United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7155 **September Term, 2019**

FILED ON: December 3, 2019

TIFFANY WASHINGTON,
APPELLANT

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-02018)

Before: ROGERS and GRIFFITH, *Circuit Judges*, and WILLIAMS, 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 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). For the reasons set out below, it is

ORDERED and **ADJUDGED** that the decision of the district court be **AFFIRMED**.

Tiffany Washington, an African-American woman, served as a sergeant in the Metro Transit Police Department from 2008 to 2016. The Department is a unit of the Washington Metropolitan Area Transit Authority (WMATA), which operates trains and buses in and around the District of Columbia. Washington worked at WMATA's Revenue Collection Facility in Alexandria, Virginia, where she supervised lower-ranking officers aboard the "money train," which transports cash fares from Metro stations to the Facility.

On September 18, 2015, Washington left the Facility before the end of her scheduled shift. The parties dispute whether her supervisor granted her request for leave earlier that day, although all agree that her departure left the Facility without a supervisor. After departing, Washington learned via text message that the money train had broken down. Although she was in sporadic

contact with the officers aboard the train and an off-duty supervisor, Washington failed to inform an on-duty supervisor of the breakdown for the next several hours. As a result, nobody provided the stranded officers with food or water or attempted to relieve them, and they remained aboard the train late into the night.

WMATA's investigation into the events of September 18 found that Washington abandoned her supervisory duties by failing to inform an on-duty supervisor of the breakdown, a violation of WMATA policy. The investigation also found that Washington exercised poor judgment by failing to ensure the officers aboard the train were relieved. But WMATA did not fault Washington for failing to properly request leave, finding instead that a "communication breakdown" between her and her supervisor had occurred. Even so, as a result of the way she responded to the breakdown of the money train, the Chief of Police "lost confidence in [Washington's] ability to perform in a leadership position" and demoted her from sergeant, a supervisory position, to police officer, a nonsupervisory position. Letter of Demotion (Jan. 4, 2016), J.A. 57.

After receiving a right-to-sue letter from the Equal Employment Opportunity Commission, Washington sued WMATA in federal district court. She asserted her demotion constituted unlawful discrimination based on her race, color, and gender and unlawful retaliation for a prior complaint of harassment, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* WMATA moved for summary judgment, and the district court employed the familiar Title VII burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "First, the plaintiff carries the burden of establishing a prima facie case" of unlawful discrimination. Second, the burden "shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action." Finally, "[i]f the employer does this, the burden then shifts back to the plaintiff, who must be afforded a fair opportunity to show that the employer's stated reason for its actions was in fact pretext for unlawful discrimination." *Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109, 1113-14 (D.C. Cir. 2016). At step three, the district court found that no reasonable jury could credit Washington's claims of pretext and granted summary judgment to WMATA on all claims.

Washington appealed. The district court had jurisdiction under 28 U.S.C. § 1331 and we have jurisdiction under 28 U.S.C. § 1291. Our review of the district court's grant of summary judgment is de novo. *Cruz v. McAleenan*, 931 F.3d 1186, 1191 (D.C. Cir. 2019).

Washington presents four arguments on appeal, but each of them fails. *First*, Washington argues the district court ignored her prima facie case of discrimination. *See* Washington Br. 10-13. But "once the employer asserts a legitimate, non-discriminatory reason" for an adverse employment action, "the question whether the employee actually made out a prima facie case is no longer relevant and thus disappear[s] and drops out of the picture. . . . [T]he district court need not—*and should not*—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493-94 (D.C. Cir. 2008) (first alteration in original) (internal quotation marks and citation omitted). Because WMATA asserted a legitimate and nondiscriminatory reason for Washington's demotion—her conduct on

September 18—the district court properly proceeded to the final step in the *McDonnell Douglas* framework.

Second, Washington points to supposed deficiencies in the investigation and its conclusions. *See* Washington Br. 18-23. As the district court observed, the theory that WMATA's asserted reasons for Washington's demotion were false "is challenging to prove, because it is not enough to show that WMATA's reasons were false—she must show that the officials who disciplined her did not actually believe those reasons." Mem. Op. 8, J.A. 692. Alternatively, Washington might "establish pretext with evidence that a factual determination underlying an adverse employment action is egregiously wrong, because if the employer made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so." *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 296 (D.C. Cir. 2015) (internal quotation marks and citation omitted).

Washington did not present evidence from which a rational factfinder could conclude that WMATA made an error too obvious to be unintentional. Nor did she present evidence that those who disciplined her disbelieved their stated reasons for doing so. At most, Washington showed that WMATA could have credited her oral, undocumented request for leave and absolved her of responsibility for later events, notwithstanding the absence of another supervisor at the Facility. WMATA chose otherwise, and we do not "serve as [a] 'super-personnel department[] that reexamine[s]' whether such a decision was wise, sound, or fair." *Giles v. Transit Emps. Fed. Credit Union*, 794 F.3d 1, 7 (D.C. Cir. 2015) (quoting *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006)). We agree with the district court that Washington's "attempts to poke holes" in WMATA's investigation "do not impugn the honesty of the WMATA officials who demoted her, or even directly contradict the key conclusions they relied upon in doing so." Mem. Op. 9, J.A. 693.

Third, Washington argues that the district court erroneously rejected her comparator evidence. *See* Washington Br. 13-18. She identified three white male supervisors who received lighter discipline for their misconduct: one who took home a WMATA off-road vehicle for his personal use, damaged it, and received a ten-day suspension; one who was accused of sending inappropriate text messages and received a three-day suspension; and another who was involved in a traffic accident in a rental car and received no suspension.

"Whether two employees are similarly situated ordinarily presents a question of fact for the jury." *George v. Leavitt*, 407 F.3d 405, 414 (D.C. Cir. 2005) (internal quotation marks and citation omitted). But not always. When employee misconduct is at issue, we ask whether "the offenses are of 'comparable seriousness.'" *Wheeler*, 812 F.3d at 1118 (quoting *McDonnell Douglas*, 411 U.S. at 804); *see also Burley*, 801 F.3d at 300-02 (affirming summary judgment when plaintiff failed to show that comparators committed offenses of similar seriousness). Washington's principal responsibility was to supervise an assigned shift of subordinate police officers. *See* WMATA Job Description: Sergeant (Mar. 14, 1998), J.A. 85. Her offense involved the immediate control and supervision of her subordinates, bearing directly on her fitness as a sergeant. In contrast, none of the proposed comparators engaged in misconduct that concerned his ability to supervise, other than in the indirect sense that all misbehavior reflects, in one way or

another, on a person's character. We agree with the district court that the conduct of Washington's proffered comparators "differed from hers in a key respect," and that "difference fully explains why she alone was demoted." Mem. Op. 17, J.A. 701. The district court properly rejected Washington's comparator evidence.

Fourth, Washington says her demotion was unlawful retaliation for a complaint she made to WMATA's Office of Employee Relations about a coworker's unprofessional behavior. *See* Washington Br. 23-27. But "[n]ot every complaint garners its author protection under Title VII." Mem. Op. 19, J.A. 703 (quoting *Broderick v. Donaldson*, 437 F.3d 1226, 1232 (D.C. Cir. 2006)). Here, Washington complained only that the offending employee "was purportedly rude to her—but without any hint that his conduct was based on race, gender, or any other category protected under Title VII." *Id.*; *see also* Resolution to Employee Relations Concern (Feb. 6, 2015), J.A. 94 (describing the offending employee's "manner of communication [as] negative" and "unprofessional"). Because Washington has failed to show that her complaint concerned discrimination in violation of Title VII, her Title VII retaliation claim necessarily fails.

For the foregoing reasons, we affirm the judgment of the district court granting WMATA's motion for summary judgment.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. 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. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk