

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EXHIBIT

PENGAD 800-631-6969

No. 17-5290

September Term, 2018

1:16-cv-00398-JEB

Filed On: January 30, 2019

Qihui Huang,

Appellant

v.

Ajit Varadaraj Pai, Chairman of Federal
Communications Commission (FCC), et al.,

Appellees

BEFORE: Henderson, Rogers, and Wilkins, Circuit Judges

ORDER

Upon consideration of the motions for summary reversal, the response, the reply, and the supplements thereto; appellees' motion for summary affirmance and the response thereto; the motion to refer for criminal prosecution and the supplement thereto; the motion for jury trial and the supplement thereto; the motion for leave to seek damages under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), and the supplement thereto; the motion for stay, which is construed as a motion to defer consideration of certain claims, and the supplement thereto; appellant's brief and appendix; and appellant's remaining submissions, which are construed as supplements to the motions for summary reversal, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly dismissed for lack of jurisdiction appellant's claims against her individual supervisors. See Jarrell v. U.S. Post Office, 753 F.2d 1088, 1091 (D.C. Cir. 1985) ("the head of the agency is the only proper defendant in a Title VII action"). Dismissal of appellant's claims arising under criminal law and her request for criminal punishment of the appellees was also proper because appellant lacks standing to enforce the criminal law. See Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

The district court construed appellant's claim of discrimination based on appellees' failure to transfer her to a new management team as arising under the

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Rehabilitation Act and properly dismissed that claim for lack of jurisdiction because appellant failed to exhaust her administrative remedies. See Spinelli v. Goss, 446 F.3d 159, 162 (D.C. Cir. 2006). The court also correctly dismissed for failure to state a claim appellant's claims of discrimination and retaliation arising from her supervisor's responses to a draft report she prepared, the failing rating on her performance review, the requirement of additional documents in support of her request for sick leave, and her placement on a Performance Improvement Plan. See Stewart v. Ashcroft, 352 F.3d 422, 426 (D.C. Cir. 2003) (to state a Title VII claim, a "plaintiff bears the burden of showing tangible employment action evidenced by firing, failing to promote, a considerable change in benefits, or reassignment with significantly different responsibilities"). Dismissal of appellant's claims of hostile work environment and constructive termination was also proper. See Baloch v. Kempthorne, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (a plaintiff alleging hostile work environment "must show that his employer subjected him to 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'") (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)) (additional citations omitted); Steele v. Schafer, 535 F.3d 689, 694-95 (D.C. Cir. 2008) (conduct giving rise to a constructive termination claim must be even more severe than what is required for a hostile work environment claim).

The district court properly granted summary judgment for appellees on appellant's claim arising from the denial of her in-grade pay step increase. While the failure to exhaust that claim could be excused on equitable grounds, see Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002), appellant has shown no error in the district court's conclusion that she abandoned her claim. Further, the district court correctly held that appellant failed to raise a material issue of disputed fact that appellee's legitimate, non-discriminatory reasons for denying appellant's pay step increase were pretextual and that appellees discriminated against her. See, e.g., Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 496 (D.C. Cir. 2008). It is

FURTHER ORDERED that the motion to refer for criminal prosecution, the motion for jury trial, and the motion to defer consideration be denied. Appellant has shown no entitlement to the requested relief. It is

FURTHER ORDERED that the motion for leave to seek Bivens damages be denied. See Brown v. GSA, 425 U.S. 820, 835 (1976) (Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

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of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EXHIBIT

PENGDAD 800-631-6889

B**No. 17-5290****September Term, 2018****1:16-cv-00398-JEB****Filed On: April 16, 2019**

Qihui Huang,

Appellant

v.

Ajit Varadaraj Pai, Chairman of Federal
Communications Commission (FCC), et al.,

Appellees

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith,
Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges**ORDER**

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.**Per Curiam****FOR THE COURT:**
Mark J. Langer, ClerkBY: /s/
Ken Meadows
Deputy Clerk