United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5001 **September Term, 2017**

FILED ON: NOVEMBER 14, 2017

RICHARD HORNSBY,
APPELLANT

v.

MELVIN L. WATT, DIRECTOR, FEDERAL HOUSING FINANCE AGENCY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-00517)

Before: ROGERS and MILLETT, *Circuit Judges*, and SENTELLE, *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 the briefs filed by the parties. *See* FED. R. APP. P. 34(A)(2); D.C. CIR. R. 34(j). The court has accorded the issues full consideration and determined they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

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

I.

According to the complaint, Richard Hornsby became the Chief Operating Officer of the Federal Housing Finance Agency ("FHFA") on December 5, 2011. On April 25, 2014, he settled an employee's human resources complaint against another employee, Jeffrey Risinger. Three days later, Risinger falsely reported to FHFA's lawyers and its Office of Inspector General that he had heard Hornsby make kidnapping, physical harm, and death threats against Hornsby's previous supervisor, Edward DeMarco. That same day, Hornsby denied making these threats but was escorted from his workplace and placed on paid administrative leave, which included his salary and benefits. On April 30, 2014, Hornsby was arrested for three felony charges at his home by agents dressed in assault gear. He remained overnight in the D.C. jail. Soon after a senior FHFA official leaked news of Hornsby's arrest to several media outlets. He remained on paid administrative leave during the pendency of his criminal proceedings, during which time

FHFA offered him a settlement and threatened to place him on indefinite suspension.

On November 20, 2014, Hornsby was acquitted of the charges, which had been reduced to two misdemeanors. Hornsby was "chagrined" that he was not immediately reinstated to his FHFA position. Compl. ¶ 22. Twenty-nine days after his acquittal the FHFA director, appellee Melvin Watt, issued a proposal to terminate his employment. This decision was made final, effective March 21, 2015; Hornsby's appeal of his actual termination is pending before the Merit Systems Protection Board and is not a part of the instant appeal.

Upon denial of his formal administrative complaint, Hornsby sued, *see* 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407(a), alleging retaliatory action by the FHFA in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, and the Civil Rights Act of 1991, 42 U.S.C. § 1981a. He alleged that FHFA's "refus[al] to reinstate him to duty" for the 29-day period after he was acquitted on his criminal charges "constitutes an act of unlawful retaliation." Compl. ¶ 26. He also alleged that FHFA's act of "proposing [Hornsby's] removal from his position . . . constitutes an act of unlawful relation." *Id.* ¶ 28. The district court dismissed his complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Hornsby v. Watt*, 217 F.Supp. 3d 58 (D.D.C. 2016).

II.

On appeal, Hornsby presents narrow claims focused solely on the 29-day post-acquittal *continuation* of his administrative leave and the proposal to terminate his employment. Upon *de novo* review, and accepting the facts alleged in the complaint as true and drawing all reasonable inferences in Hornsby's favor, *Harris v. D.C. Water & Sewer Auth.*, 791 F.3d 65, 68 (D.C. Cir. 2015), we hold none of his challenges has merit, even assuming that being placed on administrative leave could constitute the type of adverse action that would support a retaliation claim, a question we are leaving open.

Although in his appellate brief Hornsby lists six issues in his statement of issues, he in effect presents three challenges to the dismissal of his complaint. First, Hornsby contends that the district court applied the incorrect legal standard in analyzing the existence of a materially adverse action. "'To prove unlawful retaliation, a plaintiff must show: (1) that he opposed a practice made unlawful by Title VII; (2) that the employer took a materially adverse action against him; and (3) that the employer took the action because the employee opposed the practice.'" *Id.* (quoting *McGrath v. Clinton*, 666 F.3d 1377, 1380 (D.C. Cir. 2012)). The materially adverse action requirement means that the action objectively "'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). In the context of a retaliation claim, a plaintiff alleging a materially adverse action must demonstrate that a reasonable jury could find he had suffered an "objectively tangible harm." *Bridgeforth v. Jewell*, 721 F.3d 661, 663 (D.C. Cir. 2013) (internal quotation marks and citation omitted). *See also Taylor v. Solis*, 571 F.3d 1313, 1321 (D.C. Cir. 2009);

Wiley v. Glassman, 511 F.3d 151, 161 (D.C. Cir. 2007).

Hornsby insists that these cases are irrelevant because they involve the more stringent summary judgment stage. Yet the legal rule is the same at the motion to dismiss and summary judgment stages. The district court correctly concluded that Hornsby must show "objectively tangible harm" to plausibly establish that a materially adverse action was taken against him. Further, the district court could properly look to Title VII discrimination cases. Although "[i]n the retaliation context the 'adverse action' concept has a broader meaning" than in the discrimination context, *Baird v. Gotbaum*, 662 F.3d 1246, 1249 (D.C. Cir. 2011), both contexts require an inquiry into whether a plaintiff has suffered objectively tangible harm. "An employment action may be sufficient to support a claim of discrimination if it results in 'materially adverse consequences affecting . . . future employment opportunities such that a reasonable trier of fact could find objectively tangible harm.'" *Wiley*, 511 F.3d at 157 (citation omitted); *see id.* at 161. Thus, the district court was correct in concluding that "while the scope of actions covered by Title VII's substantive provision and its anti-retaliation provisions differ, the magnitude of harm that plaintiff must suffer does not," and so the court could look to discrimination cases for discussions of "objectively tangible harm" where a plaintiff has been placed on paid administrative leave. *Hornsby*, 217 F. Supp. 3d at 66.

Second, Hornsby contends that "the district court erred by dismissing Mr. Hornsby's case based solely on the facts alleged in the complaint and without analyzing the circumstances surrounding his forced administrative leave." Applt's Br. 16. He asserts that because courts must make an "individualized inquiry into each's plaintiff's situation," *id.*, rather than relying on "a survey of other cases," *id.* at 14, "[t]his fact intensive question cannot be answered at the [Rule] 12(b)(6) stage" and "discovery is necessary," *id.* at 17; *see* Reply Br. 4.

In ruling on the motion to dismiss for failure to state a claim, the district court properly confined its consideration to "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice." *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Hornsby essentially seeks to avoid meeting pleading requirements by urging discovery was necessary. Yet "the ordinary rules for assessing the sufficiency of a complaint apply" to Title VII complaints. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511 (2002). Even before discovery, Hornsby's complaint had to "contain[] 'enough facts to state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). His reliance on *Blakes v. City of Hyattsville*, 909 F. Supp. 2d 431, 441-42 (D. Md. 2012), regarding the need for discovery is misplaced because that case had advanced to the summary judgment stage. Here, the district court ruled that Hornsby failed, at an earlier stage, to allege any concrete facts "from which the Court could infer that this short [29-day] extension of his paid administration leave caused him objectively tangible harm." *Hornsby*, 217 F. Supp. 3d at 67. Absent such allegations, Hornsby's case could not reach the summary judgment stage.

Third, Hornsby contends that his complaint alleged facially plausible claims that survive dismissal pursuant to Rule 12(b)(6). The question is whether Hornsby has pled "factual content

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Even assuming that being placed on administrative leave could constitute a materially adverse action in some circumstances, Hornsby failed to allege facts showing he experienced objectively tangible harm stemming from just the 29-day continuation period. His allegations fail to provide a basis to draw an inference that, during this period, the FHFA was not conducting its investigation of whether to reinstate him with reasonable diligence. *Joseph v. Leavitt*, 465 F.3d 87 (2d Cir. 2006), is illustrative of the situation confronting the FHFA. In that case, a federal agency was investigating serious accusations after criminal changes had been dismissed against one of its employees. *Id.* at 92. The court concluded that the employee's suspension (including five months of paid administrative leave after acquittal) was not an adverse employment action because the decision not to immediately reinstate him "did not materially alter the terms and conditions of [his] employment," and having "reasonably suspended its own investigation pending the criminal prosecution," the employer post-acquittal "acted with reasonable diligence in conducting its investigation of the serious accusations," particularly since "[t]he government's burden in obtaining a criminal conviction . . . is much greater than an employer's burden in dismissing an employee or temporarily relieving him of his duties." *Id.* at 91-93. Although that case involved summary judgment, here the same reasoning applies given the varying burdens of proof, the serious nature of the allegations, and Hornsby's failure to allege facts from which it could reasonably be inferred that the FHFA's investigation was a pretext for retaliation.

Hornsby's reliance on *Richardson v. Petasis*, 160 F. Supp. 3d 88 (D.D.C. 2015), is misplaced. Although the district court there concluded that 39 days of paid administrative leave was an adverse employment action, the plaintiff had pled having suffered "objectively tangible harm" from both the lengthy duration *and* the plaintiff's inability to return to her employment without completing a task that her boss was preventing her from completing. *Id.* at 118. Hornsby has not pled such unusual conditions and by itself, the 29-day continued leave does not reasonably amount to objectively tangible harm. *See, e.g.*, *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 332 (5th Cir. 2009). Hornsby's pay and benefits continued throughout his administrative leave. His complaint identifies no career opportunity that was actually lost or impaired. Hence, his boilerplate claims to have lost pay, benefits, and career opportunities during this 29-day period are insufficient "naked assertion[s] devoid of further factual enhancement." *Iqbal*, 566 U.S. at 678 (internal quotation marks and citation omitted) (alteration in original).

To the extent Hornsby relies on the proposal to terminate his employment as a separate, materially adverse action, this claim appears to have been forfeited because his opening brief does not flesh out that contention. *See City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003); *see also United States v. Olano*, 507 U.S. 725, 733 (1993). In any event, Hornsby does not allege facts in support, and because the proposal is not a final action and does not necessarily mean termination will occur, there is nothing in the record that the proposal (as opposed to the actual termination) led to the loss of a job or advancement opportunities. *See Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008).

Finally, although it can be reasonably inferred that his arrest, night in jail, and initial placement on administrative leave caused Hornsby emotional distress, Hornsby has not alleged facts showing that FHFA's refusal to reinstate him (for 29 days) or its proposal to terminate his employment caused him significant emotional distress, only that he was "certainly chagrined," Compl. ¶ 22, by the refusal to reinstate him.

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

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk