In the

United States Court of Appeals

For the Seventh Circuit

No. 21-3158

KRISTIE A. ALLEY,

Plaintiff-Appellant,

v.

PENGUIN RANDOM HOUSE,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:20-cv-00117-RLY-DLP — **Richard L. Young,** *Judge;*
Doris L. Pryor, *Magistrate Judge*.

ARGUED SEPTEMBER 12, 2022 — DECIDED MARCH 9, 2023

Before EASTERBROOK, KIRSCH, and JACKSON-AKIWUMI, *Circuit Judges*.

KIRSCH, *Circuit Judge*. Kristie Alley sued her former employer, Penguin Random House, for retaliation under Title VII of the Civil Rights Act of 1964 and for breach of contract under Indiana law. Alley alleged that Penguin demoted her in retaliation for reporting sexual harassment and violated Indiana law in doing so. The Title VII claim proceeded

to summary judgment, but the record demonstrated that Alley was demoted for her *failure* to report allegations as required by Penguin policy and, therefore, she did not engage in statutorily protected activity. Accordingly, the court concluded that no reasonable juror could find that Alley was retaliated against and granted Penguin's motion for summary judgment on that claim. Alley now appeals that ruling, as well as the magistrate judge's earlier dismissal of her state law breach of contract claim under Federal Rule of Civil Procedure 12(b)(6). We affirm both decisions.

I

Kristie Alley started working as a full-time order processor at Penguin Random House's shipping warehouse in Crawfordsville, Indiana in 2014. Within two years, Penguin promoted Alley to the management position of Group Leader. In that role, Alley monitored production and served as a liaison between supervisors and line employees.

Penguin required Group Leaders (and all managers and supervisors) to report sexual harassment allegations when they learned of them and provided clear instructions on how to do so. The company's Anti-Harassment and Reporting Procedure instructed employees who believed they themselves or a coworker had been subject to harassment to promptly report to: (1) their manager; (2) a department or division head; or (3) a human resources representative. Alternatively, employees may report violations anonymously by contacting the ombudsperson. Managers and supervisors were required to communicate any employee complaint—formal or informal—to human resources and were subject to discipline for failing to report suspected harassment. Alley received a copy

of this policy during her orientation and participated in trainings that referred to it.

On September 13, 2019, Penguin employee Marlene Guzman informed Alley that Scott Lillard was sexually harassing her. Despite her duty to follow Penguin's reporting procedure, Alley did not. Instead, she conducted her own independent investigation into the allegations. Alley asked Guzman to provide a written statement detailing her allegations, which Guzman gave her a few days later. Megan Haines, Guzman's then-coworker and roommate, submitted a corroborating statement as well. Alley also messaged via Facebook Ashley Pendleton, a former Penguin employee, to discuss her experience with Lillard at the facility. Pendleton had stopped showing up for work a few months prior, and Alley suspected it had something to do with Lillard. Alley also made one phone call to the ombudsperson, but no one answered. She did not contact anyone in management or human resources to report Guzman's allegations.

In the meantime, both Haines and another Penguin employee, Emily Felix, came forward to HR on their own, reporting that Lillard was sexually harassing Guzman. Penguin immediately launched an investigation into the allegations. Guzman submitted a statement detailing her harassment, and Haines submitted a corroborating statement.

Penguin's senior vice president and the facility's HR director then met with Alley to learn if she had any further information. Alley admitted that she already knew of Guzman's allegations and that she had reached out to Pendleton (the former employee) hoping to obtain more information about Lillard. Following the meeting, Alley forwarded the statements Guzman and Haines had provided to her.

The next week, Alley provided a statement alleging that she too had been sexually harassed by Lillard starting in 2015. Cole Golladay, her former supervisor and Group Leader, later revealed that Alley had reported the harassment to him in 2017, and that he did not report despite his obligation to do so. Golladay was not disciplined for his failure to report.

In light of this information, Penguin terminated Lillard in late September 2019. Shortly after, Penguin's senior vice president and another manager met with Alley to inform her that she was being demoted from Group Leader to forklift operator. They told her that the demotion was due to her failure to report sexual harassment, thereby putting Penguin's employees at risk. Alley continued working at Penguin as a forklift operator until resigning in July 2020.

II

Alley appeals the district court's grant of summary judgment on her retaliation claim and dismissal of her breach of contract claim. Under Rules 56 and 12(b), our review is de novo. *Scaife v. U.S. Dep't of Vet. Affairs*, 49 F.4th 1109, 1114 (7th Cir. 2022); *Adams v. City of Indianapolis*, 742 F.3d 720, 727–28 (7th Cir. 2014).

A

To survive summary judgment on a Title VII retaliation claim, a plaintiff must produce evidence from which a reasonable juror could find that: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal link between the two. *Abrego v. Wilkie*, 907 F.3d 1004, 1014 (7th Cir. 2018). "The key question is whether a reasonable juror could conclude that there was a causal link between the protected activity … and the adverse

action." *Rozumalski v. W.F. Baird & Assocs., Ltd.*, 937 F.3d 919, 924 (7th Cir. 2019) (citing *Ortiz v. Werner Enters. Inc.*, 834 F.3d 760, 765–66 (7th Cir. 2016)). Relevant evidence may include "suspicious timing, ambiguous statements of animus, evidence other employees were treated differently, or evidence the employer's proffered reason for the adverse action was pretextual." *Rozumalski*, 937 F.3d at 924 (citation omitted). We consider all of the evidence as a whole. *Ortiz*, 834 F.3d at 765.

Alley alleges that Penguin demoted her in retaliation for reporting sexual harassment. She argues that she helped Guzman report by encouraging her to put the allegations into writing and to collect a corroborating statement from Haines. According to Alley, she wanted to do this before taking the allegations to Penguin so that the company would be forced to investigate rather than cover them up. On appeal, she contends that these actions were protected under Title VII and that she was demoted because of them. Alley argues that: the timing of her demotion was suspicious, Penguin's reason for demoting her was pretextual, the dissimilar treatment of Golladay is proof that she was not actually demoted for failing to report harassment, and edits made in her management journal are further support of Penguin's disingenuousness.

To satisfy the first requirement of a retaliation claim, Alley argues that the steps she took to help Guzman report her allegations are statutorily protected activity. But they are not. "An employee engages in a protected activity by either: (1) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under Title VII or other employment statutes; or (2) opposing an unlawful employment practice." *Northington v. H & M Int'l*, 712 F.3d 1062, 1065 (7th Cir. 2013). Sexual harassment is indisputably

an unlawful employment practice and thus, reporting allegations is a recognized protected activity under Title VII. See e.g., *Magyar v. Saint Joseph Reg'l Med. Ctr.*, 544 F.3d 766, 770–72 (7th Cir. 2008). But Alley did not actually report harassment; she *failed* to report harassment. Failing to report is not a protected activity under Title VII. Whatever her motivation in undertaking her own investigation instead of taking the report to HR, her conduct simply is not statutorily protected activity. Thus, Alley cannot satisfy the first requirement of a retaliation claim.

It is undisputed that Alley never reported Guzman's sexual harassment allegations. Alley argues that she attempted to report when she called the ombudsperson, but her call went unanswered, and she never actually spoke with anyone. She admits that she never made another attempt to call the ombudsperson or to communicate the complaint to an HR representative as required by the reporting policy. Penguin management independently learned of the allegations and asked Alley if she knew anything. Only then did Alley come forward and admit that Guzman had reported these allegations to her as well.

We also note that even if Alley did engage in a protected activity by attempting to help Guzman report, there is still insufficient evidence to reasonably conclude that Penguin retaliated against her. Although suspicious timing "can sometimes raise an inference of a causal connection" between an employee's protected action and an adverse employment action, there is nothing suspicious about the timing of Alley's demotion. *Gracia v. SigmaTron Int'l, Inc.*, 842 F.3d 1010, 1021 (7th Cir. 2016). When "there are reasonable, non-suspicious explanations for the timing" of the defendant's conduct, proximity in

time is not enough to support a retaliation claim. *Terry v. Gary Cmty. Sch. Corp.*, 910 F.3d 1000, 1008 (7th Cir. 2018). Here, there is a perfectly reasonable explanation for the timing of Alley's demotion: Penguin learned of her failure to comply with her obligation to report sexual harassment allegations and demoted her eight days later, after concluding its investigation.

Similarly, Alley failed to produce evidence of pretext. A showing of pretext would require evidence suggesting that Penguin lied about the real reason for Alley's demotion. See *O'Leary v. Accretive Health Inc.*, 657 F.3d 625, 635 (7th Cir. 2011). But the evidence shows that Penguin took the allegations against Lillard seriously and that it demoted Alley for failing to report them. After learning of the allegations, Penguin immediately launched an investigation, suspended Lillard just a day later, and terminated him the week after that.

Alley argues that Penguin's dissimilar treatment of Golladay, who in 2017 failed to report Alley's own allegations against Lillard, casts doubt on Penguin's motive. But a reasonable fact finder could not conclude that Golladay is a similarly situated employee. Similarly situated employees must be "directly comparable to the plaintiff in all material respects." *McDaniel v. Progress Rail Locomotive, Inc.*, 940 F.3d 360, 368 (7th Cir. 2019) (cleaned up); see also *Lesiv v. Illinois Cent. R.R. Co.*, 39 F.4th 903, 919 (7th Cir. 2022) ("In a case challenging disciplinary action, the plaintiff and comparator ordinarily must have dealt with the same supervisor, been subject to the same standards, and have engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment

of them.") (cleaned up). Although Golladay also failed to report harassment allegations—in this case, Alley's—Penguin did not learn of his failure until more than two years after the fact. In contrast, Penguin was already investigating Guzman's allegations when it learned of Alley's failure to report and was able to take immediate action. The law does not require employers to discipline employees equally for behavior that happened multiple years apart. Penguin's decision to treat the two employees differently in this situation is not evidence of a retaliatory motive.

Lastly, Alley argues that summary judgment is precluded because there is a disputed question of fact regarding changes made to entries in her management journal. But any dispute is immaterial. Even when asked about the relevancy of the journal at oral argument, counsel could not give an answer other than it was suspicious and that Penguin may have changed it to try to build a record against her. We fail to see how.

The record shows that Alley was not demoted in retaliation for reporting sexual harassment allegations, but for her failure to report in a timely and appropriate manner. Thus, a reasonable juror could not find that her demotion was due to her engagement in a protected activity. Her retaliation claim fails.

B

We next turn to Alley's state law breach of contract claim. Indiana follows the employment at will doctrine, which generally permits both the employer and the employee to terminate the employment at any time for any reason, or for no reason at all. *Meyers v. Meyers*, 861 N.E.2d 704, 706 (Ind. 2007).

Employers may also demote employees as they see fit. Nevertheless, Alley alleges that Penguin's employee Code of Conduct created a unilateral contract containing binding minimum standards that Penguin employees are obligated to adhere to and claims that Penguin can be held liable for failing to adhere to those standards. Specifically, she alleges that Penguin violated the handbook's statement that "intimidation and retaliation against employees who in good faith provide reports of suspected or actual misconduct must not be tolerated." Alley frames this as a specific promise and argues that Penguin broke it by demoting her.

This argument fails. First, for reasons discussed above, Penguin did not retaliate against her for reporting sexual harassment. Second, Alley cannot recover because the Code of Conduct is not an enforceable unilateral contract. A unilateral contract arises when "one party makes an offer (or promise) which invites performance by another, and the performance constitutes both acceptance of that offer and consideration." *Orr v. Westminister Vill. N. Inc.*, 689 N.E.2d 712, 719 n.11 (Ind. 1997). It is unclear whether an employee handbook could ever constitute a unilateral contract and bind an employer under Indiana law. See *Peters v. Gilead Scis., Inc.*, 533 F.3d 594, 599 (7th Cir. 2008) (citing *Orr*, 689 N.E.2d at 719–20). Even if it could, the handbook would have to contain a "promise clear enough that an employee would reasonably believe that an offer had been made." *Orr*, 689 N.E.2d at 720 (citation omitted). Alley does not point to any provision in the handbook that is a secure promise of employment. The provision she cites is simply a personnel policy stating that certain behavior is intolerable.

Penguin's employee Code of Conduct did not convert Alley's at will employment into a contractual relationship. Thus, she cannot bring a claim for breach of contract.

AFFIRMED

JACKSON-AKIWUMI, *Circuit Judge*, dissenting. While I agree with the majority opinion on the breach of contract claim, I part ways with its evaluation of Alley's effort to report Guzman's harassment allegation and Alley's subsequent demotion. There are sufficient material and disputed facts in the record for Alley's retaliation claim to go to a jury.

The majority opinion concludes Alley's retaliation claim fails for two reasons: (1) Alley never reported Guzman's allegations; and (2) there is insufficient evidence to "reasonably conclude" Penguin retaliated, particularly because Cole Golladay, who failed to report Alley's own allegation of harassment two years prior and was not disciplined, is an improper comparator. In my view, these objections misread the circumstances of the case.

A. Alley's effort to report

I begin with undisputed facts of Alley's effort to report Lillard's harassment. Alley was first told by Marlene Guzman of Lillard's harassment on September 13, 2019. Lillard was a fellow group leader at the plant who, at the time, was working alongside Alley in splitting the duties of a supervisor who was on leave. Because of Guzman's fears of continuing to work under Lillard, and apparent indifference by management to previous complaints about Lillard from six other workers,[1] Guzman and Alley decided to make a report to the ombudsperson as detailed in Section 4.4. of Penguin's Code of Conduct.

[1] Penguin contends that these previous complaints about Lillard were focused on his management style and did not hint at sexual harassment or gender-based bullying.

On September 16 or 17, Alley received a written statement from Guzman. On September 17, she called several numbers listed in Penguin documents seeking to speak with the ombudsperson. She eventually spoke for seven minutes with an employee of Penguin who had trouble finding the appropriate number. Alley then independently found the number for the ombudsperson and left a message. Meanwhile, on September 18 and 19, another employee reported Lillard for harassing Guzman, and a roommate of Guzman submitted a corroborating statement.

On September 19 or 20,[2] Alley was called into a meeting with two Human Resources managers, HR Director Bonnie Mann and Senior Vice President Lori DeReza. Mann and DeReza asked Alley if there was anything wrong with her as she had been acting unusually. In that meeting, Alley was the first to disclose that she had received Guzman's statement about harassment by Lillard. Alley was subsequently demoted from her group leader position in a meeting on September 27, ostensibly because she failed to report Lillard's harassment. Penguin's anti-harassment policy requires managers to report violations to HR, but also includes a procedure where employees can report to the ombudsperson.

Alley's theory of retaliation is that she was demoted for disclosing to HR that Guzman was being harassed by Lillard. A retaliation claim can survive summary judgment if the plaintiff produces enough evidence for a reasonable jury to

[2] The record is unclear as to when this meeting happened. Alley said it was September 20 in her complaint and deposition. However, in the summary judgment and appeal briefs, Alley says it was September 19. Penguin also says the meeting was September 19.

conclude (1) they engaged in protected activity; (2) defendants took materially adverse action against them; and (3) there was a but-for causal connection between the two. *Nicholson v. City of Peoria*, 860 F.3d 520, 523 (7th Cir. 2017). Protected activity for the purposes of a Title VII retaliation claim is "some step in opposition to a form of discrimination that the statute prohibits." *Ferrill v. Oak Creek-Franklin Joint Sch. Dist.*, 860 F.3d 494, 501 (7th Cir. 2017) (citing *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 631 (7th Cir. 2011)). This only requires an employee to have a "good-faith and *reasonable* belief" that they are opposing unlawful conduct. *Id.* (emphasis in original). Alley's behavior meets this standard: she listened to Guzman, agreed with her desire to report to the ombudsperson, took a statement from her, and made an honest attempt to contact the ombudsperson. She then told HR about Guzman's statement at the meeting on September 19 or 20. These are enough facts for a reasonable jury to conclude that Alley engaged in protected activity for the purposes of her retaliation claim.

B. Evidence of retaliation

This takes us to the question of whether Alley presented evidence of a "but-for" causal connection between her report and her demotion. Alley can meet this standard using circumstantial evidence such as "suspicious timing, ambiguous statements of animus, evidence other employees were treated differently, or evidence the employer's proffered reason for the adverse action was pretextual." *Rozumalski v. W.F. Baird & Assocs., Ltd.*, 937 F.3d 919, 924 (7th Cir. 2019) (citing *Greengrass v. Int'l Monetary Sys. Ltd.*, 776 F.3d 481, 486 (7th Cir. 2015)).

1. Penguin's treatment of Golladay

Alley contends that retaliation against her is evidenced in part by the treatment of Golladay, who received her report about Lillard's sexual harassment in 2017 but did not follow up on the report and yet was not disciplined by Penguin. (The record suggests that Penguin did not even investigate Golladay's failure to report.) Indeed, Golladay did not report the harassment upwards until two years later, on September 25, 2019, in an email to his manager, Mike Brock. This is several days *after* Alley attempted to call the ombudsperson about Lillard's harassment of Guzman, *after* two other employees reported the same, and *after* Alley's meeting with HR during which she also reported the same.

Penguin—and the majority opinion—view Golladay's conduct as irrelevant because Penguin did not discover Golladay's failure to report until two years after the fact. The majority opinion concludes that this time gap justified Penguin's different treatment of Alley and Golladay. This supposition not only fails to view the facts in the light most favorable to Alley as the non-moving party, it also assumes that Alley's comparison to Golladay is an attempt to use the *McDonnell Douglas* burden shifting framework.[3] However, Alley is

[3] Even if Alley was proceeding under the *McDonnell Douglas* framework, we have reminded that comparisons between employees may not be drawn too narrowly. *See Dunlevy v. Langfelder*, 52 F.4th 349, 354 (7th Cir. 2022) ("If a comparator engaged in equivalent or more egregious conduct than the plaintiff but received a lighter punishment, or none at all, that satisfies the inquiry. The parties agree that [the compared employees] had the same supervisor and were subject to the same standards. Thus, the only question is whether the two men's conduct was of 'comparable seriousness,' *i.e.*, did they engage in 'similar—not identical—conduct to qualify as similarly situated.'"). Likewise, where disciplinary actions are

proceeding under the *Ortiz* framework and referencing Golladay as circumstantial evidence to show causation. *See Ortiz v. Werner Enters., Inc.*, 834 F. 3d 760, 766 (7th Cir. 2016) (holding "all evidence belongs in a single pile and must be evaluated as a whole."); *Runkel v. City of Springfield*, 51 F.4th 736, 742 (7th Cir. 2022) ("[O]ur decision in *Ortiz v. Werner Enterprises* rejected the distinction between direct and indirect evidence and the corresponding methods of proof … . [W]e and district courts should consider all available evidence and, when deciding a motion for summary judgment, should ask whether a reasonable jury could find that the relevant decision was motivated in part by an unlawful criterion."); *see also Rozumalski*, 937 F.3d at 924 (holding "evidence other employees were treated differently" can be used to show a causal link for a retaliation claim).

The fact that Penguin chose to demote Alley but let Golladay escape any form of discipline (and perhaps even investigation) is particularly noteworthy given the difference in the level of egregiousness. Alley's purported delay in reporting to HR was mere days; Golladay took over two years and waited until *after* the secret of Lillard's harassment was out of the bag and the company's internal processes had begun. The majority opinion places substantial weight on Penguin's explanation that Golladay's infraction was stale, making it less urgent to act upon than Alley's. However, a jury is entitled to read such an explanation as an ex-post justification for Alley's

---

challenged, such as in a case the majority opinion references, *see supra* 7-8 (citing *Lesiv v. Illinois Cent. R.R. Co.*, 39 F.4th 903 (7th Cir. 2022)), we have stated that the "congruence" between the conduct of both employees "need not be perfect." *Lesiv*, 39 F.4th at 919.

demotion. An employer "who advances a fishy reason [for adverse action] takes the risk that disbelief of the reason will support an inference that it is a pretext for discrimination." *Loudermilk v. Best Pallet Co., LLC*, 636 F.3d 312, 315 (7th Cir. 2011).

To be sure, evidence that other employees reported Lillard's harassment and did not receive discipline cuts against Alley. But this merely shows that there is competing evidence a jury must evaluate, not that the record compels a ruling as a matter of law against Alley. *Flowers v. Renfro*, 46 F.4th 631, 636 (7th Cir. 2022) ("At summary judgment, the district court could not weigh credibility, balance the relative weight of conflicting evidence, choose between competing inferences, or resolve swearing contests. It had one task only—to determine whether there were any disputes of material fact that required a trial and upon which a reasonable jury might rely to return a verdict for the nonmoving party.").

2. Penguin's changes to Alley's employment record

In addition to Golladay as a comparator suggesting retaliation, Alley has presented evidence of changes made to her management journal. Two days after her September 27 demotion, Alley checked her management journal and saw that her work performance ratings for March 4, August 19, and August 23 had changed from "N"—for "neutral"—to "B"—for "bad." The explanations from Penguin's management as to how and why these changes were made are confusing and contradictory.

HR Director Bonnie Mann testified that she spoke with Mike Brock, who managed Alley at the time and authored the August 19 entry. According to Mann, Brock told her that "he

might have put N for not good versus B for bad or vice versa." Mann then testified that "[Brock] noticed that [Zach Link, another superior] had done the same thing … . And then [Brock] brought it to [Link's] attention. And [Link] went in and updated it and made the correction." Link, however, testified that he never made any changes to Alley's journal entries, nor was he ever contacted to make such changes.

These explanations from management are inconsistent. The majority opinion dismisses the issue by calling the dispute "immaterial." In doing so, it notes that counsel for Alley at oral argument was only able to state that the changed records were suspicious because they suggested Penguin was trying to build a record against Alley. But poorly substantiated and explained downward changes to an employee's ratings after the employee engages in protected activity are exactly the kind of circumstantial evidence a plaintiff is allowed to rely on to show a causal link for a retaliation claim. *Rozumalski*, 937 F.3d at 924.

3. Penguin's justification for demoting Alley

A final piece of evidence worth discussing is Penguin's justification for demoting Alley: that she failed to report harassment. Alley has presented sufficient evidence to raise a jury question about whether this reason is pretextual because a reasonable jury could conclude her actions did not constitute a "failure" to report in the first place.

Alley has presented evidence of working with Guzman to make a report to the ombudsperson, which Penguin's antiharassment procedure specifically contemplates. Alley heard from Guzman on September 13, and attempted to report to the ombudsperson on September 17. Just two or three days

later, Alley disclosed Guzman's allegations to HR managers Mann and DeReza and detailed the work she had done to help Guzman file her complaint. In short, there are disputed material facts about the nature of Alley's activity (failure to report versus an attempt to report to the ombudsperson and an actual report to HR) that preclude summary judgment. *Dunn v. Menard, Inc.*, 880 F.3d 899, 905 (7th Cir. 2018) ("A genuine dispute of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'").

For these reasons, I respectfully dissent in part.