United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7036 **September Term, 2019**

FILED ON: February 3, 2020

AARON BALL,
APPELLANT

v.

GEORGE WASHINGTON UNIVERSITY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00507)

Before: HENDERSON and MILLETT, *Circuit Judges*, and EDWARDS, *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 that 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 District Court order be affirmed.

From 2008 until 2015, Aaron Ball was a plumber at George Washington University (GW). Starting in 2013, Ball frequently asked for, and was granted, leave under the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq*., the District of Columbia Family Medical Leave Act (DCFMLA), D.C. Code §§ 32-501 *et seq*., and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq*. After returning to work following one leave period, Ball's supervisors confronted him with evidence that he was "loafing" during work hours and had falsified work records to cover it up. The evidence of misconduct allegedly included video footage showing that Ball was not working when and where he claimed to have been doing so. Ball was subsequently suspended and then discharged. He filed suit, asserting ADA claims of discrimination and retaliation, *see* 42 U.S.C. § 12112(a), discrimination and retaliation claims under the District of Columbia Human Rights Act (DCHRA), *see* D.C. Code § 2-1402.11(a), and retaliation and wrongful-interference-with-leave claims under the FMLA, *see* 29 U.S.C. § 2615(a). In addition, because, during discovery, GW failed to produce some of the video footage on which it relied,

Ball moved for sanctions under Rule 37(e) of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 37(e). In two thorough and well-reasoned orders, the district court denied Ball's sanctions motion and granted GW's summary judgment motion. Ball now appeals.

Under Rule 37(e) of the Federal Rules of Civil Procedure, the district court may sanction a party "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." FED. R. CIV. P. 37(e). Ball had the burden to establish that GW lost or destroyed the video footage at issue once a duty to preserve it attached. *See Shepherd v. Am. Broad. Cos*., 62 F.3d 1469, 1478 (D.C. Cir. 1995). We review the district court's factual findings underlying its denial for clear error. *Id*. at 1475–76. The district court reviewed the evidence and concluded that the footage was automatically deleted before Ball filed his EEOC complaint, the only event Ball suggested created a duty to preserve the footage. Ball has not demonstrated that the district court clearly erred in making this finding. Nor was the district court obliged to wait until it decided the already fully briefed summary judgment motion to rule on the sanctions motion, as Ball now suggests. Consequently, we find no error in the district court's denial of Ball's sanctions motion.

Ball next argues that the district court erred in granting GW's summary judgment motion. If a plaintiff lacks direct evidence of employer discrimination or retaliation in the context of ADA, DCHRA or FMLA claims, as Ball lacks, the claims are evaluated under the burden-shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Giles v. Transit Emps. Fed. Credit Union*, 794 F.3d 1, 5 (D.C. Cir. 2015) (ADA and DCHRA); *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 161 (D.C. Cir. 2015) (FMLA). If the employer proffers a non-discriminatory reason for the challenged action, "the central question at summary judgment is whether [the plaintiff] produced sufficient evidence for a reasonable jury to find that [the employer's] asserted reason for [the challenged action] was not the true reason." *Miles v. Howard Univ.*, 653 F. App'x. 3, 7 (D.C. Cir. 2016) (internal quotation marks and ellipses omitted) (quoting *Allen v. Johnson*, 795 F.3d 34, 39 (D.C. Cir. 2015)). Evaluating an employer's asserted reason for a discharge, we ask not whether the employer was objectively correct in discharging the employee but instead whether "the employer honestly believes in the reasons it offers." *Fischbach v. D.C. Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996). GW proffered a legitimate reason for Ball's termination: his workplace misconduct. Ball claims that he presented sufficient evidence for a reasonable jury to conclude that GW's reason was pretextual. We disagree.

Ball first claims that flaws in the investigation of his alleged misconduct undermine GW's reliance on it. But, for a jury to conclude that an employer lacked an honest belief that the employee engaged in misconduct, the employer's investigation into the misconduct must have been "not just flawed but inexplicably unfair." *See Burly v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 299 (D.C. Cir. 2015) (quoting *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 855 (D.C. Cir. 2006)). Ball points to what are, at worst, minor procedural flaws in the investigation, including, for example, the involvement of a non-supervisory employee. But he identifies no flaw sufficient to establish that the investigation was "inexplicably unfair."

Second, Ball argues that a letter drafted by a second-level supervisor, acting on behalf of GW's plumbing division, asserting that Ball's February 2015 leave request would impose an

"undue hardship"[1] on the plumbing division "demonstrate[s] a bias towards [him] due to his disability and the leave accommodation required" because Ball's direct supervisor testified in his deposition that he was unaware of the second-level supervisor's undue hardship letter and that the division was able to keep up with its work despite Ball's absence. The second-level supervisor's letter appears, on its face, to have been reasonable—a substantial number of GW's plumbers were out on leave and Ball's direct supervisor testified that, although they were able to keep up with the plumbing division's work, the absence of several employees put a significant burden on the remaining employees. Consequently, the letter does not support an inference that GW's proffered basis for Ball's discharge was pretextual.

Ball also argues that GW's alleged failure to ensure that he had a usable iPod (used by GW plumbers to record their work assignments) when he returned from leave "is highly probative of his argument that [GW's] proffered reasons for suspension and termination were pretextual" because his lack of an iPod led to the investigation of his work and his ultimate termination. Accepting as true Ball's testimony that the supervisor told Ball that he would secure an iPod for Ball, the fact that Ball's misconduct was discovered because of the supervisor's failure to follow through does nothing to undermine GW's honest belief that Ball engaged in misconduct. Even if a jury could infer from Ball's deposition testimony that the supervisor lied about Ball's having a usable iPod, the supervisor was not the final decisionmaker, the final decisionmaker did not rely on Ball's lack of an iPod in terminating Ball and there was substantial objective evidence, including key card records showing that Ball could not have been working in the buildings he claimed to have been working in when he claimed to have been doing so, to support the ground for termination—misconduct—the final decisionmaker *did* rely on.

Ball argues that the temporal proximity of various events establishes that GW's explanation for his discharge was pretextual. We have held that temporal proximity is insufficient by itself to rebut an employer's legitimate explanation for an adverse action. *See Woodruff v. Peters*, 482 F.3d 521, 530 (D.C. Cir. 2007) (less than one-month gap between employee filing EEOC complaint and employee's deposition and supervisor's reduction of employee's privileges and authority insufficient to rebut employer's legitimate explanation for adverse actions). The several temporal proximities that Ball points to are insufficient to rebut GW's proffered reason for his discharge in light of the supervisor's evidence that he engaged in misconduct—notably the key card records earlier discussed.[2]

Finally, Ball asserts an FMLA interference claim. "To state an FMLA interference claim, a plaintiff must allege facts sufficient to show, among other things, that (1) he was entitled to take leave because he had a serious health condition, (2) he gave his employer adequate notice of his intention to take leave, and (3) his employer denied or otherwise interfered with his right to take

[1] Under the ADA, an employer need not grant an accommodation such as medical leave if the requested accommodation "would impose an undue hardship on the operation of the [employer's] business." *See* 42 U.S.C. § 12112(b)(5)(A).

[2] On appeal, Ball presses a mixed-motive theory to support his ADA, FMLA and DCHRA claims. Ball has made no argument to this court demonstrating that the district court erred in concluding that a mixed-motive theory was not supported by the summary judgment record. Accordingly, Ball has forfeited his challenge to the district court's rejection of his mixed motive claim.

leave." *Thomas v. District of Columbia*, 227 F.Supp.3d 88, 110 (D.D.C. 2016) (internal quotation marks and citations omitted) (quoting *Hodges v. District of Columbia*, 959 F.Supp.2d 148, 155 (D.D.C. 2013)). Ball does not dispute that he was not entitled to take FMLA leave at the time of his final request. Accordingly, this claim, too, fails.

For the foregoing reasons, the judgment of the district court is affirmed. 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.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk