NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 13, 2023*
Decided April 17, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 21-3110

FIONA FENG CHEN,
Plaintiff-Appellant,

v.

JANET YELLEN,
Secretary of the Treasury,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 3:14-cv-50164

Iain D. Johnston,
Judge.

O R D E R

Fiona Chen, a former employee of the Internal Revenue Service, sued the Secretary of the Treasury under Title VII of the Civil Rights Act of 1964, alleging that her supervisors subjected her to a hostile work environment on the basis of her race and

* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

national origin and retaliated against her when she complained. The district court entered summary judgment in favor of the Secretary. We affirm.

Chen, an Asian woman originally from Taiwan, worked for the IRS in Chicago between 2002 and 2008. Her claims center on her experiences after she joined a group managed by Rebecca Solano in 2006. In February 2007, in an annual review, Solano rated Chen's performance as "outstanding," giving her a 4.8 on a 5-point scale and a positive narrative evaluation. By March, however, Chen says Solano's tone had changed. Chen, who was the only Asian employee in the group, alleges that during a meeting regarding employee evaluations, Solano directed aggressive comments and body language toward Chen when describing how and when an employee's job would be terminated. Chen filed a grievance with the National Treasury Employees Union, but after interviewing other meeting attendees Solano's supervisor concluded that the grievance could not be substantiated. Around the same time, Chen requested a replacement for a defective computer, which she alleges Solano failed to procure.

When Chen transferred to another division later that year—to escape Solano, she says—Solano conducted a departure evaluation to document Chen's performance. Solano gave Chen the same high numerical score as in the prior evaluation, but in the narrative component explained that Chen had made numerous procedural errors that caused Solano extra work. For example, on one occasion a taxpayer complained about Chen's professionalism, and on another Chen's spelling and grammar errors in a report were so substantial that Solano needed to re-write the report.

Chen's relationship with her new supervisor, Jamy Kilmnick, also soured. Kilmnick completed Chen's mid-year review by relying on Solano's departure evaluation. Despite Chen's protests, the union contract required this step because Kilmnick had not supervised Chen long enough to perform a new evaluation. Chen also complained that she was asked to finish certain cases for Solano, a request Chen believes was intended to harass her. Further, Chen says Kilmnick subjected her to more frequent case-file reviews than non-Asian employees and laughed at her during a phone call about her work schedule.

In October 2007, Chen filed an administrative complaint with the IRS's Equal Employment Opportunity (EEO) office about Solano's departure rating and other management issues. That same month, Chen told her union representative that she had conducted background checks on Kilmnick and his supervisor, that the two were linked to the same physical address, and that she believed they were engaged in an affair. The following month, Kilmnick learned of Chen's actions from the union representative and

filed a complaint with the Inspector General for Tax Administration, citing concerns for his personal safety because an employee was inappropriately investigating him. An agent at the Inspector General's office gathered information related to Kilmnick's complaint and, without conducting a full investigation, referred it to the IRS Employee Conduct and Compliance Office. Chen resigned from the IRS in 2008.

In 2014, after the EEO complaint was resolved in the IRS's favor, Chen sued the Secretary of the Treasury in federal court. She alleged that she had been subjected to a hostile work environment based on her race and national origin and, when she complained about her treatment, Kilmnick retaliated against her by filing the complaint with the Inspector General. During discovery, Chen attempted to introduce the testimony of an expert witness, Dr. Kyle Brink, who had published extensively on workplace management. The district court granted the Secretary's motion to bar Dr. Brink's testimony under Federal Rule of Evidence 702 because it was largely based on Chen's unsubstantiated allegations, not facts or data. After discovery, the court entered judgment for the Secretary, finding that Chen had not established a prima facie case for either claim because she failed to provide evidence that she experienced harassment, that the alleged harassment was based on her race or national origin, or that she experienced any adverse actions based on her EEO complaint. Chen now appeals.

Summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Lesiv v. Ill. Cent. R.R. Co.*, 39 F.4th 903, 911 (7th Cir. 2022). We construe all inferences in Chen's favor, but she is "not entitled to the benefit of inferences that are supported only by speculation or conjecture." *Boss v. Castro*, 816 F.3d 910, 916 (7th Cir. 2016) (citation omitted).

We start with Chen's hostile-work-environment claim. Chen first argues that the district court used the wrong standard in granting the Secretary's summary judgment motion, pointing to the court's order denying the Secretary's motion to dismiss her complaint. FED. R. CIV. P. 12(b)(6). Chen contends that the court confirmed 26 instances of harassment in its denial of the Secretary's motion to dismiss. But she is mistaken: the court listed 26 instances of harassment that the parties agree that Chen *alleged*. It did not find that those instances had occurred. Further, that Chen's complaint survived dismissal is not sufficient to demonstrate that she could satisfy her evidentiary burden at summary judgment. *Compare Kaminski v. Elite Staffing, Inc.*, 23 F.4th 774, 777 (7th Cir. 2022) (explaining that at pleading stage plaintiff need only "allege facts to allow for a

plausible inference" that she suffered a hostile work environment based on protected status), *with Paschall v. Tube Processing Corp.*, 28 F.4th 805, 813–14 (7th Cir. 2022) (explaining that to get past summary judgment plaintiff must provide evidence from which a reasonable jury could reach the same conclusion).

Chen next argues that the court erred when it concluded that she failed to demonstrate that the alleged harassment was based on her race or national origin. She points to Solano's departure evaluation, which she believes reflected cultural bias, and her phone call with Kilmnick, insisting that he must have laughed at her because of her accent. But Chen provides no evidence to support her speculation. Her subjective belief that the complained-of conduct had a racial or national origin-related character or purpose is insufficient to create a genuine issue of material fact. *See Paschall*, 28 F.4th at 814. Moreover, Chen admitted in her deposition that she believed that Solano created a hostile work environment for *all* employees. Chen asserts that she was affected more severely by Solano's overbearing style because she is an immigrant. But no evidence suggests that Solano was aware of Chen's immigration status, much less that her actions were motivated by animus toward individuals born outside of the United States.

Even if Chen could demonstrate that her supervisors' conduct was based on a protected status, we agree with the district court that it was not so severe or pervasive that it altered the conditions of her employment. Nothing in the record suggests that the conduct created a workplace "permeated with discriminatory intimidation, ridicule, and insult." *Abrego v. Wilkie*, 907 F.3d 1004, 1015 (7th Cir. 2018) (citation omitted).

As to her retaliation claim, Chen argues that the court wrongly concluded that she failed to provide evidence that Kilmnick's complaint to the Inspector General constituted an adverse employment action. An action is materially adverse when it would dissuade a reasonable worker from making or supporting a charge of discrimination. *Boss*, 816 F.3d at 918. Materially adverse actions include diminishing financial terms of employment and subjecting an employee to "humiliating, degrading, unsafe, unhealthful" or otherwise negative alterations in work environment. *See Alamo v. Bliss*, 864 F.3d 541, 552 (7th Cir. 2017). But Chen has pointed to no evidence that Kilmnick's complaint affected her income or otherwise negatively changed any other condition of her work. Indeed, Chen admitted in her deposition that she was not aware of Kilmnick's complaint to the Inspector General until after she resigned. She repeatedly asserts that the complaint exposed her to criminal liability, but the investigation referral form and the investigator's deposition reveal that it did not. The informal investigation focused solely on the propriety of Chen's workplace conduct.

Chen also argues that the court erred by concluding that Kilmnick's complaint was not causally linked to her EEO complaint. But Chen points to no evidence, as she must, that links the two complaints. *See Chatman v. Bd. of Educ. of Chi.*, 5 F.4th 738, 748 (7th Cir. 2021). Chen relies only on the timing between the complaints. But suspicious timing is not enough to create a triable issue by itself. *Igasaki v. Ill. Dep't of Fin. & Pro. Regul.*, 988 F.3d 948, 959, 960 (7th Cir. 2021). The court also properly declined to credit Chen's unsupported speculation that Kilmnick lied about his motivations for contacting the Inspector General—that Chen's investigation and allegations caused concern for his safety and reputation—and Chen points to no evidence that his explanation was pretextual. *See id.* at 959.

Chen also contends that the district court erred in excluding the expert testimony of Dr. Brink. We disagree. The court thoroughly addressed the requirements of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993), and did not abuse its discretion in barring Dr. Brink's testimony, *see Kirk v. Clark Equip. Co.*, 991 F.3d 865, 872 (7th Cir. 2021). Dr. Brink's testimony was largely based on allegations and not "sufficient facts or data." FED. R. EVID. 702(b). Specifically, the court found that Dr. Brink relied on the allegations in Chen's original complaint filed in 2014—not the operative complaint filed in 2018. In any event, allegations in a complaint are not evidence, and "an anemic and one-sided set of facts casts significant doubt on the soundness of [his] opinion." *Smith v. Ill. Dep't of Transp.*, 936 F.3d 554, 558–59 (7th Cir. 2019).

We have reviewed Chen's other arguments, and none has merit.

AFFIRMED.