

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5313

September Term, 2017

FILED ON: DECEMBER 19, 2017

MARCUS L. MCDANIEL,
APPELLANT

v.

SONNY PERDUE, U.S. SECRETARY OF AGRICULTURE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00723)

Before: HENDERSON and ROGERS, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED AND ADJUDGED that the district court's decision be affirmed for the reasons set forth in the memorandum filed simultaneously herewith.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

MEMORANDUM

Appellant Marcus L. McDaniel appeals the district court's grant of summary judgment in favor of appellee Secretary of Agriculture in appellant's employment discrimination action. *See McDaniel v. Vilsack*, C.A. No. 12-723, 2016 WL 5349198 (D.D.C. Sept. 23, 2016).

McDaniel is an African American male who began working at the United States Department of Agriculture ("USDA") in 2008, as the GS-13 Safety & Occupational Health Manager for USDA's Natural Resources Conservation Services. From January 31, 2009 until June 15, 2009, Eloris Speight, an African American female, served as McDaniel's second-level supervisor. On June 15, 2009, Letitia Toomer, an African American female, became McDaniel's second-level supervisor, and Speight became McDaniel's third-level supervisor. On July 31, 2009, during McDaniel's probationary period, his employment was terminated. McDaniel's termination letter cited unsatisfactory job performance and unprofessional conduct as reasons for his termination:

Based on feedback received from management, it has been determined that your conduct in performing your job has been unsatisfactory. During your short tenure with the Agency, you have demonstrated an unwillingness to accept direction and accomplish work items as prescribed. Moreover, the manner in which you behaved in dealings with management and other agency personnel . . . has been challenging and unprofessional. It is our determination that during your probationary period you have failed to demonstrate your potential to be an asset to the agency. Therefore, your continued employment is not in the best interest of the agency.

On May 4, 2012, McDaniel filed a complaint in the district court against the Secretary of Agriculture pursuant to Title VII of the Civil Rights Act of 1964. McDaniel alleged that Speight unlawfully terminated his employment because he is an African American male. The Secretary

moved for summary judgment, and the district court granted the Secretary's motion.

This Court reviews “the district court’s grant of summary judgment de novo, viewing the evidence in the light most favorable to [the non-moving party] and drawing all reasonable inferences accordingly.” *Salazar v. Wash. Metro. Transit Auth.*, 401 F.3d 504, 507 (D.C. Cir. 2005).

Under the *McDonnell Douglas* burden-shifting framework for employment discrimination, when a defendant offers a “legitimate, non-discriminatory reason” for an adverse employment action, “the sole remaining question” becomes “whether, based on all the evidence, a reasonable jury could conclude that [defendant’s] proffered reason for the [adverse action] was pretext” for discrimination. *Pardo-Kronemann v. Donovan*, 601 F.3d 599, 603-04 (D.C. Cir. 2010); accord *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). As the district court concluded, “McDaniel’s performance and behavioral issues cited by [USDA] constitute legitimate non-discriminatory reasons for his termination.” *McDaniel*, 2016 WL 5349198, at *5. Therefore, the sole remaining question is whether a reasonable jury could conclude that USDA’s proffered reason for terminating McDaniel’s employment was pretext for discrimination.

A plaintiff may prove pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). McDaniel relies on four pieces of evidence to prove pretext: (1) on “one occasion” Speight allegedly told him that he “wasn’t white” and he should “stop acting like it”; (2) there were times when Speight allegedly told him that she was “going to get rid of [him], either you or your job is going to go or both, safety and health is not a function,

you're not going to be a part of Human Resources"; (3) Speight provided inconsistent testimony about her role in the decision to terminate McDaniel; and (4) Speight's reasons for terminating McDaniel allegedly shifted from being based on unsatisfactory performance to subjective conduct issues.

As the district court determined, however, it is undisputed that the "getting rid of" comment was made in reference to whether McDaniel's position should fall under the Human Resources umbrella. *McDaniel*, 2016 WL 5349198, at *5. Moreover, there is no evidence that the "getting rid of" comments were connected with the remark that Speight should "stop acting white." *Id.* at *6. Therefore, Speight's alleged comment that she could "get rid of" McDaniel is irrelevant to McDaniel's attempt to prove pretext.

Likewise, although McDaniel tries to manufacture a shift in reasons for his termination, the reason has remained consistent. The termination letter informed McDaniel that "you have demonstrated an unwillingness to accept direction and accomplish work items as prescribed" and "the manner in which you behaved in dealings with management and other agency personnel . . . has been challenging and unprofessional." Speight's affidavit is consistent with the termination letter as she explained that "McDaniel's conduct was the main reason for his termination" and he "was terminated for unsatisfactory conduct based on the observations by supervisors in his supervisory chain." In her deposition, Speight also noted that McDaniel was terminated because of his improper conduct. Under these circumstances, as the district court determined, "McDaniel fails to show that an alleged shift in the justification for his termination shows pretext."

McDaniel, 2016 WL 5349198, at *8.

McDaniel's remaining proffered evidence boils down to (1) the alleged "one occasion" when Speight told McDaniel that he "wasn't white" and he should "stop acting white" and (2)

Speight's allegedly inconsistent testimony regarding her role in the decision to terminate McDaniel. This Court has explained that "an isolated race-based remark unrelated to the relevant employment decision could not, without more, permit a jury to infer discrimination." *Morris v. McCarthy*, 825 F.3d 658, 669 (D.C. Cir. 2016). McDaniel has not proffered any evidence of when or in what context the "stop acting white" comment was made, and there is no evidence to connect Speight's alleged race-based comment to the termination decision. Moreover, Speight's allegedly inconsistent testimony regarding her role in the termination decision fails to create a triable issue of fact. Therefore, as the district court determined, McDaniel's proffered evidence is insufficient to permit a reasonable jury to conclude that USDA's proffered reasons were a pretext for discrimination. *McDaniel*, 2016 WL 5349198, at *5-9.

For the foregoing reasons, we affirm the district court's decision.