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Charles Brennan v. City of Philadelphia

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2512

CHARLES BRENNAN,
Appellant

v.

CITY OF PHILADELPHIA; MAYOR JAMES F. KENNEY;
CHRISTINE DERENICK-LOPEZ; JANE SLUSSER

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-18-cv-01417)
District Judge: Honorable Jan E. DuBois

Argued on March 24, 2021

Before: HARDIMAN, GREENAWAY, JR., and BIBAS, *Circuit Judges*.

(Filed: May 19, 2021)

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OPINION[*]

HARDIMAN, *Circuit Judge*.

Charles Brennan appeals the District Court's summary judgment in favor of the City of Philadelphia and three individuals. We will affirm.

I

Brennan worked for the City in various law enforcement capacities for about thirty years. After some time in the private sector, he returned to government service in 2016 as the City's Chief Information Officer. On January 12, 2018, Brennan was fired. Soon after, he sued the City and his supervisor, Christine Derenick-Lopez. He also sued Mayor James Kenney and the Mayor's Chief of Staff, Jane Slusser. Brennan alleged he was fired in retaliation for objecting to the City's unlawful racial hiring practices and for blowing the whistle on wasteful City spending. The District Court rejected Brennan's claims. It held his race-based claim failed because he did not show the City's legitimate reason for firing him was pretextual and his whistleblower claim failed to show causation.

Brennan raises two arguments on appeal. He argues the District Court erred in entering summary judgment on his retaliation claims under (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; 42 U.S.C. § 1981; the Pennsylvania Human

[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Relations Act, 43 PA. CONS. STAT. § 951 *et seq.*; and the Philadelphia Fair Practices Ordinance, Phila. Code § 9-1101 *et seq.*; and (2) the Pennsylvania Whistleblower Law, 43 PA. CONS. STAT. § 1421 *et seq*. We address each argument in turn.

II[1]

Brennan claims he was terminated in retaliation for his complaints that the City discriminated by hiring based on race. Appellees says they fired Brennan because he opposed his supervisor after he made inappropriate comments in public while representing the City. The District Court assumed that Brennan had established a prima facie case of retaliation. Appellees proffered a legitimate nonretaliatory reason for Brennan's termination. So the question presented here is whether the Court erred in finding no pretext.

To prove pretext, Brennan must do more than "simply show that the employer's decision was wrong or mistaken." *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). Instead, he must show there is "a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons," which can be done by pointing to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" that allow a reasonable factfinder to find the City's reasons "unworthy of credence." *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 504 (3d Cir. 1997) (citations and quotations omitted).

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[1] The District Court had jurisdiction over Brennan's federal law claims under 28 U.S.C. § 1331 and his state law claims under § 1367. We have jurisdiction under 28 U.S.C. § 1291 as the District Court's order granting summary judgment was a final decision. We exercise plenary review over the District Court's summary judgment and view all evidence and draw all inferences in Brennan's favor. *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 224 (3d Cir. 2000).

We agree with the District Court that Brennan did not carry his burden at the Rule 56 stage.

Brennan claims "similarly situated persons" were not fired. *See Fuentes*, 32 F.3d at 765. He points to Derenick-Lopez and Nolan Atkinson—two senior-level City employees who made inappropriate and insensitive comments—and Brian Abernathy, who allegedly violated City policy by disclosing information about prisoners to federal immigration officers. We agree with the District Court that they are not valid comparators because none was "directly comparable to [the plaintiff] in all material respects." *In re Tribune Media Co.*, 902 F.3d 384, 403 (3d Cir. 2018) (quoting *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002)).

First, Atkinson and Brennan had different supervisors. *See id.* (requiring a comparator to have "dealt with the same supervisor" and "engaged in the same conduct" (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992))). Second, the record shows Atkinson's behavior improved after Derenick-Lopez relayed Brennan's complaints to Atkinson's supervisor. In contrast, the record reflects no improvement, or even any attempt at improvement, in Brennan's communication style. Third, and most importantly, there is no indication that Atkinson was insubordinate or oppositional toward his supervisor. Appellees' stated reason for firing Brennan was based not only on his inappropriate comments, but also on his poor response to Derenick-Lopez's request that he attend sensitivity training. So pointing to other employees, like Atkinson, who made inappropriate comments but improved in response to a supervisor's counsel cannot prove pretext.

Derenick-Lopez is a poor comparator for similar reasons. Brennan and Derenick-Lopez have different supervisors. While Brennan complained that she used profanity in the workplace, that conduct differs from Brennan's comment that his female employees own more shoes than his male employees and his implication that attendees at a City-sponsored conference could not afford the food catered by the City. Brennan's comments were made in public and his supervisor and several coworkers believed they reflected poorly upon the City. And Brennan neither reported Derenick-Lopez to her supervisor nor claimed that Derenick-Lopez was ever insubordinate.

Abernathy also fails as a comparator. Violating City policy by disclosing information to federal immigration officials has nothing to do with making inappropriate comments when representing the City or being insubordinate to one's supervisor.

Another weakness in Brennan's comparator argument is that other department heads complained that the City was hiring based on race and there is no evidence those complainants were disciplined or fired. That others complained but suffered no adverse employment action undermines Brennan's argument that he was fired for those complaints.

Brennan's alternative arguments also fail to show pretext. The temporal proximity between his final complaint about the City's hiring practices and his termination—over a month—is not "unduly suggestive," especially where, as here, the employer's proffered legitimate reason for termination fits neatly into this timeframe. *See Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003) (finding a three-week gap, "in the context of the record as a whole," insufficient to prove causation). The pattern of antagonism

between Brennan and Derenick-Lopez does little to prove pretext when Brennan admits the two had a cordial relationship after his final complaint and for several weeks before he was fired. *Cf. Robinson v. Se. Pa. Transp. Auth., Red Arrow Div.*, 982 F.2d 892, 895 (3d Cir. 1993) (affirming finding of causation when pattern of antagonism "continued until [the employee's] discharge"). Brennan's reading of Slusser's deposition testimony—that she admitted he was fired for complaining about racial discrimination—is an unreasonable and untenable one since Slusser immediately clarified that Brennan was fired for his oppositional attitude toward Derenick-Lopez after she asked him to attend sensitivity training. Nor do we find the severance package offer to Brennan sufficient to show pretext because the record suggests such offers are not unusual for the City.

Finally, Brennan argues that issues of material fact remain in dispute. He denies some of the inappropriate comments attributed to him, he says he never refused to attend sensitivity training, and he claims his interpersonal conflicts with co-workers were overblown. We agree with the District Court that those disputes are immaterial.

First, whether or not Brennan made all the comments attributed to him, he admits to some of them and the record shows all of them were reported to Derenick-Lopez. When evaluating pretext, the veracity of the complaints is less significant than whether the employer acted on them in good faith. *See Fuentes*, 32 F.3d at 766–67 ("[T]he question is whether [the supervisor] believed [co-worker] criticisms to be accurate and actually relied upon them."). Brennan has offered no evidence suggesting Derenick-Lopez responded to reports about Brennan's comments in bad faith or that she had reason

to disbelieve the City employees who reported to her. Second, the record shows Brennan refused to attend sensitivity training unless Derenick-Lopez ordered him to do so, which matches Appellees' version of events. And third, Appellees have repeatedly said Brennan was fired for his comments and insubordination; a fleeting reference to Brennan's interpersonal conflicts with his staff does not create a genuine dispute of material fact.

III

We next address Brennan's claim under the Pennsylvania Whistleblower Law, which, as relevant here, protects employees who report wrongdoing or waste by their employers. 43 PA. CONS. STAT. § 1423. Brennan claims he was fired for making three qualifying reports: one for the "rigged" public bidding process for police body cameras, one for the City's contract with Comcast, and another for the City's racial hiring practices.

The District Court granted summary judgment after concluding Brennan failed to show his reports caused his termination. The Whistleblower Law requires "concrete facts or surrounding circumstances that the report of wrongdoing or waste led to the plaintiff's dismissal, such as" a "specific direction" not to file the report or threats made to chill the filing of reports. *Golaschevsky v. Pa., Dep't of Env't Prot.*, 720 A.2d 757, 759 (Pa. 1998) (cleaned up) (quoting *Gray v. Hafer*, 651 A.2d 221, 225 (Pa. Commw. Ct. 1994)).

We agree with the District Court. For essentially the same reasons Brennan fails to show pretext on his first set of claims, he fails to establish causation for his whistleblower claim. Brennan again points to temporal proximity and antagonism with Derenick-Lopez,

but those allegations fall short of the "concrete facts" required under Pennsylvania law. *Golaschevsky*, 720 A.2d at 759.

*   *   *

For the reasons stated above, we will affirm the District Court's summary judgment.