United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7068 **September Term, 2019**

FILED ON: MAY 26, 2020

PHILLIP ANDREW HAUGHTON,
APPELLANT

v.

DISTRICT OF COLUMBIA,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-01767)

Before: TATEL and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The court has afforded the issues full consideration and determined they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is hereby

ORDERED AND ADJUDGED that the judgment of the district court be **AFFIRMED**.

In a 2009 reduction-in-force, the District of Columbia abolished Phillip Haughton's public elementary school teaching job. Haughton sued the District, claiming disability discrimination and/or retaliation in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*. At trial, the District called witnesses who testified that Haughton had been disruptive and unprepared, and Haughton called witnesses who generally denied that his performance had been poor.

At the close of trial, and after conferring at length with both parties, the district court instructed the jury that it could find the District liable only if Haughton had shown that his disability was a but-for cause of his termination. Specifically, the court explained that the "question you must answer is whether Mr. Haughton's disability was a determinative factor with

respect to the District of Columbia's decision to abolish his particular position," defining "determinative factor" to mean that, "if not for Mr. Haughton's disability, he would not have been selected for inclusion in the reduction in force." J.A. 213-14. The jury returned a verdict that Haughton had not "proven, by a preponderance of the evidence, that the District of Columbia discriminated against him" or "retaliated against him" when it abolished his position. J.A. 227 (special verdict form).

Haughton's primary argument on appeal is that the district court "erred by charging the jury with a higher standard of causation than required" under the ADA. Haughton Br. 9. Haughton argues that he was in fact entitled to the motivating-factor standard that governs mixed-motive claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. We review *de novo* "[a]n alleged failure to submit a proper jury instruction." *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 556 (D.C. Cir. 1993).

Whether the ADA incorporates by cross-reference to Title VII the latter's motivating-factor standard remains an open question in this circuit. We need not answer that question here. Even assuming that standard were available under the ADA, Haughton would not be entitled to it because he repeatedly denied that he was advancing the type of theory or claim to which a motivating-factor standard could apply.

We have described Title VII as providing "two separate ways for plaintiffs to establish liability." *Ponce v. Billington*, 679 F.3d 840, 844 (D.C. Cir. 2012); *see also Mayorga v. Merdon*, 928 F.3d 84, 89 (D.C. Cir. 2019). Under one route, a plaintiff may claim that discrimination based on a protected characteristic was *a but-for cause* of the adverse action and, if successful, may receive damages as well as certain injunctive and declaratory relief. *See* 42 U.S.C. § 2000e-2(a)(1). We have previously characterized such claims as advancing "the 'single-motive' or 'pretext' theory of discrimination." *Ponce*, 679 F.3d at 844 (quoting *Fogg v. Gonzales*, 492 F.3d 447, 451 (D.C. Cir. 2007)).[1]

Alternatively, if a plaintiff is able to establish that "race, color, religion, sex, or national origin was *a motivating factor* for any employment practice," 42 U.S.C. § 2000e-2(m) (emphasis added), then she has prevailed on a mixed-motive theory. Where the defendant in a mixed-motive case "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor," *id*. § 2000e-5(g)(2)(B), the plaintiff's remedies are limited to declaratory and injunctive relief, as well as certain fees and costs, *see, e.g.*, *Ponce*, 679 F.3d at 844-45.

To be sure, in a typical case, a Title VII plaintiff "may proceed under both theories simultaneously." *Id.* at 845. But, because jury instructions must be tailored to the record evidence,

[1] Courts, including ours, sometimes use the "pretext" label as a shorthand for single-motive claims, but, when contrasting them from mixed-motive claims, the "single-motive" label is preferable because, "[a]s with but-for causation, a plaintiff can use evidence of pretext and the *McDonnell Douglas* framework to prove a mixed-motive case." *Ponce*, 679 F.3d at 844; *see generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

"[a]t some point in the proceedings," the "District Court must decide whether a particular case involves mixed motives." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989). Here, there is no question that Haughton deliberately advanced only a single-motive theory. For example, Haughton's counsel asserted to the district court that he "never thought [this] was a case where [the District] had a valid reason and I'm not thinking that now." J.A. 180. And counsel presented Haughton's evidence in all-or-nothing terms: If the jury agreed that the new school principal simply fabricated Haughton's putative performance deficits, plaintiff would win; if not, he would lose. As the district court recapped, "the way you've argued it," and "the way the evidence has come in," the case is "all about [the principal] lying." J.A. 177. "That's what this case has been from the beginning," the court summarized, to which counsel replied, "And it still is, Your Honor." J.A. 178. Haughton never suggested, for example, that the jury might find that he was fired in part due to performance shortcomings, but that discrimination was also a factor. On this record, we therefore see no error in the district court's conclusion that Haughton was entitled to only a but-for jury instruction.

Haughton's statement of issues also suggests that the district court "erred in failing to admit a [2007] letter . . . regarding his reasonable accommodations." Haughton Br. 10. This argument is forfeited because Haughton failed to develop it in the body of his brief. *See, e.g.*, *Al-Tamini v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019). In any case, the district court's evidentiary ruling was well within its discretion. *See Harvey v. District of Columbia*, 798 F.3d 1042, 1057 (D.C. Cir. 2015). Indeed, Haughton himself agreed that the letter was irrelevant and withdrew his request to admit it. *See* J.A. 189, 193.

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. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk