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Alexander Godwin v. Pennsylvania Department of Transportation

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1416

ALEXANDER GODWIN,
Appellant

v.

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION;
PENNDOT ENGINEERING DISTRICT 8; BOB COLDREN;
DANIEL BOWERS; DIANA WEAVER

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 5:19-cv-04951)
Magistrate Judge: Honorable Timothy R. Rice

Submitted Under Third Circuit L.A.R. 34.1(a):
January 20, 2023

Before: AMBRO,[*] PORTER, and FREEMAN,
Circuit Judges.

(Filed: May 3, 2023)

OPINION[*]

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[*] Judge Ambro assumed senior status on February 6, 2023.

[*] This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

PORTER, *Circuit Judge*.

Alexander Godwin appeals the entry of summary judgment for the Pennsylvania Department of Transportation (PennDOT) on Godwin's claims under Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Rights Act. Godwin's arguments lack sufficient merit, so we will affirm.

I

A

Alexander Godwin joined PennDOT in November 2014. A black man, he alleges that he experienced racism at work three times in 2018. One coworker told Godwin he had been hired as a "token." J.A. 7, 44. Another "used the n-word to describe a video he was watching on his phone." J.A. 7. And a third "asked Godwin the meaning of a phrase containing the n-word." *Id.*

Following these incidents, Godwin spoke at the worksite's morning meeting on September 26, 2018, and asked his colleagues to apologize. Only one did. Godwin testified that he did not hear another discriminatory comment at PennDOT after that meeting. On October 3, Godwin complained to PennDOT's human resources department.

PennDOT's investigation revealed that racial slurs were used regularly at its worksites. The three employees Godwin identified received the following discipline: the first was reprimanded, the second had to attend counseling, and the third was told she would be fired in the event of "any future incident of the same or similar nature." J.A. 9.

Godwin remained employed by PennDOT, and he sought other opportunities. On November 7, 2018—while PennDOT's investigation was still in progress—Godwin

interviewed with Robert Ludgate for a construction job with the City of Lancaster. The interview went well, but Godwin was Ludgate's second pick to fill the position.

Ludgate then phoned Godwin's three references. The first had worked with Godwin before he joined PennDOT and provided a positive reference. The second reference was a supervisor at PennDOT. Ludgate testified that the supervisor "was surprised that he had been listed as a reference" because "Godwin had not worked for him very long"—just one week. J.A. 440. Ludgate explained that the supervisor told him there was little he could say about Godwin. *Id.* Ludgate never spoke with the third reference.

Ludgate hired his top choice: a current city employee with similar experience who was also bilingual, "another strong factor in his favor." J.A. 441. Ludgate testified that the supervisor's failure to provide a reference did not hurt Godwin's candidacy.

Neither side deposed Godwin's PennDOT supervisor. But Godwin remembered things differently than Ludgate. He testified that Ludgate and another City of Lancaster official told him that "it was between me and another guy and I didn't get it due to the fact that I got a bad reference from a supervisor at PennDOT." J.A. 107.

B

"Title VII requires a claimant in Pennsylvania to file a charge with the [Equal Employment Opportunity Commission] within 300 days of an unlawful employment practice." *Mikula v. Allegheny Cnty. of PA*, 583 F.3d 181, 183 (3d Cir. 2009). Godwin filed his charge on July 31, 2019, so events before October 4, 2018, were untimely. He alleged that he experienced racial discrimination at PennDOT from November 10, 2014,

when he was hired, until November 26, 2018, when he went on leave for a work-related injury. He checked the boxes for discrimination based on "RACE," "COLOR," and "RETALIATION," but not the "CONTINUING ACTION" box. The EEOC issued Godwin a right-to-sue notice on August 10, 2019, before completing its investigation, and terminated its processing of his charge.

Godwin then sued PennDOT for violating Title VII and the Pennsylvania Human Rights Act by subjecting him to a hostile work environment that culminated in the allegedly retaliatory reference. *See* 42 U.S.C. § 2000e et seq.; 43 Pa. Stat. and Cons. Stat. § 951 et seq. He also sued three individual employees of PennDOT. After they defaulted, Magistrate Judge Timothy K. Rice ordered them to pay $25,000 in damages.

After discovery, the magistrate judge entered summary judgment for PennDOT. The Court held that Godwin's Title VII claim was time-barred because the last racist comment he identified occurred in September 2018, more than 300 days before his EEOC charge, and was not part of a "continuing violation." The Court determined that Godwin did not establish that his PennDOT supervisor gave him a bad reference in November 2019—within the 300-day window—because Godwin relied only on his own hearsay testimony for support. Even if the bad reference did occur, the Court decided that "incidents that are actionable on their own, like specific retaliatory actions, cannot serve as a basis for a continuing violation theory." J.A. 13.

Godwin timely appealed.

II

The parties consented to jurisdiction by Magistrate Judge Rice under 28 U.S.C. § 636(c)(1). The Court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f). We have jurisdiction over its final order under 28 U.S.C. §§ 636(c)(3) and 1291. *Jones v. Unknown D.O.C. Bus Driver & Transp. Crew*, 944 F.3d 478, 481 (3d Cir. 2019).

We review the summary judgment de novo. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014). "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). We view the facts and their reasonable inferences in the light most favorable to the non-movant and may affirm "on any grounds supported by the record." *Nicini v. Morra*, 212 F.3d 798, 805–06 (3d Cir. 2000).

III

Godwin alleges that PennDOT subjected him to a hostile work environment that included racist comments from coworkers and culminated in a bad reference from his supervisor. Even if we assume the bad reference occurred and could support a claim otherwise based on untimely allegations, Godwin has not asserted that prohibited discrimination was the likely reason for the bad reference. He has therefore failed to show that there is a genuine dispute of fact on this issue, so summary judgment for PennDOT was appropriate.

Title VII prohibits an employer from discriminating against an employee "because he has opposed any practice" made unlawful by Title VII. 42 U.S.C. § 2000e-3(a). And the PHRA says that employers may not "discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act." 43 P.S. § 955(d). It follows that, to survive a motion for summary judgment, a plaintiff advancing a retaliation claim must "produce[] evidence from which a reasonable factfinder could conclude that [his] engagement in a protected activity was the *likely reason* for the adverse employment action." *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 259 (3d Cir. 2017); *accord Spanish Council of York, Inc. v. Pa. Hum. Rels. Comm'n*, 879 A.2d 391, 397–99 (Pa. Commw. Ct. 2005) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Godwin has not done that here, so summary judgment for PennDOT was appropriate.[1]

Godwin testified in his deposition that he heard from Ludgate that his PennDOT supervisor provided a "bad reference." J.A. 107. But he did not produce any evidence that the supervisor was motivated by Godwin's protected activity. When asked at his

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[1] Had Godwin shown that his protected activity was the likely reason for his supervisor's conduct, we would need to decide whether providing an unwarranted negative reference for a position at another employer—or no reference at all—in retaliation for protected activity is actionable under Title VII. *See E.E.O.C. v. L.B. Foster Co.*, 123 F.3d 746, 753–55 (3d Cir. 1997). We would also need to decide whether a discrete act, such as a retaliatory reference, can support a hostile work environment claim if it is part of a "series of separate acts that collectively constitute one 'unlawful employment practice.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). We reach neither question because Godwin has not alleged a causal link between his protected activity and the supervisor's conduct.

deposition whether the supervisor even knew about his complaints about the racist remarks, Godwin answered, "[n]ot from me personally, I would say no." J.A. 107. He suggested that the supervisor "could have heard it from anyone on the job," but then reiterated: "I don't believe that he knew about them." *Id.* Godwin did not depose the supervisor, but he did depose Ludgate, who testified that the supervisor told him that he was unable to give Godwin a reference because the two had only worked together for a week. That's a nondiscriminatory reason for the challenged conduct that Godwin does not meaningfully rebut. *See Carvalho-Grevious*, 851 F.3d at 260.

Five weeks passed between Godwin's complaint to PennDOT's human resources department and Ludgate's reference call. Timing that is "unusually suggestive" of prohibited discrimination may support an inference of causation, but we have held that a three-week gap is not necessarily sufficient. *Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003). And although we may consider "timing plus other evidence," *id.*, Godwin has provided no evidence of a causal link between his workplace complaint and the "bad reference." So whether his supervisor gave him a "bad reference" or no reference at all, Godwin has failed to support the causation element that Title VII claims require.[2]

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[2] The Court suggested that it did not consider Godwin's hearsay statements that the supervisor gave him a bad reference because those statements would not have been admissible at trial. But the substance of Godwin's testimony may have been admissible if the actual declarant was available for examination. *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1275 n.17 (3d Cir. 1995). And when hearsay statements may be admissible at trial, district courts can consider them on a motion for summary judgment. *Id.* Any error on this front was immaterial, though, because even if one

IV

The cornerstone of Godwin's Title VII and PHRA claims is the alleged "bad reference" his supervisor gave him in November 2018. Even if we assume that is what happened, Godwin has not shown that his "engagement in a protected activity was the *likely reason* for the adverse employment action." *Carvalho-Grevious*, 851 F.3d at 259. In fact, Godwin negated any such inference when he testified that his supervisor was likely unaware of Godwin's workplace complaints. So we will affirm the entry of summary judgment for PennDOT.

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assumes the truth and admissibility of Godwin's testimony, he admits that his supervisor likely did not know about his protected conduct, which defeats his claims. *Carvalho-Grevious*, 851 F.3d at 260.