United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5148 **September Term, 2019**

FILED ON: DECEMBER 16, 2019

LORI PANARELLO,

APPELLANT

v.

DAVID LONGLY BERNHARDT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-01966)

Before: PILLARD, WILKINS and RAO, *Circuit Judges*.

J U D G M E N T

This appeal from a final order of the United States District Court for the District of Columbia granting the Secretary of the Interior's motion to dismiss and/or for summary judgment was presented to the court and briefed and argued by counsel. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the following reasons, it is

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

This case involves Title VII discrimination and retaliation claims brought against the Department of the Interior by Lori Panarello, a lieutenant in the United States Park Police. Panarello alleged that she was disparately disciplined, subjected to a hostile work environment, denied awards and training opportunities, and passed over for promotions on the basis of her sex and prior protected equal employment opportunity (EEO) activity. In particular, Panarello argued that, following her participation in EEO activity in the 1990s, she was subjected to a retaliatory scheme orchestrated by a former Park Police deputy chief and his proxies. After the completion of discovery, the Secretary moved to dismiss and/or for summary judgment with respect to all of Panarello's claims. The district court granted the motion, holding Panarello failed to administratively exhaust her denial of training and awards, hostile work environment, and disparate discipline claims. Additionally, the district court held the agency possessed a legitimate

nondiscriminatory reason for failing to promote Panarello.

This court reviews a district court's dismissal for failure to state a claim and grant of summary judgment de novo. *Coleman v. Duke*, 867 F.3d 204, 209 (D.C. Cir. 2017). The district court primarily based its holding on Panarello's failure to exhaust her denial of training and awards, hostile work environment, and disparate discipline claims. Because administrative exhaustion is not a jurisdictional requirement under Title VII, *Artis v. Bernanke*, 630 F.3d 1031, 1034 n.4 (D.C. Cir. 2011), we assume without deciding that Panarello exhausted her claims before the agency. Instead we consider the merits, presented in a summary judgment posture, and affirm because Panarello failed to produce sufficient evidence to create a genuine issue of fact that, if resolved in her favor, would support her claims. *See EEOC v. Aramark Corp.*, 208 F.3d 266, 268 (D.C. Cir. 2000) ("[W]e may affirm on any ground properly raised.").

Title VII prohibits, as relevant here, the federal government from discriminating against its employees on the basis of sex, 42 U.S.C. § 2000e-16, and in retaliation for exercising rights under Title VII, *id.* § 2000e-3(a). If an employee makes out a prima facie case of discrimination, the burden shifts to the employer to provide a legitimate nondiscriminatory reason for the action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973). When an employer moves for summary judgment based on evidence of legitimate nondiscriminatory reasons for challenged employment actions, the employee must introduce evidence supporting her claim of discrimination or retaliation. The court must answer "one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee?" *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). Panarello has not met this burden.

First, no reasonable jury could find that the Park Police subjected Panarello to disparate discipline in retaliation for her EEO activity. Panarello argues that the proposed demotion she received following an incident at the Jefferson Memorial—later converted to a two-week suspension—reflected retaliation. But she presents no evidence sufficient to create a triable factual dispute over the agency's nondiscriminatory reason that as the highest-ranking officer on duty, Panarello was appropriately suspended for failing to prevent, and even participating in, admittedly "juvenile" and unprofessional acts in the presence of members of the public. Panarello has produced no evidence rebutting this legitimate reason for the suspension. *See id.* (burden on plaintiff to rebut legitimate nondiscriminatory reason).

Second, Panarello's hostile work environment claim—which incorporates her denial of training and awards claim—also fails because it is premised on the same unsupported theory of retaliation and is composed of discrete acts linked only by an attenuated theory of retaliation unsupported by evidence. *See Brooks v. Grundmann*, 748 F.3d 1273, 1278 (D.C. Cir. 2014) (plaintiff may not "combine discrete acts to form a hostile work environment claim" (internal quotation marks omitted)). Finally, the agency furnished a legitimate nondiscriminatory reason—Panarello was significantly less qualified than other applicants—for not selecting her for various captain and command positions. *See Adeyemi v. District of Columbia*, 525 F.3d 1222, 1227 (D.C. Cir. 2008) ("[W]hen an employer says it made a hiring or promotion decision based on the relative qualifications of the candidates, a plaintiff can directly challenge that qualifications-based

explanation only if the plaintiff was '*significantly* better qualified for the job' than those ultimately chosen." (quoting *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006))). Panarello did not produce any evidence that the Park Police's legitimate nondiscriminatory reason was pretextual. *Cf. Holcomb*, 433 F.3d at 897 (Title VII is not a vehicle for the judiciary to "serve as a super-personnel department that reexamines an entity's business decisions" (citation and internal quotation marks omitted)).

Ultimately, Panarello's allegations rest on a theory of retaliation without evidentiary support. She attempts to rebut the government's nondiscriminatory reasons by alleging a conspiracy orchestrated by a Park Police deputy chief who sought to retaliate against her for participation in EEO activity in the 1990s. This deputy chief retired before the claimed discriminatory actions took place and Panarello offers no evidence that would allow a reasonable juror to believe that, from retirement, the deputy chief controlled the Park Police's promotion and disciplinary activities—matters he did not control even when he was on active duty. *See Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003) ("[T]he plaintiff must show that a reasonable jury could conclude from all of the evidence that the adverse employment decision was made for a discriminatory reason." (citing *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998) (en banc))); *Carter v. George Washington Univ.*, 387 F.3d 873, 880 (D.C. Cir. 2004).

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.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk