FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1621

BRANDON MITCHELL,

Appellant,

v.

MORRIS A. YOUNG in his official capacity as Sheriff, Gadsden County, Florida,

Appellee.

On appeal from the Circuit Court for Gadsden County.
William L. Gary, Judge.

December 14, 2020

B.L. THOMAS, J.

Brandon Mitchell appeals the trial court's order granting Sheriff Young's motion for summary judgment. For the reasons below, we affirm.

Facts

Appellant was a sergeant with the Gadsden County Sheriff's Office. He filed a complaint against Sheriff Young in his official capacity as Sheriff of Gadsden County, asserting that Sheriff Young treated similarly situated employees of a different race more favorably than him. Appellant also asserted that Sheriff

Young improperly retaliated against him when he engaged in protected activities. His discrimination and retaliation claims were filed pursuant to 42 U.S.C. § 2000e and Chapter 760, Florida Statutes (2015).

In May 2012, Appellant was subject to an internal-affairs investigation for an incident related to a shotgun used in a citizen suicide. Appellant believed that he had removed all the ammunition from the shotgun when he recovered it. However, when the shotgun was returned to the victim's brother, there was a live round in the chamber and the safety was off. As a result, Sheriff Young initiated an internal-affairs investigation regarding the incident.

As a result of the investigation, it was determined that Appellant violated the following Sheriff's Office policies: "Completion of Reports and Documents" (Level-One Violation) and "Endangering Others Through Neglect of Job Duties" (Level-Four Violation). Based on the violations, it was recommended that Appellant receive an eight-hour suspension, a seventy-six-hour suspension, and a demotion to the rank of deputy.

Before the discipline could be communicated or administered, Appellant again violated Sheriff's Office policy. On August 22, 2012, Lieutenant Turner emailed the sergeants, including Appellant. He stated that he was disappointed in the sergeants' failure to check on a residence listed on the "watch order list." Appellant sent a reply email to the original recipients along with several additional recipients, including his superiors, stating his concern with dispatch's failure to log information. He then sent a follow-up email asking Lieutenant Turner how many times he had checked the residence. He ended the email with "MAD AS H#LL."

Although Lieutenant Turner did not take issue with Appellant's email, Major Wood told Sheriff Young that the email was "grossly insubordinate" and recommended Appellant be terminated. Major Wood amended the recommendation for discipline related to the shotgun incident to include the new violation of "Gross Insubordination" (Level-Five Violation).

Appellant was provided a predetermination conference by a three-person board. During the conference, Appellant admitted

that sending the email was misconduct and apologized. On September 4, 2012, the board voted unanimously to approve the proposed discipline, and Sheriff Young concurred. Appellant was offered an opportunity to voluntarily resign, but he declined because he was denied the opportunity to cash out his leave balance and was terminated on September 7, 2012.

Sheriff Young moved for summary judgment in response to Appellant's complaint. After conducting a hearing, the trial court issued a written order granting the motion. The trial court found that Appellant's racial-discrimination claim was based on "hearsay innuendo and his perception," and that Appellant failed to show that similarly situated employees outside his protected class were treated more favorably. The court also ruled that any action taken against Appellant was not retaliation for engaging in protected activity.

Analysis

I. Intentional Racial Discrimination Claim

Appellant argues the trial court erred by finding that he did not establish the elements of a prima-facie case of intentional racial discrimination. We disagree because Appellant failed to present valid comparators under the *McDonnell Douglas*[1] standard.

A trial court's granting of summary judgment is reviewed de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). A plaintiff alleging intentional discrimination can survive summary judgment if he or she can meet the burden-shifting framework set out in *McDonnell Douglas*. *Lewis v. City of Union Cnty., Ga.*, 918 F.3d 1213, 1220–21 (11th Cir. 2019). Under *McDonnell Douglas*, the plaintiff establishes a prima-facie case of discrimination by showing that: (1) he belongs to a protected class; (2) he was subject to an adverse employment action; (3) he was qualified to perform his job; and (4) his employer treated similarly situated employees outside his protected class more favorably.

[1] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Lewis, 918 F.3d at 1220–21; *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 22 (Fla. 3d DCA 2009).

The only element in dispute is whether Sheriff Young treated similarly situated employees more favorably than Appellant. In a comparator analysis, a plaintiff must show that he and his comparators were "similarly situated in all material respects." *Lewis*, 918 F.3d at 1226.

> In the usual case, a comparator who is 'similarly situated in all material respects' 'will have engaged in the same basic conduct (or misconduct) as the plaintiff'; 'will have been subject to the same employment policy, guideline, or rule'; 'will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor as the plaintiff'; and 'will share the plaintiff's employment or disciplinary history.'

Hartwell v. Spencer, 792 F. App'x 687, 693 (11th Cir. 2019) (quoting *Lewis*, 918 F.3d at 1227).

Appellant relied on several comparators to support his claim of racial discrimination, none of which were "similarly situated in all material respects." Although some of the comparators committed level-five policy violations, only one comparator committed "gross insubordination," which is the conduct that led to Appellant's termination. However, this comparator differed from Appellant because there was a much larger time gap between his instances of misconduct and those of Appellant.

None of the comparators committed misconduct within the same short time period as Appellant, leading to different disciplinary and employment histories. Many comparators had different supervisors than Appellant or were of a different rank than Appellant when they committed their misconduct. *See Brillinger v. City of Lake Worth*, 317 F. App'x 871, 876 (11th Cir. 2008) (considering rank when determining whether a similarly situated employee was treated differently). Thus, Appellant failed to provide comparators that were "similarly situated in all material respects," and he was unable to prove a prima-facie case of race discrimination. *See Lewis*, 918 F.3d at 1220–21; *see also Valenzuela*, 18 So. 3d at 22.

Appellant thus failed to present evidence of similarly situated employees in all material respects who were treated more favorably than him. As a result, he failed to establish an intentional racial-discrimination claim under the *McDonnell Douglas* standard and the trial court correctly granted summary judgment on Appellant's intentional racial-discrimination claim.

II. Retaliation Claim

Appellant argues that the trial court erred by finding that he failed to establish the elements of a prima-facie case of retaliation. "To make a *prima facie* case for a claim of retaliation under Title VII, a plaintiff must first show (1) that 'she engaged in statutorily protected activity,' (2) that 'she suffered an adverse action,' and (3) 'that the adverse action was causally related to the protected activity.'" *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1134–35 (11th Cir. 2020) (quoting *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 924 (11th Cir. 2018)). "[W]e construe the 'causal link' element to require merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated."[2] *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261,

[2] We note that the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), held that a plaintiff must prove that *but for* the protected conduct, the defendant would not have taken the particular adverse action. Although federal circuit courts have integrated the standard into summary judgment analysis, they are split concerning whether this standard applies at the prima-facie stage of the summary judgment analysis or at the pretext stage. *See Gogel*, 967 F.3d at 1135 n.13. This is true in Florida courts as well. *See Griffin v. Deloach*, 259 So. 3d 929, 932 n.4 (Fla. 5th DCA 2018) (affirming summary judgment on the issue of pretext and opting not to reach the effect of the Supreme Court's ruling in *Nassar* on the proper standard of causation in claims brought under the Whistle-blower's Act); *Palm Beach Cnty. Sch. Bd. v. Wright*, 217 So. 3d 163 (Fla. 4th DCA 2017) (holding that the "but-for" standard adopted in *Nassar* applies to FCRA retaliation claims). We decline to address the question here and instead rely on the "wholly unrelated" standard to determine whether Appellant established a prima-facie case of retaliation. *See Gogel*, 967 F.3d at 1135–36 n.13.

1278 (11th Cir. 2008) (quoting *Simmons v. Camden Cnty. Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985)).

"Causation may be inferred by 'close temporal proximity between the statutorily protected activity and the adverse employment action.'" *Callahan v. City of Jacksonville, Fla.*, 805 F. App'x 749, 753 (11th Cir. 2020) (quoting *Thomas v. Cooper Lighting Inc.*, 506 F.3d 1362, 1364 (11th Cir. 2007)); *DeBose v. USF Bd. of Tr.*, 811 F. App'x 547, 557 (11th Cir. 2020) (holding a three-to-four-month delay, standing alone, is typically too large a gap to prove causation). A causal relationship may also be inferred from a series of adverse actions taken immediately after a plaintiff engages in protected activity. *Baroudi v. Sec'y, U.S. Dep't of Vets. Aff.*, 616 F. App'x 899, 903 (11th Cir. 2015). "However, the intervening retaliatory acts must be material, or significant, to suggest a causal link." *Id.* (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67–68 (2006)).

Appellant engaged in protected activity prior to his termination in 2012. In 2009, Appellant filed a complaint against Lieutenant Turner regarding a racial remark he made during an arrest. The only adverse action taken after the incident, however, was confiscation of Appellant's vehicle, which occurred almost a year and a half later. Thus, Appellant cannot rely on temporal proximity to prove causation. *See DeBose*, 811 F. App'x at 557. Additionally, this action was not material or significant as Appellant was only without his vehicle for one shift. *See Baroudi*, 616 F. App'x at 903.

Appellant also engaged in protected activity in 2011 when he and his fellow sergeants submitted a complaint against Lieutenant Turner for making racial remarks. About seven months after Captain Barkley addressed the matter, the shotgun incident occurred. Three months later, Appellant sent the insubordinate emails for which he was terminated. There is no evidence that Sheriff Young retaliated against Appellant for signing the complaint against Lieutenant Turner by opening the shotgun investigation or terminating him. Both incidents occurred more than three or four months after the protected activity, so causation cannot be inferred by close temporal proximity. *See DeBose*, 811 F. App'x at 557. Additionally, the investigation into the shotgun

incident occurred because there was evidence that Appellant engaged in misconduct and Appellant was terminated after he sent what his superiors considered insubordinate emails. Thus, Sheriff Young's adverse actions against Appellant had a cause separate from Appellant's protected activity. *See Goldsmith*, 513 F.3d at 1278.

Appellant failed to show that the alleged adverse action was not "wholly unrelated" to his protected activity. *See id.* Thus, Appellant failed to establish the "causally related" prong of a prima-facie case of retaliation. *See Gogel*, 967 F.3d at 1134–35. Accordingly, we affirm the trial court's order granting summary judgment on Appellant's retaliation claim.

III. Evidence of Pretext

Finally, Appellant argues the trial court erred by failing to consider his evidence of pretext for both claims. This argument is unavailing because discrimination and retaliation claims based on circumstantial evidence are analyzed according to a burden-shifting framework. *Hartwell v. Spencer*, 792 F. App'x 687, 690 (11th Cir. 2019); *Callahan*, 805 F. App'x at 753. Under this framework, the plaintiff must first establish a prima-facie case of discrimination or retaliation. *Hartwell*, 792 F. App'x at 690; *Callahan*, 805 F. App'x at 753. If the plaintiff makes this showing, the burden then shifts to the employer to proffer a legitimate, non-discriminatory or non-retaliatory reason for the adverse action. *Hartwell*, 792 F. App'x at 690; *Callahan*, 805 F. App'x at 753. If the employer does so, the plaintiff must then be afforded an opportunity to show that the employer's proffered reason was really a pretext for discrimination or retaliation. *Hartwell*, 792 F. App'x at 690; *Callahan*, 805 F. App'x at 753.

Here, the trial court was not required to reach the burden-shifting framework or the issue of pretext, where Appellant failed to present a prima-facie case. *See Hartwell*, 792 F. App'x at 690; *Callahan*, 805 F. App'x at 753. Thus, the trial court did not err by declining to consider Appellant's evidence of pretext for either claim.

AFFIRMED.

KELSEY, J., concurs; RAY, C.J., concurs in result only.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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