United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5119 **September Term, 2019**

1:14-cv-01673-RMC

Filed On: February 27, 2020

Edward Richardson,

Appellant

v.

Jerome Powell, Chair, Federal Reserve Board of Governors of the Federal Reserve System,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Tatel, Millett, and Pillard, Circuit Judges

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 filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, appellant's request for initial hearing en banc, the motion to supplement the appendix, and the lodged supplemental appendix, it is

ORDERED that the motion to supplement the appendix be granted. The Clerk is directed to file the lodged supplemental appendix. It is

FURTHER ORDERED that the request for initial hearing en banc be denied. See Fed. R. App. P. 35(a). It is

FURTHER ORDERED AND ADJUDGED that the district court's order filed March 21, 2019, be affirmed. The district court properly granted summary judgment to appellee and denied appellant's cross-motion for summary judgment. First, the district court correctly concluded that appellant had not presented sufficient evidence for a reasonable jury to conclude that appellee's asserted nondiscriminatory reasons for his termination before the end of his probationary period – his failure to disclose the prior unfavorable incidents with his previous employer, as well as his performance issues during that period – were pretextual, and that "the adverse employment decision was

made for a discriminatory . . . reason." Kersey v. Wash. Metro. Area Transit Auth., 586 F.3d 13, 17 (D.C. Cir. 2009) (citation and internal quotation marks omitted). Specifically, appellant's use of comparator evidence is insufficient to establish pretext, because he has not demonstrated that the proposed comparators were "similarly situated to him" and committed "offenses of comparable seriousness." Burley v. Nat'l Passenger Rail Corp., 801 F.3d 290, 301 (D.C. Cir. 2015) (citation and internal quotation marks omitted). And appellant's arguments that appellee provided changing and inconsistent reasons for his termination are not supported by the evidence in the record. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (party opposing summary judgment must "designate specific facts showing that there is a genuine issue for trial," supported by "evidentiary materials" such as "affidavits, . . . depositions, answers to interrogatories, and admissions on file.") (internal quotation marks omitted).

Further, the district court's grant of summary judgment was appropriate as to appellant's claims regarding his shift schedules. Appellant has not presented sufficient evidence for a reasonable jury to conclude that he was given certain shift assignments or prohibited from bidding on particular shifts "for a discriminatory or retaliatory reason." Kersey, 586 F.3d at 17 (citation, internal quotation marks, and alteration omitted). Moreover, to the extent appellant contends that appellee failed to promote him because of his disability, he has not shown that he was eligible to be promoted to the desired position. See Cuddy v. Carmen, 762 F.2d 119, 122 (D.C. Cir. 1985) (plaintiff asserting discrimination claim based on failure to promote must show, inter alia, that he "was qualified for the position in question."). In addition, the district court correctly concluded that appellant did not present sufficient evidence for a reasonable jury to conclude that appellee subjected him to a hostile work environment due to his disability. See George v. Leavitt, 407 F.3d 405, 416 (D.C. Cir. 2005) (to constitute a hostile work environment, "conduct must be extreme to amount to a change in the terms and conditions of employment," and "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.") (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).

Finally, by failing to seek recusal in the district court, appellant forfeited any argument that the district court judge should have recused herself. See United States v. Brice, 748 F.3d 1288, 1289 (D.C. Cir. 2014). In any event, appellant's arguments that the district court judge should have recused herself are without merit. See In re: Kaminski, 960 F.2d 1062, 1065 n.3 (D.C. Cir. 1992) (per curiam) ("A judge should not recuse [herself] based upon conclusory, unsupported or tenuous allegations."); Liteky v. United States, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.").

No. 19-5119 **September Term, 2019**

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 petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam