United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5250 **September Term, 2018**

FILED ON: DECEMBER 28, 2018

NATHAN MOUSSELLI,
APPELLANT

v.

KIRSTJEN M. NIELSEN, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01901)

Before: SRINIVASAN and KATSAS, *Circuit Judge*s, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

The court considered this appeal on the record from the United States District Court for the District of Columbia, and on the briefs and arguments of the parties. The court has given the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is hereby

ORDERED AND ADJUDGED that the judgment of the District Court is **AFFIRMED**.

Nathan Mousselli is a Department of Homeland Security, Immigration and Customs Enforcement, special agent who works on cyber-related criminal investigations. In August 2013, he was recalled to the United States from Moscow, where he had been stationed on a temporary detail. Mousselli asserts that his detail was curtailed because of his religion (Russian Orthodox) and national origin (Russian-Ukrainian).

After exhausting his administrative remedies, Mousselli timely brought the present action against the Secretary of Homeland Security, alleging unlawful employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The district court granted summary judgment to the Secretary, finding that the Secretary had produced evidence of a legitimate, nondiscriminatory basis for curtailing Mousselli's detail in Moscow and that Mousselli had not produced sufficient evidence to allow a reasonable jury to infer that the Secretary's

explanation was a pretext for unlawful discrimination. Mousselli now appeals.

"Where, as here, the plaintiff's claim of discrimination is principally supported by circumstantial evidence, we analyze the claim under the framework first set forth in" *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007). Under that framework, Mousselli must first establish a prima facie case of discrimination. *Id.* Once Mousselli does so, the burden shifts to the Secretary to "articulate some legitimate, nondiscriminatory reason for the" reassignment. *Id.* (internal quotation marks omitted). If the Secretary meets that burden, then "the *McDonnell Douglas* framework—with its presumptions and burdens—disappears, and the sole remaining issue is discrimination *vel non*." *Id.* (internal quotation marks and alterations omitted). At that point, "to survive summary judgment [Mousselli] must show that a reasonable jury could conclude from all of the evidence that the adverse employment decision was made for a discriminatory reason." *Id.* (internal quotation marks omitted).

Assuming for the sake of argument that Mousselli has made out a prima facie case of discrimination, we can turn to the Secretary's articulated reason for curtailing Mousselli's detail. To explain the basis for Mousselli's reassignment, the Secretary produced affidavits from John Connolly, the then-Assistant Director for International Affairs within Homeland Security Investigations for ICE, and Peter Edge, the then-Deputy Executive Associate Director of Homeland Security Investigations for ICE, who made the decision to reassign Mousselli.

As those affidavits explained, on August 22, 2013, Connolly "received a Top Secret communication from another agency of the U.S. Government" that "recommended that ICE recall Mr. Mousselli" and that "provided highly classified reasons" for the recommendation. Connolly Aff. ¶ 5, J.A. 55. That communication made Connolly "fear for Mr. Mousselli's safety and for national security," and on the same day, he presented it to Edge, his supervisor. *Id.* ¶ 7, J.A. 55. After reviewing the communication, Edge concluded that Mousselli had to "be recalled to the United States immediately for security reasons." Edge Aff. ¶ 6, J.A. 59. In addition, Edge determined that the recall "was necessary to protect ICE's working relationship with the agency that transmitted the classified communication to ICE" and that "[i]gnoring the recommendation . . . could cause the other agency to question ICE's institutional judgement, create an inaccurate appearance that ICE does not trust that agency's reports or judgement, or create an inaccurate appearance that ICE lacks a firm commitment to national security." *Id.* ¶ 7, J.A. 59-60.

Connolly thus instructed one of his subordinates, Leo Lin, to arrange for Mousselli to travel from Moscow to Washington, D.C. To avoid drawing unnecessary attention to the travel, Connolly directed Lin to tell Mousselli that he was needed to deliver an in-person brief. Lin carried out those instructions, and, on August 26, Mousselli returned to the United States, where he was informed that his detail was being curtailed.

Both Connolly's and Edge's affidavits affirm that neither of them remembers having met or spoken to Mousselli before terminating his detail. The affidavits also affirm that, at the time of the reassignment, neither Connolly nor Edge was aware of Mousselli's religion or national origin.

Those affidavits meet the Secretary's burden under the *McDonnell Douglas* framework to "articulate some legitimate, nondiscriminatory reason for the" reassignment. *Czekalski*, 475 F.3d at 363 (internal quotation marks omitted). Accordingly, the remaining question is whether Mousselli has adduced sufficient evidence to allow a reasonable jury to infer that the proffered reason was pretextual, and that he in fact was reassigned because of his religion or national origin. In an attempt to meet that burden, Mousselli offers three categories of evidence. None of them suffices to allow a reasonable jury to conclude that he was discriminated against based on his religion or national origin.

First, Mousselli points to a set of emails among himself and other low-level officials in which Mousselli shared a picture of himself conducting Easter services at a Russian Orthodox church with Vladimir Putin in the background. According to Mousselli, because those emails involve government officials and reference his religious activities, a reasonable jury could infer from them that Connolly and Edge knew about his religion. That argument is unpersuasive.

Although Mousselli "need only offer circumstantial evidence that could reasonably support an inference" that Connolly and Edge had the requisite knowledge, *Talavera v. Shah*, 638 F.3d 303, 313 (D.C. Cir. 2011) (internal quotation marks omitted), those emails do not clear that bar. Mousselli has not proffered any evidence that the emails, which were circulated among officials several steps removed from Connolly and Edge in the organizational hierarchy, were ever forwarded to or otherwise came to the attention of Connolly, Edge, or any other high-level DHS officials. Accordingly, Mousselli has "offered only evidence from which a reasonable jury would have had to speculate" about the requisite knowledge, "and that is insufficient to defeat summary judgment." *Id.* Moreover, although Mousselli might have rendered Connolly's and Edge's lack of personal knowledge immaterial by arguing that they had been persuaded to reassign him by a subordinate motivated by discriminatory animus, he has failed to advance any such argument in his briefs or to develop sufficient evidence to support such a theory of "cat's-paw liability." *Staub v. Proctor Hosp.*, 562 U.S. 411, 421-22 (2011).

Second, Mousselli points to a November 17, 2014, letter he received from ICE's Office of Professional Responsibility that informed him that, on August 8, 2013 (approximately two weeks before his assignment was curtailed), the Office had "received information from the Department of Homeland Security, Office of Inspector General regarding a complaint alleging that you were involved in an extramarital affair with a subordinate; drunkenness; anti-American comments; driving under the influence and potential financial problems." Letter from Ian M. Quinn, Deputy Assistant Dir., Investigative Servs. Div., Homeland Sec. Investigations, to Nathan Mousselli (Nov. 17, 2014), J.A. 40. The letter also states that the Office investigated the complaint, that the results of the investigation "do not support the reported allegation(s)," and that the Regional Security Officer at the Moscow Embassy nevertheless "considers you a risk, as your apparent behavior was not commensurate with the 'higher standards principles' required . . . for Mission Russia Personnel." *Id.* Mousselli argues that the letter could allow a jury to infer that the Secretary's stated reason for his reassignment was pretextual and that he was actually reassigned based on the complaint underlying the letter.

Mousselli, however, has offered no evidence from which a jury could infer that Connolly and Edge, the relevant decisionmakers, were aware of the underlying complaint, which was made to an office in which neither of them worked. In any event, even if a jury could reasonably infer from the letter that Mousselli was actually reassigned because of the allegations of serious misconduct contained in the complaint, there still would be no basis for the further inference that the reassignment was motivated by Mousselli's religion or national origin. Accordingly, a reasonable jury could not rely on that letter to find that Mousselli's reassignment violated Title VII.

Third, Mousselli recounts conversations that he had with four different DHS employees, each of whom Mousselli says told or implied to him that his religious activities or other "allegations about him" were the reason behind his reassignment. Mousselli Decl. ¶¶ 15-20, J.A. 70-71. Even assuming, as we must on summary judgment, that Mousselli's characterizations of those conversations are accurate, they do not allow a reasonable jury to infer that the reassignment was discriminatory: the four employees have all executed affidavits stating that they were not involved in, or knowledgeable about the reasons for, his reassignment, and Mousselli has proffered no evidence to contradict those statements. Given the undisputed evidence that those employees were not privy to the decisionmaking process, their speculation would not afford a basis for a jury to reasonably infer that Connolly and Edge's explanation was pretextual and that religion played a role in Mousselli's reassignment.

In sum, the Secretary has proffered a legitimate, nondiscriminatory reason for Mousselli's reassignment—that another government agency recommended that DHS curtail Mousselli's detail for classified national security reasons. And Mousselli has not produced sufficient evidence to allow a jury to reasonably infer that the proffered reason was pretextual and that Mousselli was actually reassigned because of his religion or national origin. In the absence of such evidence, Mousselli's Title VII claims cannot survive summary judgment.

Pursuant to D.C. CIR. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate 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. R. 41(b).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk