United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5006 **September Term, 2008**

FILED ON: JANUARY 26, 2009

PATRICIA KILBY-ROBB,
APPELLANT

v.

MARGARET SPELLINGS, SECRETARY, U.S. DEPARTMENT OF EDUCATION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 05cv02270)

Before: ROGERS and BROWN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of counsel. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. CIR. RULE 36(b). It is

ORDERED and ADJUDGED that the judgment of the district court be affirmed.

Appellant, an employee of the Department of Education, sued the Department, claiming her performance evaluation of "successful" constituted an adverse employment action. However, "poor performance evaluations are not necessarily adverse actions and they should not be considered such if they did not affect the employee's grade or salary." *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *see also Russell v. Principi*, 257 F.3d 815, 819 (D.C. Cir. 2001). Appellant argued for the first time in her opposition to summary judgment that her performance evaluation resulted in a lesser bonus, but she offered no notice of such a link in her complaint. At oral argument, Appellant cited *Steele v. Schafer*, 535 F.3d 689 (D.C. Cir. 2008), to support the sufficiency of her complaint, but the complaint in *Steele* expressly referenced a hostile workplace, *id.* at 694. Here, Appellant's complaint merely referenced benefits generally. But assuming her complaint sufficed under Federal Rule of Civil Procedure 8, the Department has offered a reasonable explanation for Appellant's 2003

performance evaluation, and Appellant has failed to show that this explanation was pretextual.[1]

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. RULE 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

[1] Because the mandatory exhaustion requirement is not jurisdictional, *see Munsell v. Dep't of Agriculture*, 509 F.3d 572, 581 (D.C. Cir. 2007); *In re James*, 444 F.3d 643, 647–48 (D.C. Cir. 2006), we do not decide whether Appellant adequately exhausted her administrative remedies.