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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICOLLE FOSTER, Plaintiff - Appellant, v. CREDIT ONE BANK, N.A., Defendant - Appellee.	No. 23-2983 D.C. No. 2:21-cv-00680-APG-VCF MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted October 8, 2024
Las Vegas, Nevada

Before: BEA, CHRISTEN, and BENNETT, Circuit Judges.
Partial Dissent by Judge BENNETT.

Plaintiff Nicolle Foster appeals the district court's order of summary judgment in favor of Credit One Bank, N.A. ("Credit One"). Because the parties are familiar with the facts, we do not recount them here. The district court's judgment is affirmed.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

We have jurisdiction pursuant to 28 U.S.C. § 1291. This court reviews the grant of a motion for summary judgment *de novo*. *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At the summary judgment stage, courts must "review all of the evidence in the record" and "draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

The Americans with Disabilities Act ("ADA") forbids covered entities from "discriminat[ing] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Employers are also prohibited from retaliating against employees who have "opposed any act or practice made unlawful" by the ADA. 42 U.S.C. § 12203(a). "Discrimination and retaliation claims under the ADA are both subject to the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Curley v. City of North Las Vegas*, 772 F.3d 629, 632 (9th Cir. 2014). "Under that framework," employees alleging discrimination have "the initial burden of establishing a prima facie case of discrimination (or retaliation)." *Id.* If the employee establishes his prima facie case, the employer bears the burden of "provid[ing] a legitimate, nondiscriminatory (or nonretaliatory) reason for the

adverse employment action." *Id*. "If the employer does so, then the burden shifts back to the employee to prove that the reason given by the employer was pretextual." *Id*.

The Family and Medical Leave Act ("FMLA") entitles eligible employees to "12 workweeks of leave during any 12-month period" "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). The FMLA renders it unlawful for employers to "interfere with, restrain, or deny the exercise of or the attempt to exercise" rights under the FMLA. 29 U.S.C. § 2615(a)(1). Interference claims are evaluated using the "preponderance of the evidence" standard. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001). The FMLA also forbids employers from retaliating against employees for "opposing any practice made unlawful" by the FMLA. 29 U.S.C. § 2615(a)(2). Where an alleged FMLA violation is "willful," the statute of limitations is three years. 29 U.S.C. § 2617(c)(2).

1. *Foster's ADA discrimination claim.* Foster alleged that Credit One discriminated against her for her disability in violation of 42 U.S.C. § 12112(a) of the ADA.[1] "[A]n ADA discrimination plaintiff . . . must show that the adverse employment action would not have occurred but for the disability." *Murray v. Mayo*

[1] Foster was diagnosed with anxiety and depression. We assume without deciding that Foster's major life activities are substantially limited, and that she is disabled under the ADA. There is no dispute that Credit One is a covered entity.

Clinic, 934 F.3d 1101, 1105 (9th Cir. 2019). At her deposition, Foster admitted that she did not "believe Credit One used [her] medical condition to terminate" her, and she did not have any facts to support her position that she was "terminated because of [her] medical condition." Indeed, Foster took FMLA leave for her disability for multiple weeks without incident. Foster provided no other evidence tending to prove that Credit One would not have terminated her but for her disability. Foster therefore fails to make out a *prima facie* case of disability discrimination under the *McDonnell Douglas* framework, and summary judgment in favor of Credit One on Foster's ADA discrimination claim was appropriate.

2. *Foster's ADA retaliation claim.* Foster's *prima facie* ADA retaliation claim is that she was fired shortly after she complained about the administration of her FMLA leave.[2] Foster had a bad relationship with Mason, the temporary supervisor who incorrectly docked her pay. Even though the error regarding the administration of Foster's pay was quickly resolved after she brought it to the attention of HR and her regular supervisor, Foster contended that Mason conspired with Credit One upper management to fire her in retaliation for her complaint.

Credit One contends that it had a legitimate, non-discriminatory reason for firing Foster—namely, its conclusion that Foster violated company policy after it

[2] We assume without deciding that Foster's complaint about the administration of her sick pay while on FMLA leave constitutes opposition to an act made unlawful under the ADA. *See* 42 U.S.C. § 12203.

investigated reports of Foster having used racial and homophobic slurs in the employee lunchroom.

Foster argued that Credit One's purported legitimate non-discriminatory reason for firing Foster was pretext for unlawful discrimination under the ADA. Foster's pretext argument relies on the following inferences: (1) Foster did not say the slurs in question, (2) Mason orchestrated the false accusations against Foster in retaliation for her exercise of her rights under the ADA, and (3) Credit One conspired with Mason to cover up Mason's involvement in the decision to fire Foster in retaliation for her complaint about the administration of her FMLA leave.

While Foster provided evidence sufficient to raise a genuine dispute of material fact as to whether she actually said the alleged slurs, she fails to provide facts evincing *Credit One*'s retaliation against her under the ADA. Even assuming that the accusations against Foster were false, and even further assuming that Mason orchestrated those false accusations, there is no evidence that Mason was involved in the decision to fire Foster.

Ninth Circuit precedent directs that "if a subordinate, in response to a plaintiff's protected activity, sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove" that the "biased subordinate influenced or was involved in the decision or decisionmaking process." *Poland v.*

Chertoff, 494 F.3d 1174, 1182 (9th Cir. 2007). Here, where there is some evidence that Mason set in motion an investigation into Foster's alleged use of slurs, but where there is no evidence that Mason was involved in the resulting decision to fire Foster, Mason's purported retaliation cannot be impugned to Credit One.

Our precedent further establishes that an employer does not have to be correct about their proffered justification for firing; the employer need only have an honest belief about the reason for the decision. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). While Foster *argues* that Credit One participated in a multi-person conspiracy to fire her in violation of the ADA, Foster provides no *evidence* that anyone involved in the decision to fire her lacked an honest belief about the reason for the termination.

Neither does the investigation itself evince retaliation. Credit One interviewed the employees who accused Foster of having said the slurs. Credit One also interviewed Foster about the alleged misconduct, and Foster denied ever having said anything derogatory. Credit One concluded that Foster violated Credit One's policies. While Foster might have been better served had she been provided with more details about the accusations against her, that the investigation process was perhaps not as thorough as it could have been is insufficient to raise a genuine dispute that Mason and Credit One conspired to hold a sham investigation to conceal retaliation.

The other issues Foster raises regarding Credit One's investigation do not change this conclusion. That Credit One did not report having interviewed Mason is hardly a surprise. Foster was accused of having made derogatory remarks *about* Mason, not *to* him. There is no evidence that Credit One considered Mason a witness to the purported incident.

Foster also points to differences in the changing characterization of the exact words she was accused of having said as evidence of pretext. Specifically, Foster argues that she was initially accused of using a racial slur in reference to herself, but Megan Lago's interview notes state that Foster "called" Mason a racial slur. Foster admits that either use of the term in the workplace would have been offensive. Moreover, the termination form states that Foster was reported to have made "inappropriate, offensive comments relating to sexual orientation and race . . . regarding another supervisor." Thus, the given reason for Foster's termination does not hinge on Foster directly having called Mason a racial slur. That Foster was variably described as having called Mason a racial slur on the one hand and having used a racial slur on the other hand does not create a genuine dispute as to whether Credit One had reason to suspect the accusations against Foster were false.

Foster also points to Vera Yanez-Tourigny's statement in Foster's unemployment hearing. Even if it were admissible, Yanez-Tourigny's somewhat inconsistent statement was not sufficient to raise a genuine dispute regarding Credit

One's retaliation against Foster. There is no evidence that Yanez-Tourigny was involved in the decision to fire Foster. The small contradiction in her testimony regarding the provenance of the statements at a hearing several months after the events in question, even in combination with Foster's other evidence, is insufficient to raise a genuine dispute regarding whether Credit One participated in a conspiracy to fire Foster in violation of the ADA.

Although Foster does raise a genuine dispute regarding her purported use of slurs in the workplace, Credit One identified a legitimate, non-discriminatory reason for firing her. Because Foster did not provide evidence of pretext, summary judgment in favor of Credit One was therefore appropriate.

3. *Foster's FMLA interference claim.*

The parties do not dispute that the Complaint was filed more than two years and less than three years from the events in question. Therefore, for Foster's claims to survive the statute of limitations, Foster must show that Credit One's alleged FMLA violations were "willful." 29 U.S.C. § 2617(c)(2).

Foster alleged that Credit One "fired [Foster] in direct response for her taking a medical leave of absence due to anxiety and depression." Foster, however, provided no evidence that Credit One willfully considered Foster's use of FMLA leave as a factor in its termination decision. Credit One's stated reasons for firing Foster were the results of its investigation into her purported use of racial and

homophobic slurs. At her deposition, when asked whether Foster "believe[d] Credit One used [her] time off on FMLA as a reason to terminate [her]," Foster answered "No." Additionally, Foster took FMLA leave in the summer of that same year without incident, Credit One "[n]ever" denied her requests for leave under the FMLA and Foster stated she took FMLA leave "whenever [she] felt it necessary to take it." After Foster did not receive pay for her three days of FMLA leave in December, Credit One acknowledged that it had been mistaken and restored Foster's pay the very next pay period. Foster therefore failed to prove by a preponderance of the evidence that Credit One willfully interfered with Foster's rights under the FMLA.

4. *Foster's FMLA retaliation claim.*

Foster did not plead an FMLA retaliation claim under 29 U.S.C. § 2615(a)(2). Although Foster urges us to recast the facts of her FMLA interference claim as a retaliation claim, there is no evidence that Foster mistakenly pleaded interference instead of retaliation. *Cf. Rexwinkel v. Parsons*, 162 Fed. App'x. 698, 700 (9th Cir. 2006) (allowing an FMLA interference claim to proceed where the plaintiff had "mistakenly alleged retaliation" and the "complaint, facts, and briefing indicate[d] that [plaintiff] intended to bring" an interference suit). We therefore need not reach the merits of Foster's FMLA retaliation claim. Even if we did reach the merits, however, summary judgment was appropriate for reasons similar to our affirmance

of summary judgment on Foster's ADA retaliation claim: Foster did not raise a genuine dispute that Credit One participated in a multi-person conspiracy to retaliate against her for her exercise of her FMLA rights.

The judgment is **AFFIRMED.**

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Foster v. Credit One Bank, N.A., No. 23-2983

BENNETT, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's decision to affirm the grant of summary judgment on the Americans with Disabilities Act ("ADA") retaliation claim based on Nicolle Foster's complaint about her missing pay while on Family and Medical Leave Act ("FMLA") leave.[1]

The district court granted summary judgment on the ADA retaliation claim because it found no evidence supporting that Foster's complaint and her termination were causally linked or that Foster's termination was pretextual. I disagree and thus would reverse the district court's grant of summary judgment on the ADA retaliation claim.

The evidence, viewed in the light most favorable to Foster, shows the following. *See Ray v. Henderson*, 217 F.3d 1234, 1239 (9th Cir. 2000). Foster had been employed by Credit One Bank, N.A. ("Credit One") since 2007. She had a history of problems with her former supervisor, Dale Mason. In December 2018, Foster took three days of FMLA leave. While she was absent, Mason was filling in for Foster's supervisor at the time, Terrance Taylor. Mason denied Foster pay for the days she was absent. When Foster returned to work, Taylor informed her that

[1] Like the majority and the district court, I assume without deciding that Foster's complaint constitutes opposition to an act made unlawful under the ADA. *See* 42 U.S.C. § 12203(a).

she would not be paid for the time she was absent. Foster complained to a human resources ("HR") representative, who confirmed that Foster should have received FMLA pay. Foster then spoke with Taylor about her complaint for missing FMLA pay and her concern that Mason had discussed her FMLA leave with another employee. Taylor said that he would talk to Mason, suggesting that Mason learned of Foster's complaints against him.

Just a few days later, on December 18, 2018, two employees provided written statements to Mason alleging that, on December 17, 2018, they had heard Foster call Mason a homophobic slur and say that Mason "mess[es] with n*****s."[2] Mason reported these allegations to HR. Credit One suspended Foster pending an investigation. Credit One's employee handbook states that "[e]very complaint of harassment will be investigated thoroughly and promptly." Credit One told Foster that she "was being suspended due to derogatory remarks" about Mason, but Credit One refused to provide Foster with any more details, including what the alleged derogatory remarks were. Foster denied making any derogatory comments.

Megan Lago, an HR representative, conducted the investigation into Foster's alleged use of derogatory language. During the investigation, Lago learned about Foster's allegation that Mason was "out to get" her. Lago, however, never

[2] Foster is black.

interviewed Mason.[3] Lago's investigation revealed conflicting stories. David Tillman's initial handwritten statement and Ebony White's statements (both in her email to Mason and as reflected in Lago's interview notes) did not allege that Foster had called Mason the N-word. But during his interview with Lago, Tillman said that Foster "called [Mason] 'n****r.'" Lago never reconciled this conflict with the original claims made by the witnesses.[4] Instead, Lago accepted Tillman's new story and misrepresented that "[*b*]*oth* witnesses confirmed [Foster] called Mr. Mason a N*****" (emphasis added). Credit One terminated Foster just days later, on December 21, 2018, for "inappropriate, offensive comments relating to sexual orientation and race." At no time before her termination did Credit One tell Foster what she had been accused of saying. Foster learned about the specific allegations against her during her unemployment hearing months later.

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[3] The majority claims that no negative inference can be drawn from this fact because Mason did not witness the alleged incident. Maj. at 7. While that *might* be one reasonable view, given the other circumstances—the history of problems between Foster and Mason, the allegation that Mason was "out to get" Foster, and Mason's involvement in reporting the incident—and viewing those circumstances in Foster's favor, a factfinder could infer that Credit One ignored material evidence, supporting an inference of pretext.

[4] While I agree with the majority that either use of the racial slur is offensive, Maj. at 7, viewing the evidence in the light most favorable to Foster, a factfinder could conclude that these were material inconsistencies, and Credit One's failure to reconcile them raises an inference of pretext.

A jury could infer from these facts that Credit One's investigation was pretextual. A jury could infer that Credit One did not care about uncovering the truth, as it refused to tell Foster—a longtime employee—what exactly she had been accused of saying. *See Hostetler v. Wormuth*, No. 22-cv-03605, 2023 WL 6795411, at *4 (N.D. Cal. Oct. 12, 2023) (reasoning that the employer's "proffered explanation for the investigation ('morale issues') may well have been pretextual, because the Department never provided information about the allegations against her" (citation omitted)). In addition, contrary to its own procedures, Credit One did not conduct a thorough investigation. *See Harden v. Marion Cnty. Sheriff's Dep't*, 799 F.3d 857, 864 (7th Cir. 2015) (explaining that pretext may be inferred when "persons conducting the investigation fabricate, ignore, or misrepresent evidence, or the investigation is circumscribed so that it leads to the desired outcome (for instance, by deliberately failing to interview certain witnesses)"). Credit One never interviewed Mason, despite knowing about the prior issues between Foster and Mason, the allegation that Mason was "out to get" Foster, and Mason's involvement in reporting the allegations against Foster to HR. Credit One also failed to reconcile material discrepancies between the original complaints and Tillman's later statement to Lago. Lago also misrepresented that *both* witnesses to the alleged incident had stated that Foster called Mason the N-word. All of this supports that Credit One's investigation was pretextual. *See id.*; *see also Tex. Dep't of Cmty. Affs. v. Burdine*,

450 U.S. 248, 256 (1981) (explaining that a plaintiff may show pretext "indirectly by showing that the employer's proffered explanation is unworthy of credence" (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973))).

Considering the very short lapse in time between Foster's complaint about her FMLA pay and her termination based on a pretextual investigation, and the lack of any other legitimate reason for her firing, a factfinder could conclude that Credit One terminated Foster because of her complaint. *See Ray*, 217 F.3d at 1244 ("That an employer's actions were caused by an employee's engagement in protected activities may be inferred from 'proximity in time between the protected action and the allegedly retaliatory employment decision.'" (quoting *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987))). I therefore respectfully dissent from the majority's decision to affirm the district court's grant of summary judgment on the ADA retaliation claim.[5]

[5] I agree with the majority's decision to affirm the grant of summary judgment on the ADA discrimination claim. Maj. at 3–4. I also agree with the majority's affirmance on the FMLA interference claim, but only because of Foster's own admission that Credit One did not fire her because she used FMLA leave, and the evidence showing that Credit One had never denied her prior requests for FMLA leave and had quickly corrected its nonpayment of FMLA pay. Maj. at 8–9. Finally, I agree with the majority's determination that Foster did not properly plead an FMLA retaliation claim. Maj. at 9. But for similar reasons discussed above, I do not join the majority's determination that, if we were to consider the merits of Foster's FMLA retaliation claim, summary judgment would be proper on that claim.