6-20-2018

Richard Hoffman v. City of Bethlehem

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 17-2807

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RICHARD HOFFMAN,
Appellant

v.

CITY OF BETHLEHEM

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 5-16-cv-01581)
District Judge: Honorable Edward G. Smith

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Submitted Under Third Circuit L.A.R. 34.1(a)
April 9, 2018

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Before: CHAGARES, VANASKIE and FISHER, *Circuit Judges*

(Opinion filed: June 20, 2018)

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OPINION[*]

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VANASKIE, *Circuit Judge.*

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

Appellant Richard Hoffman appeals the District Court's grant of summary judgment in favor of Appellee, the City of Bethlehem (the "City"). Hoffman challenges the District Court's conclusion that the City's refusal to reinstate him did not violate the Rehabilitation Act, 29 U.S.C. § 794. Because the City offered legitimate, nondiscriminatory reasons for refusing to reinstate Hoffman, and Hoffman failed to demonstrate those reasons were pretextual, we will affirm the District Court judgment.

I.

Hoffman was a patrolman for the City's police department since July 2003.[1] Late one night in August 2013, while off duty, Hoffman was charged with driving a motor vehicle while under the influence ("DUI") and careless driving. Subsequently, the Police Department, through the City Solicitor, requested that City Council terminate Hoffman. In addition to the DUI, the City Solicitor cited, *inter alia*, three other alcohol-related incidents, two prior disciplinary actions, Hoffman's alleged untruthfulness during the DUI investigation, and the alleged damage Hoffman had caused to public confidence in the Police Department. After holding a hearing at which Hoffman did not appear, City Council terminated Hoffman.

Hoffman timely grieved his termination, and the matter was referred to arbitration. The question presented to the arbitrator was whether there was "just cause"

[1] The following facts are taken from the City's Statement of Undisputed Material Facts in Support of Summary Judgment, which the City submitted to the District Court. Hoffman did not respond to the City's statement, nor did he submit his own counter-statement. Rather, Hoffman incorporated the City's statement by reference into his opposition to the motion for summary judgment. Thus, the following facts are undisputed.

for Hoffman's termination. (A91a.) The arbitrator concluded there was just cause to discipline Hoffman, but not to terminate him. The arbitrator determined that a 25-day suspension, "the longest suspension short of discharge," was appropriate.[2] (A107a.) The arbitrator based his reasoning on the doctrine of progressive discipline and the fact that Hoffman had only ever received written reprimands for prior misconduct. Additionally, the arbitrator noted that there was insufficient evidence in the record from which he could conclude that Hoffman would be fit to return to duty after the suspension. Accordingly, the arbitrator conditioned Hoffman's reinstatement on the City's right to require a fitness for duty evaluation.

The City appealed the arbitrator's decision. While the appeal was pending, Hoffman participated in a fitness for duty examination conducted by Dr. Frank M. Dattilio, a clinical psychologist. Dr. Dattilio prepared a report in which he concluded that, due to a strong potential for relapse with alcohol, Hoffman was unfit for duty. In addition to this conclusion, Dr. Dattilio offered several recommendations to aid in Hoffman's future treatment.

[2] Bethlehem Police Directive Number 1.3.1. establishes a disciplinary matrix for misconduct. (A91a (reprinted as part of the arbitrator's February 9, 2015 decision).) The Directive incorporates a principle of progressive discipline ranging from written reprimand to discharge. The standard discipline for a single off-duty drunk driving with collision is 5 to 20 days suspension. (A92a.) The Directive, however, provides, "[r]epeated violations may result in more severe disciplinary action based on the repetitive nature of the violations . . . ." (A92a.) Additionally, the Directive permits the Office of Police Commissioner to "deviate from the standard [disciplinary] range" and directs that "[s]uch deviation shall be based on any mitigating or aggravating factors relative to each particular incident." (A92a.)

The City refused to reinstate Hoffman, and the parties returned to arbitration. The arbitrator rendered a second opinion, agreeing with the City's decision. The arbitrator noted that the City was not obligated to provide Hoffman with employment or to monitor his recovery. The arbitrator concluded that, in light of Dr. Dattilio's evaluation declaring Hoffman unfit for duty, and due to the uncertainty surrounding whether Hoffman would be declared fit in the near future, the City was not required to reinstate Hoffman.

Hoffman did not appeal this decision. Instead, he brought a lawsuit against the City alleging that his termination and the City's refusal to reinstate him violated § 504 of the Rehabilitation Act, 29 U.S.C. § 794. After removal to the District Court, the filing of an Amended Complaint, and a denial of a motion to dismiss, the City moved for summary judgment. The District Court granted the City's motion. First, the District Court assumed that Hoffman had made out a *prima facie* case for disability discrimination based on perceived alcoholism. Second, the District Court determined that the City had proffered legitimate, nondiscriminatory reasons for refusing to reinstate Hoffman after arbitration including, *inter alia*, the DUI and Hoffman's history of misconduct. Third, the District Court concluded that Hoffman's admission of the City's Statement of Undisputed Material Facts, and failure to provide his own statement of facts, meant that Hoffman did not dispute the City's reasons for its refusal to reinstate him. Thus, the District Court concluded, summary judgment was appropriate. Additionally, the District Court noted that, although Hoffman's primary opposition to

the motion for summary judgment was a substantive challenge to Dr. Dattilio's report and the arbitrator's decision,

> [b]ecause this is a free-standing employment discrimination action and not an appeal of any sort it would be inappropriate for the court to assess the merits of the arbitrator's or Dr. Dattilio's opinions. The only issue before the court is whether the City has rebutted a prima facie case of discrimination by presenting legitimate, nondiscriminatory reasons for terminating and refusing to reinstate Hoffman, and whether Hoffman has met his burden of demonstrating that those reasons were pretextual.

(A14a n.3.)

Hoffman timely appealed the District Court's grant of summary judgment to the City with regard to the City's refusal to reinstate him after arbitration.[3]

II.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over an order granting summary judgment. *See Torres v. Fauver*, 292 F.3d 141, 145 (3d Cir. 2002).

III.

[3] The District Court also concluded that the City proffered numerous legitimate, nondiscriminatory reasons for terminating Hoffman, which Hoffman failed to rebut as pretextual. Hoffman does not appear to appeal this issue. *See, e.g.*, Appellant's Br. at 11 (providing examples of Appellee's conduct *after* the first round of arbitration as "the single issue at hand"); *id.* at 20 ("In other words, the genuine issue of material fact is, why was the Appellant never returned to work, even though his termination had been reversed by the labor arbitrator?"). To the extent Hoffman's brief could be construed as appealing the grant of summary judgment with regard to his termination, we would affirm for the reasons stated by the District Court.

The Rehabilitation Act "forbids employers from discriminating against persons with disabilities in matters of hiring, placement, or advancement." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007) (quoting *Shiring v. Runyon*, 90 F.3d 827, 830–31 (3d Cir. 1996)). Once a plaintiff establishes a *prima facie* case of discrimination under the Act,[4] the burden shifts to the defendant to rebut the presumption of discrimination by "articulat[ing] some legitimate, nondiscriminatory reason for the employment action." *Id.* at 185. A plaintiff, however, may still establish discrimination by proving the defendant's explanation is pretextual. *Id.* To prove pretext, a plaintiff may either "(i) discredit[] the employer's proffered reasons, either circumstantially or directly, or (ii) adduc[e] evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." *Id.* (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)).

The City contends that the DUI and Hoffman's past misconduct served as the basis for its refusal to reinstate Hoffman. Assuming that Hoffman satisfied his *prima facie* showing, the question on appeal is whether Hoffman adduced sufficient evidence that the City's proffered reasons for refusing to reinstate him were pretextual.[5]

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[4] "To establish a *prima facie* case of discrimination under the Rehabilitation Act, a plaintiff must initially show, '(1) that he or she has a disability; (2) that he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) that he or she was nonetheless terminated or otherwise prevented from performing the job.'" *Wishkin*, 476 F.3d at 184–85 (quoting *Shiring*, 90 F.3d at 831).

[5] The City also argues that Hoffman failed to establish that he was regarded by the City as disabled at the time of the alleged discrimination, and that this is an alternative ground for affirmance. Because we will affirm based on the absence of

Hoffman posits four separate reasons why summary judgment was not warranted. We will address each argument in turn.

Hoffman's primary argument is that the City relied on Dr. Dattilio's report in refusing to reinstate him. According to Hoffman, reliance on the report was evidence of the City's discriminatory intent because the report suggested that Hoffman was an alcoholic who was likely to relapse. Hoffman, however, fails to identify any record evidence demonstrating that the City relied on the report. Rather, the record suggests that the City consistently relied on the DUI and Hoffman's past misconduct as the bases for his initial termination, as well as the refusal to reinstate him.

Assuming *arguendo* that the City had relied on Dr. Dattilio's report, no reasonable juror would conclude that doing so was evidence of discriminatory intent. Although an employer is prohibited from discharging an employee based on a disability, an employer is not prohibited from discharging an employee based on misconduct, even if that misconduct is related to his disability. *See* 42 U.S.C. § 12113(a), (b) (establishing defense if employer requires that employee "shall not pose a direct threat to the health or safety of other individuals in the workplace"); 29 U.S.C. § 794(d) (claims of employment discrimination in violation of the Rehabilitation Act are governed by standards of the Americans with Disabilities Act). Reliance on a report that concluded that Hoffman was unfit for duty, even if that unfitness was, at bottom, related to alcohol use, was legitimate.

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evidence suggesting that the City's articulated rationale for its refusal to reinstate him was a pretext for discrimination, we need not consider this issue.

Hoffman also contends that the City's reliance on Dr. Dattilio's report was pretextual for two additional reasons: (1) the City hired Dr. Dattilio; and (2) the City ignored several of Dr. Dattilio's recommendations. There is no record support for the suggestion that Dr. Dattilio was biased by his relationship with the City. Nor does Hoffman cite any authority for the proposition that the City was obligated to implement Dr. Dattilio's recommendations.

Hoffman's second argument in support of reversal is that the arbitrator's first ruling, which resulted in a favorable decision for him, would cause a reasonable juror to disbelieve the City's stated reasons for refusing to reinstate him. We are not persuaded. The arbitrator addressed a question distinct from that which a jury would face—whether there was just cause to support Hoffman's termination, not whether the City discriminated against Hoffman. Additionally, the record is clear that the City has consistently maintained that the DUI and Hoffman's past misconduct were the reasons for its termination and reinstatement decisions, independent of whether those reasons amounted to just cause.

Third, Hoffman argues that the existence of comparators—*i.e.*, two other officers who were charged with DUIs, but who are still employed—suggests pretext. Hoffman, however, has offered no evidence demonstrating that the other officers who were charged with DUIs are appropriate comparators. For instance, there is no evidence about whether these alleged comparators were regarded as alcoholics, whether they had similar histories of misconduct, whether they were adjudicated unfit for duty, or whether they ever faced reinstatement proceedings.

Finally, Hoffman argues that the District Court's previous decision denying the motion to dismiss, *Hoffman v. City of Bethlehem*, No. 16-01581, 2016 WL 4318975 (E.D. Pa. Aug. 12, 2016), is the law of the case. The doctrine of the law of the case "limits relitigation of an issue once it has been decided." *In re Cont'l Airlines, Inc.*, 279 F.3d 226, 232 (3d Cir. 2002). In its previous decision, the District Court did not consider whether the City had proffered legitimate, nondiscriminatory reasons for refusing to reinstate Hoffman. Nor did it consider whether Hoffman had demonstrated that the City's proffered reasons were pretextual. Instead, the District Court's decision was limited to whether Hoffman had sufficiently pled the elements of a Rehabilitation Act claim. Thus, the law of the case doctrine is inapposite here.

IV.

For the foregoing reasons, we will affirm the grant of summary judgment in favor of the City.