No. 16-5266

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUBY BLACKMON,

Plaintiff-Appellant,

v.

EATON CORPORATION,

Defendant-Appellee.

ORDER

Before: GUY, BATCHELDER, and COOK, Circuit Judges.

Ruby Blackmon, a Tennessee litigant proceeding through counsel, has filed a petition for rehearing of this court's order of October 18, 2017, affirming the district court's orders denying her motion for a new trial and granting in part the defendant's pretrial motion in limine to exclude certain evidence.

Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a)(2).

We therefore **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: October 18, 2017

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Re: Case No. 16-5266, *Ruby Blackmon v. Eaton Corporation*
Originating Case No. : 2:11-cv-02850

Dear Counsel,

The Court issued the enclosed order today in this case.

Sincerely yours,

s/Cheryl Borkowski
Case Manager
Direct Dial No. 513-564-7035

cc: Mr. Thomas M. Gould

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-5266

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUBY BLACKMON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
EATON CORPORATION,	)	THE WESTERN DISTRICT OF
	)	TENNESSEE
Defendant-Appellee.	)	
	)	

O R D E R

Before: GUY, BATCHELDER, and COOK, Circuit Judges.

Ruby Blackmon, a Tennessee resident proceeding through counsel, appeals a district court order denying her motion for a new trial following a jury verdict in favor of the defendant, Eaton Corporation, in this action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* She also appeals the district court's order granting in part Eaton's pre-trial motion in limine to exclude certain evidence. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Blackmon was employed at Eaton for fifteen years before being terminated in September 2010. In her complaint, Blackmon alleged that she was sexually harassed by Darrel Tetlow, a manager, when, beginning in February 2010, he stared at her breasts on at least four occasions, breathed on her neck, and rubbed her back. Blackmon alleged that her employment was terminated because she reported the sexual harassment. Eaton maintains that Blackmon was terminated because she repeatedly used a racial slur, in violation of its anti-harassment and code-of-conduct policies. The district court granted summary judgment in favor of Eaton. We

reversed and remanded the case for trial. *Blackmon v. Eaton Corp.*, 587 F. App'x 925, 935 (6th Cir. 2014).

After the district court ruled on several pre-trial evidentiary issues, the case proceeded to trial on Blackmon's claims of hostile work environment and retaliation. Following a five-day trial, the jury returned a verdict in favor of Eaton on both claims.

Blackmon filed a motion for a new trial under Federal Rule of Civil Procedure 59(a) on the grounds that the verdict was against the weight of the evidence; that the district court erred in admitting and excluding certain evidence; that defense counsel presented false and perjured testimony; and that jurors were asleep during trial. The district court denied the motion.

On appeal, Blackmon argues that she is entitled to a new trial because: (1) the verdict was against the weight of the evidence; (2) her testimony that she was required to work overtime and that her vacation time was cancelled should not have been excluded; (3) rebuttal testimony of a former administrative manager at Eaton should not have been excluded; (4) testimony that she had an extramarital affair with a former coworker should not have been admitted; (5) defense counsel presented perjured testimony; and (6) jurors were asleep during trial.

"This Court reviews a district court's denial of a party's motion for a new trial under an abuse of discretion standard." *Nolan v. Memphis City Sch.*, 589 F.3d 257, 264 (6th Cir. 2009). "Reversal is only warranted if the Court has a 'definite and firm conviction that the [district] court committed a clear error of judgment.'" *Id.* (quoting *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820 (6th Cir. 2000)). A district court can grant a new trial if the verdict "is against the clear weight of the evidence" or is unreasonable. *Id.* But "if a reasonable juror could reach the challenged verdict, a new trial is improper." *Barnes*, 201 F.3d at 821. "A verdict is not unreasonable merely because other inferences or conclusions could have been drawn or because other results are more reasonable." *Nolan*, 589 F.3d at 264.

Blackmon first argues that the verdict in favor of Eaton as to her hostile work environment and retaliation claims is against the weight of the evidence. To prove a claim of hostile work environment, Blackmon had to show that: (1) she is a member of a protected class; (2) she was subjected to unwelcome harassment based on sex; (3) the harassment created a

hostile work environment; and (4) there is a basis for liability on the part of the employer. *See Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 347 (6th Cir. 2005). To prove a claim of Title VII retaliation, Blackmon had to show that: (1) she engaged in activity that is protected by Title VII; (2) the defendant was aware of her protected activity; (3) the defendant subsequently took an employment action that was adverse to her; and (4) there was a causal connection between her protected activity and the adverse employment action. *See Mulhall v. Ashcroft*, 287 F.3d 543, 551 (6th Cir. 2002).

Blackmon has not shown that the verdict was against the clear weight of the evidence or was unreasonable. Her hostile work environment claim is premised on her allegations that Tetlow stared at her breasts in a sexual manner on several occasions and that he breathed on her neck and rubbed her back. As noted by the district court, however, there was an "abundance of evidence to the contrary" to refute Blackmon's allegations that Tetlow engaged in this conduct. Tetlow, for example, testified that he never looked at Blackmon in a sexual manner and that he never breathed on her neck or rubbed her back. None of the witnesses (other than Blackmon) testified that they saw Tetlow breathe on Blackmon's neck or rub her back, and Blackmon's superiors testified that she never reported such conduct.

Furthermore, additional evidence supported the inference that, even if Tetlow had looked at Blackmon's chest, it was only to determine whether or not she was hiding a cell phone in her shirt, because use of a cell phone while working in certain areas at Eaton is against company policy. For instance, one of Blackmon's former coworkers testified that Blackmon told him that she believed Tetlow was staring at her breasts because Tetlow knew that she kept her cell phone in her shirt and thus he was staring at her breasts to locate the cell phone. Former human resources manager Kimberly Hood testified that she received several reports from Blackmon's coworkers that Blackmon kept her cell phone hidden in her bra and would talk on her cell phone while working on the warehouse floor, in violation of company policy. Hood also testified that she had witnessed Blackmon pull her cell phone out of her shirt during a meeting to make a phone call. There was also testimony that several of Blackmon's superiors, including Hood and

Tetlow, held a meeting during which they discussed the allegations that Blackmon held her cell phone in her breasts so that she could use it to make calls while on the warehouse floor.

"Witness credibility is solely within the jury's province, and this court may not remake credibility determinations." *United States v. L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993). Based on the testimony presented, it was not unreasonable for the jury to find that Tetlow did not harass Blackmon on the basis of her sex and that Eaton had not created a hostile work environment. The district court therefore did not abuse its discretion in concluding that the verdict on Blackmon's hostile-work-environment claim was not against the weight of the evidence.

Nor did the district court abuse its discretion in rejecting Blackmon's claim that the verdict on her retaliation claim was against the weight of the evidence. Blackmon argues that Eaton retaliated against her after she reported the sexual harassment when it: (1) changed her job duties to include janitorial services; (2) falsely charged her with misconduct; (3) denied her computer access; (4) gave her negative and ill-supported performance evaluations; and (5) terminated her. She has not, however, shown a sufficient causal connection between her protected activity of reporting sexual harassment and any of the allegedly retaliatory actions. *See Allen v. Mich. Dep't of Corr.*, 165 F.3d 405, 413 (6th Cir. 1999) (vague, generalized, and conclusory allegations are insufficient to establish the causation element of a retaliation claim).

Specifically regarding her allegedly retaliatory termination, three witnesses testified that Blackmon used the "N" word multiple times and refused to stop using the word despite being instructed to do so. Jennifer Florence, former human resources development program coordinator, investigated the matter and, based on Eaton's zero-tolerance anti-harassment policy, recommended that Blackmon be terminated. Importantly, Florence made this recommendation before learning that Blackmon had reported being sexually harassed by Tetlow. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013) (holding that, in retaliation cases, a plaintiff must offer proof that "but for" the employee's protected conduct, the employer would not have taken the adverse action). Several members of Eaton's management and human resources department agreed with Florence's recommendation, and Blackmon was terminated for

violating Eaton's anti-harassment policy. Although Blackmon testified that she did not use the "N" word (except when responding to the allegation that she used the word), it was within the province of the jury to determine whose testimony was credible. *L.E. Cooke Co.*, 991 F.2d at 343. Based on the foregoing, the jury's decision to discredit Blackmon's testimony in favor of the other witnesses was not unreasonable, and Blackmon thus has failed to show that the district court abused its discretion when it found that the verdict as to her retaliation claim was not against the clear weight of the evidence.

Blackmon next claims that the district court erred in excluding her testimony that she was required to work overtime and that her vacation time was cancelled. Blackmon has waived review of these issues on appeal because she has not explained them with any detail or clarity or argued why the district court's decision to exclude the testimony was in error. *See, e.g.*, *Clanton v. Comm'r*, 491 F. App'x 610, 611 (6th Cir. 2012) (finding that appellant waived review of issues on appeal because his pleadings were "entirely conclusory, lack[ed] factual specificity, and d[id] not clearly explain the basis of his claims"); *Dillery v. City of Sandusky*, 398 F.3d 562, 569 (6th Cir. 2005) (holding that appellant waived her right to appeal district court's denial of injunctive relief because she "wholly fail[ed] to address this issue in her appellate brief"), *abrogated on other grounds as recognized by Anderson v. City of Blue Ash*, 798 F.3d 338, 357 n.1 (6th Cir. 2015).

Next, Blackmon argues that the district court erred in excluding rebuttal testimony of former administrative manager Charlie Peggins, who would have testified regarding certain "ethics complaints" that he filed against Eaton. Specifically, Blackmon claims that Peggins would have testified that he submitted ethics complaints to Eaton's corporate offices, alleging that Eaton pressured management to wrongfully terminate employees, which would have been "highly probative of the atmosphere of unethical action of Eaton . . . as it relates specifically to the culture of sexual harassment."

The district court did not abuse its "broad discretion" in excluding this evidence. *United States v. Poulsen*, 655 F.3d 492, 509 (6th Cir. 2011). First, Peggins left his employment with Eaton before Blackmon used the "N" word in September 2010—i.e., the conduct that gave rise to

her termination. He therefore lacked personal knowledge of the circumstances surrounding Blackmon's termination, which would have rendered his testimony on the subject speculative. *See Totman v. Louisville Jefferson Cty. Metro Gov't*, 391 F. App'x 454, 464 (6th Cir. 2010) (noting that "speculation is not admissible evidence" and that witnesses can testify only as to matters of which they have personal knowledge (citing Fed. R. Evid. 602)).

In addition, Peggins's proposed testimony that Eaton acted "unethical[ly]" when it pressured managers to "get [certain employees] out of the door," added little, if any, probative value to Blackmon's case. As the district court noted when it sustained defense counsel's objections to this testimony, "there's nothing about an ethics issue in this case. This [case involves] a question of whether or not there was sexual harassment and whether or not there was retaliation for making [a sexual harassment] complaint." Indeed, Peggins's proposed testimony would have contradicted Blackmon's theory of why she was terminated: Peggins claimed that Eaton planned to "push out" certain employees, and specifically alleged that Blackmon was one of those employees that Eaton sought to push out *because management had received "complaints from other associates about Ruby Blackmon,"*—not because Blackmon had reported sexual harassment. His proposed testimony, therefore, would have needlessly confused the issues and unfairly prejudiced Eaton. *See* Fed. R. Evid. 403. Accordingly, the district court did not abuse its discretion in excluding this testimony. *See Poulsen*, 655 F.3d at 509.

Nor did the district court abuse its discretion in admitting testimony from Clayton Bridgeforth, a former coworker of Blackmon's, that he had an extramarital affair with Blackmon for two years and that Blackmon harassed him and his wife once he ended the affair. As Blackmon concedes, because she did not object to this testimony at trial, we review the admission of the testimony for plain error. *See United States v. Smith*, 601 F.3d 530, 538-39 (6th Cir. 2010). Plain error review involves considering: (1) "whether an error occurred in the district court"; (2) whether the error was plain; (3) whether the plain error affects substantial rights; and (4) "whether the plain error affecting substantial rights seriously affected the fairness, integrity or public reputation of judicial proceedings." *United States v. Lumbard*, 706 F.3d 716, 721 (6th Cir. 2013) (quoting *United States v. Mahon*, 444 F.3d 530, 533 (6th Cir. 2006)).

Although Bridgeforth's testimony may have been prejudicial to Blackmon, it was not *unfairly* prejudicial, and thus its probative value was not substantially outweighed by any unfair prejudice. *See* Fed. R. Evid. 403. Blackmon testified that she went out with Bridgeforth only "a couple of times" and that she was not "upset . . . at all" when Bridgeforth ended the relationship, which occurred roughly one month before Blackmon was terminated. Bridgeforth, however, testified that Blackmon "didn't take [the break-up] very well at all. She basically lost it." He further testified that, following the break-up, Blackmon harassed him, harassed his wife, and had her friends call and harass Bridgeforth. Given the discrepancy between Blackmon's and Bridgeforth's testimony regarding Blackmon's mental state around the time when her relationship with Bridgeforth ended and when she was terminated from Eaton, Bridgeforth's testimony was probative insofar as it assisted the jury in evaluating Blackmon's credibility. Because "the credibility of a witness is always relevant," *United States v. Vandetti*, 623 F.2d 1144, 1150 (6th Cir. 1980), the district court did not commit plain error in admitting Bridgeforth's testimony.

Next, Blackmon argues that two witnesses—Tetlow and Hood—committed perjury. Blackmon has waived her argument that Tetlow committed perjury because she does not identify any portion of Tetlow's testimony that is allegedly false. *See Clanton*, 491 F. App'x at 611 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (alteration in original) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997))).

Similarly, Blackmon has not shown that any portion of Hood's testimony is false or that defense counsel suborned false testimony from Hood. She claims that Hood falsely testified that: (1) Blackmon reported sexual harassment on only one occasion, in February 2010, and (2) Blackmon violated Eaton's policies regarding use of cell phones. In an attempt to support her first claim, Blackmon refers to a document from her personnel file—which was not introduced during Hood's deposition or at trial—that states that Blackmon reported in May 2010 that she "still feels [that Tetlow] is looking at her breast" and therefore alleges that the document contradicts Hood's testimony regarding when and the number of times that Blackmon reported

sexual harassment to Hood. Blackmon, however, has not shown that Hood authored the document or had knowledge of its contents. While Blackmon may very well have reported sexual harassment to a superior *other than Hood* in May 2010, the document does not show, or lead to an inference, that Hood knew of this fact. Blackmon, therefore, cannot demonstrate that Hood's testimony is false, and indeed concedes on appeal that she "may not be able to prove definitively that Hood committed perjury." Absent a showing that Hood provided false testimony, the district court did not abuse its discretion in denying Blackmon's motion for a new trial on this basis. *See Whittington v. N.J. Zinc Co.*, 775 F.2d 698, 700 (6th Cir. 1985).

Hood's testimony regarding Blackmon's adherence to Eaton's cell phone policy likewise does not amount to perjury. Contrary to Blackmon's argument, Hood did not testify that Blackmon violated the cell phone policy by having a cell phone "on her person." Rather, Hood testified that Eaton's policy was that "[a]ll cell phones should [be] left in the lockers" and that cell phone use was not permitted "on the floor during working hours." Hood further testified that three employees informed her that Blackmon had been "talking to her sister on the phone during working hours," which would have been a violation of that policy. Hood also previously testified in her declaration that she had been informed that Blackmon had been "keeping her cellular phone in her blouse to conceal it while she talked," which also would have violated Eaton's policy of prohibiting cell phone use during working hours. Blackmon, moreover, testified that keeping a cell phone in her blouse while on the floor would have been in violation of Eaton's cell phone policy. The record thus contradicts Blackmon's assertion that Hood committed perjury and therefore fails to warrant reversal for a new trial. *See id.*

Finally, Blackmon argues that she is entitled to a new trial because several members of the jury were asleep during trial. Blackmon, however, did not object during trial that jurors were asleep. Rather, she raised the argument for the first time in her motion for a new trial. Because Blackmon did not raise this issue at trial, it is waived. *See Blue v. Coca-Cola Enter., Inc.*, 43 F. App'x 813, 816 (6th Cir. 2002) ("The failure to object to the alleged [juror] misconduct waives the argument on review.").

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk