omitted).

Ms. Gonzalez's amended complaint claimed ELSI subjected her to a "constant sexually hostile work environment" and "unwelcome harassment specifically based on [her] sex." R. at 71. The district court determined that "no reasonable jury could find that any of the conduct complained of was based on Ms. Gonzalez's sex or that it was sufficiently severe or pervasive to rise to the level of a hostile work environment." Suppl. R. at 25.

In reaching its conclusion the district court provided a detailed analysis of Ms. Gonzalez's testimony about various incidents between herself and other ELSI employees. The court found Ms. Gonzalez's testimony that a female colleague once "touch[ed] Ms. Gonzalez's butt with [a] part sleeve," made comments to her about "man juice," and asked her "whether she watches porn before she has sex with her boyfriend," was "arguably the most egregious" of the conduct she alleged. *Id.* at 22–23. But the court determined the record lacked "evidence to tie that conduct to Ms. Gonzalez's sex" and correctly observed that "the law allows for a certain measure of banter, even of a sexual nature." *Id.* at 23.

Ms. Gonzalez has not demonstrated on appeal that she advanced sufficient evidence at trial for a reasonable jury to find that the harassment she alleged was because of her sex. Accordingly, we uphold the district court's disposition of her hostile-work-environment claim.

C. Constructive Discharge

"Under federal law, constructive discharge occurs when the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Bennett v. Windstream Commc'ns, Inc.*, 792 F.3d 1261, 1269 (10th Cir. 2015) (brackets and internal quotation marks omitted). "To establish constructive discharge, a plaintiff must show that she had no other choice but to quit." *Id.* (internal quotation marks omitted).

Ms. Gonzalez's amended complaint alleged that she had no choice but to resign after she became the "chosen technician by force and ridicule by [her] supervisors" for a "customer with evident severe mental illness." R. at 77. In concluding that JMOL was warranted on the constructive-discharge claim, the district court noted Ms. Gonzalez's testimony that there was always another technician with her when she did service calls for that customer. On appeal Ms. Gonzalez has not demonstrated that she provided sufficient evidence at trial for a reasonable jury to find that she had no choice but to resign. Thus, we affirm the district court's disposition of her constructive-discharge claim.

D. Retaliation

"Title VII prohibits retaliation against an employee who has opposed any practice made unlawful by Title VII." *Bennett*, 792 F.3d at 1269 (internal quotation marks omitted); *see* 42 U.S.C. § 2000e-3(a). "Title VII retaliation claims require an

employee to demonstrate that, but for her protected activity, she would not have faced the alleged adverse employment action." *Bennett*, 792 F.3d at 1269.

Ms. Gonzalez claimed ELSI retaliated against her by withholding money from her final paycheck and by harassing her with an invoice. In granting ELSI's motion for JMOL on her retaliation claim, the district court pointed out that Ms. Gonzalez testified that she did not complain to her employer about the alleged mistreatment. The court said it was undisputed that Ms. Gonzalez did not return some work items and ELSI issued the invoice for the unreturned items. Finally, the court concluded that even assuming Ms. Gonzalez engaged in protected activity, the record lacked evidence that the invoice or paycheck issue was retaliation for any protected activity. On appeal Ms. Gonzalez did not show that she presented sufficient evidence at trial to sustain a retaliation claim. We therefore uphold the district court's disposition of that claim.

III. Conclusion

We discern no reversible error in the district court's decision. We therefore affirm the judgment below for substantially the same reasons stated by the district court. We deny Ms. Gonzalez's motion for leave to proceed without prepayment of costs and fees.

Entered for the Court

Harris L Hartz
Circuit Judge