2023 WL 4046275
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

Gilbert EDWIN, Plaintiff—Appellant,
v.
CLEAN HARBORS ENVIRONMENTAL SERVICES INCORPORATED, Defendant—Appellee.
No. 22-30263

FILED June 16, 2023

Appeal from the United States District Court for the Western District of Louisiana, USDC No. 2:18-CV-385

Attorneys and Law Firms

Gilbert Edwin, Lake Charles, LA, Pro Se.

Andrew John Halverson, Greg Guidry, Ogletree Deakins, Lafayette, LA, for Defendant—Appellee.
Before Graves, Higginson, and Douglas, Circuit Judges.

Opinion

Per Curiam:*

*1 Gilbert Edwin asserts that he is an African American male who worked for Clean Harbors Environmental Services, Inc. ("Clean Harbors"). He sued his former employer, alleging racial discrimination, disparate treatment, a hostile work environment, and retaliation. Edwin appeals the district court's grant of summary judgment against him on all claims. For the reasons cited herein, we AFFIRM.

I. BACKGROUND/PROCEDURAL HISTORY

Gilbert Edwin started working for Clean Harbors, an environmental and industrial service provider, in September of 2015. After a workplace accident in August of 2017, Edwin went on leave for four months. During that time, Edwin filed a workers' compensation claim in October, and a charge with the Equal Employment Opportunity Commission ("EEOC") for race discrimination in December.

After Edwin was cleared to return to work in January of 2018, Clean Harbors informed him that he needed to schedule a drug test, per company policy. Edwin then disclosed to Clean Harbors that he smoked marijuana and tested positive on January 16, 2018. Seven days later, Edwin was terminated for violating Clean Harbors' Alcohol and Drug Policy. Edwin asked Clean Harbors to reconsider his termination, claiming that he used marijuana for medical reasons. However, after further review, Clean Harbors maintained Edwin's termination.

Edwin then filed five claims against Clean Harbors: (1) a hostile work environment claim, (2) a disparate treatment claim, and (3) a retaliation claim, under Title VII, all based on racial discrimination, (4) a state law retaliation claim, under Louisiana's Whistleblower statute, La. R.S. § 23:967, and (5) a state law retaliation claim, under La. R.S. § 23:1361, alleging that Clean Harbors retaliated against him for taking workers' compensation.

The district court granted Clean Harbors' motion for summary judgment on all claims except for the Title VII retaliation claim. However, on reconsideration, the district court dismissed the remaining Title VII retaliation claim with prejudice. Edwin timely appealed.

II. MOTION FOR RECONSIDERATION

Edwin contends that the district court should not have granted Clean Harbors' motion for reconsideration of its denial of summary judgment on the Title VII retaliation claim, contending that a motion for reconsideration is not a proper vehicle for asserting new arguments. We review a district court's grant of a motion for reconsideration for abuse of discretion. *Williams v. Wells Fargo Bank, N.A.*, 884 F.3d 239, 243 (5th Cir. 2018).

Even if we were to accept that Clean Harbors did, in fact, assert a new argument, the district court was allowed to review it under Federal Rule of Civil Procedure 54(b) because "Rule 54(b)'s approach to the interlocutory presentation of new arguments as the case evolves can be more flexible, reflecting the 'inherent power of the rendering district court to afford such relief from interlocutory judgments as justice requires.' " *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 337 (5th Cir. 2017) (citations omitted). Moreover, "Rule 54(b) allows parties to seek reconsideration of interlocutory orders and authorizes the district court to

'revise[ ] at any time' 'any order or other decision ... [that] does not end the action.' " *Id.* at 336 (citing Fed. R. Civ. P. 54(b)).

*2 Thus, the district court did not abuse its discretion in granting Clean Harbors' Motion for Reconsideration.

III. STANDARD OF REVIEW

We review a grant of summary judgment *de novo*. *Hudson v. Lincare, Inc.*, 58 F.4th 222, 228 (5th Cir. 2023) (citation omitted). We apply the same standard as the district court and may affirm "on any ground supported by the record." *Id.* (citations omitted).

Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(a)). Summary judgment will be denied only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (citation omitted). "All 'reasonable inferences,' however, 'should be drawn in favor of the nonmoving party.' " *Id.* at 228-29 (citation omitted).

IV. DISCUSSION

Edwin argues that the district court erroneously entered summary judgment in favor of Clean Harbors on his hostile work environment, disparate treatment, and three retaliation claims. We discuss each in turn.

A. Hostile Work Environment Claim

To establish a claim of hostile work environment under Title VII, a plaintiff must prove he: "(1) belongs to a protected group; (2) was subjected to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; [and] (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012) (citation omitted).

In Louisiana, "[a]n individual claiming discrimination in violation of Title VII must file a charge of discrimination with the EEOC within 300 days 'after the alleged unlawful employment practice occurred.' " *E.E.O.C. v. WC&M Enters., Inc.*, 496 F.3d 393, 398 (5th Cir. 2007) (quoting 42 U.S.C. § 2000e-5(e)(1)); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002)("In a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days."). "Because a hostile work environment generally consists of multiple acts over a period of time, the requisite EEOC charge must be filed within 300 days of any action that contributed to the hostile work environment." *WC&M Enters., Inc.*, 496 F.3d at 398 (citations omitted).

Edwin filed his EEOC claim on December 13, 2017. He raised six acts of alleged racial harassment before the district court. As the district court correctly found, the first five acts were untimely challenged because they occurred between September 2015 and November 2016.

The only timely act raised by Edwin in the district court was an August 2017 low performance review by his manager, Marcel Bienvenu. If this event contributed to a hostile work environment, then our court may consider all of the prior acts of alleged harassment. *WC&M Enters., Inc.*, 496 F.3d at 398. Edwin failed to adequately brief this argument on appeal, however, so it is forfeited.[2] *See Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 397 (5th Cir. 2021).

*3 Even if this issue was adequately briefed on appeal, it would nevertheless fail because Edwin fails to show how the low performance review constituted harassment based on race that contributed to a hostile work environment. The act is not "sufficiently severe or pervasive to alter the conditions of [Edwin's] employment and create an abusive working environment," as required to support a hostile work environment claim. *WC&M Enters., Inc.*, 496 F.3d at 399 (cleaned up). "For harassment to be sufficiently severe or pervasive to alter the conditions of the victim's employment, the conduct complained of must be both objectively and subjectively offensive." *Id.*

Here, Edwin did not discuss the performance review being racially motivated in his EEOC report, or in his deposition. In his deposition, Edwin was repeatedly asked why he thought Bienvenu gave him poor reviews, and he never mentioned race — he answered only that Bienvenu "wasn't a fair supervisor." In his brief, Edwin states that Bienvenu told him he had given him poor reviews because "you don't like your job." Thus, Edwin fails to present evidence that the act was subjectively offensive.

Even if Edwin had presented such evidence, we find that it is not objectively offensive. To determine whether the victim's work environment was objectively offensive, courts consider the totality of the circumstances, including (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance. *WC&M Enters., Inc.*, 496 F.3d at 399. None of the above factors weigh in Edwin's favor.

Moreover, "criticism of an employee's work performance does not satisfy the standard for a harassment claim" where "the record demonstrates deficiencies in the employee's performance that are legitimate grounds for concern or criticism," as it does here. *Thompson v. Microsoft Corp.*, 2 F.4th 460, 471 (5th Cir. 2021) (cleaned up). The record shows that Edwin was caught sleeping on site, was frequently late, and left the plant without approval.

To the extent that Edwin now alleges his termination was a seventh act of harassment, this argument was raised for the first time on appeal, so it is also forfeited. *Rollins*, 8 F.4th at 397. Even so, our court has held that termination is not a separate incident of a hostile work environment. *See Parker v. State of La. Dep't. of Educ. Special Sch. Dist.*, 323 Fed. App'x 321, 327 (5th Cir. 2009); *see also Estate of Martineau v. ARCO Chem. Co.*, 203 F.3d 904, 913 (5th Cir. 2000).

Because Edwin fails to point to any act of harassment that was timely to his EEOC filing, properly briefed, and rises to the level of severity required of a hostile work environment claim, we AFFIRM the district court's grant of summary judgment on this claim.

B. Disparate Treatment Claim

To establish a *prima facie* case of disparate treatment under Title VII, a plaintiff must show "that he (1) is a member of a protected group; (2) was qualified for the position at issue; (3) was discharged or suffered some adverse employment action by the employer; and (4) was replaced by someone outside his protected group or was treated less favorably than other similarly situated employees outside the protected group." *Ernest v. Methodist Hosp. Sys.*, 1 F.4th 333, 339 (5th Cir. 2021) (citation omitted).

To satisfy the "similarly situated" prong, the employee typically carries out a comparator analysis. *Saketkoo v. Adm'rs of Tulane Educ. Fund*, 31 F.4th 990, 998 (5th Cir. 2022) (citations omitted). Under this analysis, Edwin must establish that he was treated less favorably than a similarly situated employee outside of his protected class in nearly identical circumstances. *Id.* (citations omitted). "A variety of factors are considered when determining whether a comparator is similarly situated, including job responsibility, experience, and qualifications." *Id.* (citation omitted).

*4 Edwin contends that Bryce Manuel, a white male, is a similarly situated comparator because they initially shared the same job title and Manuel was promoted ahead of Edwin. We disagree. Job titles alone do not make employees similarly situated. *See Owens v. Circassia Pharm., Inc.*, 33 F.4th 814, 827 (5th Cir. 2022). While the two men initially shared the same job title, the record shows that Manuel was hired to act as the lead press operator, and his responsibilities included operating the press, facilitating trailer drops, and acting as a liaison between Clean Harbors and PPG Industries. In contrast, Edwin was an environmental technician and did not regularly serve in the same liaison role. The record also shows that Edwin had no prior technician experience when he started at Clean Harbors, whereas Manuel had prior experience with the exact equipment used in his role as lead press operator.

Because Edwin fails to present a similarly situated comparator, we AFFIRM the district court's grant of summary judgment on this claim.

C. Retaliation Claim Under Title VII

To establish a *prima facie* case of retaliation under Title VII, Edwin must show that "(i) he engaged in a protected activity, (ii) an adverse employment action occurred, and (iii) there was a causal link between the protected activity and the adverse employment action." *Hernandez*, 670 F.3d at 657 (citation omitted).

"If the plaintiff successfully presents a *prima facie* case, the burden shifts to the employer to provide a 'legitimate, non-retaliatory reason for the adverse employment action.' " *Id.* (citations omitted). At this stage, the employer's burden is one of "production, not persuasion," and "involve[s] no credibility assessment." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (cleaned up); *see also Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) ("The employer need only articulate a lawful reason, regardless of what its persuasiveness may or may not be."). If the employer meets this burden, it shifts back to the plaintiff to show that the employer's rationale is merely a

pretext for discrimination. *Reeves*, 530 U.S. at 143.

Here, Clean Harbors does not dispute that Edwin stated a *prima facie* case of retaliation but asserts that it terminated Edwin for failing a drug test, a violation of company policy. Thus, pretext is the sole issue on appeal.

"A plaintiff may show pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or unworthy of credence." *Caldwell v. KHOU-TV*, 850 F.3d 237, 242 (5th Cir. 2017) (citation omitted). Because Clean Harbors' reason for Edwin's termination was his failed drug test, to prevail at this stage, Edwin must show that reasonable minds could disagree that this was, indeed, the reason for his termination. *Owens*, 33 F.4th at 826.

Here, Edwin points to two sections of Clean Harbors' Alcohol and Drug policy to show that Clean Harbors had substantial discretion in his termination so its decision to terminate him was pretextual.[3] However, "employment laws do not transform federal courts into human resources managers, so the inquiry is not whether [Clean Harbors] made a wise or even correct decision to terminate [Edwin]." *Owens*, 33 F.4th at 826 (cleaned up). "Instead, the ultimate determination, in every case, is whether, viewing all of the evidence in a light most favorable to the plaintiff, a reasonable factfinder could infer discrimination." *Id.* (cleaned up). It was Clean Harbors' policy to terminate any employee in a safety-position, like Edwin, who tests positive for drugs, regardless of their performance or rank, and Edwin has pointed to no evidence that his termination was actually motivated by retaliation rather than the failed drug test. Thus, Edwin has failed to show that a reasonable factfinder could infer discrimination.

*5 Because Edwin fails to present evidence that Clean Harbors' reason for terminating him was pretextual, we AFFIRM the district court's grant of summary judgment of this claim.

D. Retaliation Claim Under La. R.S. § 23:967

Louisiana Revised Statute § 23:967 bars an employer from "tak[ing] reprisal against an employee who in good faith, ... [d]iscloses or threatens to disclose a workplace act or practice that is in violation of state law." La. R.S. § 23:967. Under this statute, "the employer *must have* committed a 'violation of state law' for an employee to be protected from reprisal." *Puig v. Greater New Orleans Expressway Comm'n*, 772 So.2d 842, 845 (La. App. 5 Cir. 2000) (emphasis in original). Thus, to state a claim under the statute, a plaintiff must "indicate which state law, if any, was violated...." *Ware v. CLECO Power, LLC*, 90 F. App'x 705, 709 (5th Cir. 2004); *see also Encalarde v. New Orleans Ctr. for Creative Arts/Riverfront*, 158 So.3d 826, 826 (La. 2015). Edwin's contention that "there is no requirement that a specific state law be identified" is without merit.

Because Edwin fails to identify any state law Clean Harbors violated, we AFFIRM the district court's grant of summary judgment on this claim.

E. Retaliation Claim Under La. R.S. § 23:1361

Edwin fails to adequately brief the merits of this claim on appeal, so it is forfeited.[4] *Rollins*, 8 F.4th at 397. However, even if this issue was not forfeited, as the district court correctly held, Edwin fails to state a *prima facie* case of retaliation.[5]

Louisiana Revised Statute § 23:1361 states that, "[n]o person shall discharge an employee from employment because of said employee having asserted a claim for [workers' compensation]." La. R.S. § 23:1631(B). "To prevail on a retaliation claim, under § 23:1361, the plaintiff must establish that filing a workers' compensation claim was 'more probably than not' the reason for her termination." *Claiborne v. Recovery Sch. Dist.*, 690 F. App'x 249, 260 (5th Cir. 2017) (citing *Chivleatto v. Sportsman's Cove, Inc.*, 907 So.2d 815, 819 (La. App. 5 Cir. 2005)). However, "[i]f the employer gives a nondiscriminatory reason for the discharge, and presents sufficient evidence to prove more probably than not that the real reason for the employee's discharge was something other than the assertion of the workers' compensation claim, the plaintiff is precluded from recovery." *Woolsey v. Delta Disposals, LLC*, 914 So.2d 618, 621 (La. App. 2 Cir. 2005) (citation omitted).

Clean Harbors' nondiscriminatory reason for terminating Edwin was his failure to pass a drug test, a violation of company policy. Clean Harbors' policy prohibits the use of illicit drugs. It states that "[a]ny employee returning to work following a thirty (30) day absence may be subject to a 'Return from Leave' alcohol and drug test. A negative result is required before they will be permitted to return to their duties." The policy further states that discipline for failing to comply with the drug policy may include "termination for cause."

*6 Here, Edwin was injured in a workplace accident in August of 2017, and did not return to work until January of 2018. In line with company policy, Edwin was subject to a return from leave drug test, which was positive for marijuana. Seven days after his positive drug test, Edwin was terminated. Thus, Clean Harbors presents sufficient evidence to prove more probably than not that the reason for Edwin's termination was his failed drug test, not his workers' compensation claim.

Moreover, Edwin filed his workers' compensation claim in October of 2017, and the record shows that in November of 2017, Clean Harbors contacted Edwin to see when he would be returning to work. As the district court correctly observed, the fact that Clean Harbors was working with Edwin to return to work after he filed his workers' compensation claim, and prior to his termination, undermines the claim.

Because Edwin fails to establish a *prima facie* case under § 23:1361, we AFFIRM the district court's grant of summary judgment on this claim.

V. CONCLUSION

For the aforementioned reasons, the judgment of the district court is AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2023 WL 4046275

Footnotes

* This opinion is not designated for publication. See 5th Cir. R. 47.5.

1 The denial of a motion for summary judgment is an interlocutory order, and a motion for reconsideration of such denial is analyzed under Federal Rule of Civil Procedure 54(b). *See Cabral v. Brennan*, 853 F.3d 763, 766 (5th Cir. 2017).

2 To the extent it could be argued that Edwin raised the issue in his reply brief, "[t]his court does not entertain arguments raised for the first time in a reply brief." *U.S. v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009).

3 While this argument fails because employers are allowed to be wrong in their employment decisions, Edwin nevertheless does not fit under either section of the policy. Section 9.0 encourages employees to voluntarily come forward to seek the assistance of a substance abuse expert or professional, and/or employee assistance program, on their own, without fear of reprisal. It is undisputed that Edwin voluntarily disclosed that he smoked marijuana without a prescription. However, nothing in the record indicates that Edwin sought assistance under Section 9.0.
Section 12.0, states that "[b]efore undertaking disciplinary measures with an employee who has failed to comply with the requirements of Clean Harbors' Alcohol and Drug Policy or Standard, Clean Harbors must take appropriate steps to determine if the violation ... is related to any disability which Clean Harbors has a legal duty to accommodate." Edwin contends that the marijuana was prescribed from his doctor to treat a disability. However, the record shows that the marijuana was not prescribed by a doctor. Moreover, Clean Harbors' director of human resources, two vice presidents, and internal counsel all reviewed the doctor's note before making the decision to terminate Edwin.

4 Edwin briefs the relevant legal standard then, in one sentence, claims that the district court erred in concluding he failed to state a *prima facie* case, without any analysis.

5 Because Edwin fails to state a *prima facie* case, we do not reach the relation back issue.

End of Document

2022 WL 990530
Only the Westlaw citation is currently available.
United States District Court, W.D. Louisiana,
Lake Charles Division.

Gilbert EDWIN

v.

CLEAN HARBORS ENVIRONMENTAL SERVICES INC.

CIVIL ACTION NO. 2:18-0385

Signed 03/31/2022

Attorneys and Law Firms

Philip Joel Burse, Law Office of Philip Burse, Baton Rouge, LA, for Gilbert Edwin.

Gilbert Edwin, Lake Charles, LA, Pro Se.

Gregory Guidry, Andrew John Halverson, Ogletree Deakins et al., Lafayette, LA, for Clean Harbors Environmental Services Inc.

MEMORANDUM RULING

S. MAURICE HICKS, JR., CHIEF JUDGE

*1 Presently before the Court is Defendant's Motion for Reconsideration regarding the Court's previous order on the Motion for Summary Judgment. Rec. Doc. 122. The Defendant asks that the Court reconsider its previous ruling denying the Motion for Summary Judgment regarding Plaintiff's Title VII retaliation claim. This Motion was opposed by the Plaintiff. Rec. Doc. 126. For the following reasons, the Motion is GRANTED.

I. Procedural and Factual Background

The Plaintiff in this case, Mr. Gilbert Edwin, sued his former employer Clean Harbors Environmental Services Inc. ("Clean Harbors"), alleging claims of racial discrimination and retaliation. Rec. Doc. 42. Clean Harbors subsequently moved for summary judgment on all claims. Rec. Doc. 71. After reviewing the record, the Court granted summary judgment on most of Mr. Edwin's claims but denied summary judgment on Mr. Edwin's Title VII retaliation claim. Rec. Doc. 116.

Regarding this Title VII retaliation claim, the Court ruled that Mr. Edwin had made his *prima facie* case for retaliation because Mr. Edwin had filed an EEOC claim, was subsequently fired, and because Clean Harbors had seemingly been notified by the EEOC of the investigation. Id. at 10. The Court further held that there was an issue of material fact regarding the company policies which could lead a reasonable jury to find that the decision to fire Mr. Edwin was pretextual. Id. at 11-12. It is this ruling that Clean Harbors is asking the Court to reconsider.

II. Legal Standard

While the Federal Rules of Civil Procedure do not explicitly recognize a motion for reconsideration, such motions are generally reviewed under Federal Rule of Civil Procedure 54(b). Rule 54(b) allows a court to "reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir. 1981). Generally, the Courts treat such motions in a similar fashion as Rule 59(e) motions to alter or amend the judgment, although the "standards for granting reconsideration under Rule 54(b) are somewhat looser than those under Rule 59(e)." Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp., 259 F.Supp.2d 471, 475 (M.D. La. 2002); see also HBM Interests, LLC v. Chesapeake La., *LP*, 2013 WL 3893989 at *1 (W.D. La. 2013). These types of motions are generally meant to "serve the narrow purpose of allowing a party 'to correct manifest errors of law or fact or to present newly discovered evidence.' " Waltman v. Int'l Paper Co., 875 F.2d 468, 473 (5th Cir. 1989) (quoting Keene Corp. v. Int'l Fidelity Insurance Co., 561 F.Supp. 656, 665 (N.D. Ill. 1982)).

III. Application

a. *Prima Facie* case

Here, Clean Harbors is asking the Court to reconsider, arguing that it made errors in its analysis of the record regarding both the *prima facie* case of the Title VII retaliation claim as well as the issue of pretext. The Court will first analyze the issue regarding Mr. Edwin's *prima facie* case of Title VII retaliation.

To establish a *prima facie* case of retaliation under Title VII, the Plaintiff must show that "(i) he engaged in a protected activity, (ii) an adverse employment action occurred, and (iii) there was a causal link between the protected activity and the adverse employment action." Hernandez v. Yellow Transportation, Inc., 670 F.3d 644 (5th Cir. 2012). Regarding the causal link, "[c]lose timing between an employee's protected activity and an adverse action against him may provide the 'causal connection' required to make out a *prima facie* case of retaliation." Swanson v. General Services Admin., 110 F.3d 1180, 1188 (5th Cir. 1997) (citing Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993)).

*2 In the present matter, the first two prongs were not disputed. Mr. Edwin had filed a report with the EEOC and was subsequently fired. This Court previously held that there were enough facts to establish the third prong regarding causation because the record seemed to indicate that Clean Harbors had been sent a letter from the EEOC approximately one month prior to Mr. Edwin's termination. See Rec. Doc. 116 at 10; Rec. Doc. 71-2, Exhibit 18 at CH0010-0011. In its Motion for Reconsideration, however, Defendant has shown that this Notice from the EEOC was not received. Rec. Doc. 122-1 at 2-3. Rather, it appears that the EEOC Notice was sent to an incorrect email address on December 19, 2017 and was not resent thereafter. Rec. Doc. 71-2, Exhibit 18 at CH0024. Clean Harbors has also demonstrated the reason the email was not received, as the email address used by the EEOC in sending the Notice contained a typo. Compare Rec. Doc. 71-2, Exhibit 18 at CH0024 with Rec. Doc. 71-2, Exhibit 10 at CH0252 (demonstrating that the email used by the EEOC was wrong). It is thus apparent that Clean Harbors would not have had knowledge of Mr. Edwin's EEOC filing through the EEOC Notice as that email was not delivered.

A further review of the record demonstrates that without this basis, it is unclear whether Clean Harbors had any knowledge that Mr. Edwin had filed an EEOC claim prior to his termination. Mr. Edwin first personally informed Clean Harbors of his EEOC complaint at the time he was being terminated. See Rec. Doc. Rec. Doc. 99-10, page 286; Rec. Doc. 99-7, pages 189-193. However, by this time the decision to terminate Mr. Edwin had already been finalized for his failure to comply with the company's drug policy. Rec. Doc. 71-2, Exhibit 16 at CH0623. Thus, any knowledge stemming from Mr. Edwin himself would not establish a *prima facie* case of retaliation. Factual issues remain, however, as to whether Clean Harbors had notice of the EEOC complaint through the right to sue notification. In her deposition, Barbara Ward, Clean Harbors' Human Resources Director, initially stated that she had received the right to sue notification from the EEOC on December 21, 2017. Rec. Doc. 105-4, p. 83, lines 17-25. However, later in her deposition, Ms. Ward noted that the right to sue notification had been sent to the wrong address and had been faxed to her "sometime in January." Id., p. 173-174. This right to sue notification shows that Mr. Edwin had filed some claim with the EEOC although it did not include any details of the charge or investigation. Rec. Doc. 71-2, Exhibit 18 at CH0013-0014. Thus, there remains some factual dispute as to when Clean Harbors received this right to sue notification, although it appears that they received it sometime during the month prior to Mr. Edwin's termination. Because close proximal timing can by itself establish a *prima facie* case of retaliation, the Court finds that summary judgment remains inappropriate as to the *prima facie* case.

b. Evidence of Pretext

In a retaliation case, if the plaintiff can establish their *prima facie* case of retaliation, then the burden shifts to the defendant "to proffer a legitimate, non-retaliatory reason for ... [the] termination." Musser v. Paul Quinn College, 944 F.3d 557, 561 (5th Cir. 2019). If the defendant can do so, then the burden shifts back to the plaintiff who must then show that the employer's reason is a mere pretext, which requires a "showing that the adverse action would not have occurred 'but for' the employer's retaliatory motive." Feist v. La. Dep't of Justice, Office of Att'y General, 730 F.3d 450, 454 (5th Cir. 2013) (citing Univ. of Texas Southwestern Med. Center v. Nassar, 570 U.S. 338, 360-61 (2013)). To meet this but for showing, the plaintiff must "show that there is a 'conflict in substantial evidence' on this ultimate issue." Musser, 944 F.3d at 561 (quoting Hernandez, 670 F.3d at 658). This standard can be met by showing evidence such as "disparate treatment, or that her employer's explanation is unworthy of credence." Brown v. Wal-Mart Stores East, L.P.,

969 F.3d 571, 577 (5th Cir. 2020) (quoting Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll., 719 F.3d 356, 363 (5th Cir. 2013)). Further, evidence that a company failed to follow their policies may also be used in establishing pretext. See Smith v. Xerox Corp., 371 F.App'x 514, 520 (5th Cir. 2010) (citing the question of "whether the employer followed its typical policy and procedures in terminating the employee" as one "indicia of causation").

*3 Here, Clean Harbors has demonstrated a legitimate, non-retaliatory reason for firing Mr. Edwin. As Mr. Edwin sought to come back to work, he tested positive for marijuana. Rec. Doc. 71-2, Exhibit 15 at CH0052; Rec. Doc. 71-2, Exhibit 13 at CH 0254. While Mr. Edwin has referred to this as medical marijuana, it is undisputed that it was not prescribed by a doctor. Rec. Doc. 98-1, Exhibit 31 at CH0402 (a doctor's letter noting that the doctor was not authorized to prescribe medical marijuana); Rec. Doc. 71-2, Exhibit 11, ¶ 6. Clean Harbors has a policy which "strictly prohibits the possession, use ... of illicit drugs or other intoxicants." Rec. Doc. 71-2, Exhibit 2 at CH0064. Further, any employee returning from a leave of absence could be required to take a drug test. Rec. Doc. 71-2, Exhibit 3 at CH0163. Violation of the policy could result in discipline "up to and including termination for cause." Id. at CH0170. Thus, Clean Harbors has met their burden of showing a valid reason for firing Mr. Edwin, which shifts the burden to Mr. Edwin to establish pretext.

In its original ruling, the Court held that certain Clean Harbors policies seemed to provide Clean Harbors with enough discretion that they could have chosen not to fire Mr. Edwin. Rec. Doc. 116, p. 11-12. Clean Harbors now asks the Court to reconsider that position for two reasons, first that the Court failed to consider how Mr. Edwin's safety-sensitive position impacted their decision to terminate and, second, that Mr. Edwin would not technically meet the policy requirements. The Court will consider each argument in turn.

Clean Harbors first argues that it was policy to fire any employees in safety-sensitive positions who failed a drug screening. The Court notes that this issue was not initially raised in the Motion for Summary Judgment but that Clean Harbors feels that this is now relevant in light of the Court's previous ruling. In her deposition testimony, Ms. Ward repeatedly indicates that it was Clean Harbors' policy to terminate any "employee [who] tests positive in a safety-sensitive position for drugs" and that this was true regardless of "whether he was a good performer, a poor performer, [or] the greatest employee ...". Rec. Doc. 105-4, p. 65, lines 5-22. See also Id., p. 69, lines 16-20; Id., p. 179, lines 1-3 (stating that when there was a positive test "[i]n a safety-sensitive position, [that she] had no examples of when it did not result in termination"). Mr. Edwin's job was a safety-sensitive position. Id., p. 95, lines 1-8. Mr. Edwin has not shown any evidence that would create a factual dispute on this specific issue, and it would thus appear on reconsideration that Clean Harbors was following their normal drug-related policy regarding safety-sensitive positions.

Clean Harbors also asks the Court to reconsider whether Mr. Edwin might still be protected by other portions of the company's drug policies. Clean Harbors' policy protects an individual who suffers from "an alcohol or drug dependency" and who "voluntarily come[s] forward to seek the assistance" of one of several experts for that dependency. Rec. Doc. 71-2, Exhibit 3 at CH0169. Notably, Mr. Edwin does not clearly fit this policy as he was not seeking help for dependency, but rather mentioned his drug use as he sought to return to work because he was about to fail his drug test. In its previous ruling, however, the Court had noted that this policy seemed to provide Clean Harbors with some discretion and that they could have chosen not to fire Mr. Edwin. However, this finding no longer appears accurate in light of the additional, undisputed information discussing Clean Harbors' consistent practice regarding positive drug screens for employees in safety-sensitive positions. As such, it would appear that there is no longer a "conflict in substantial evidence" that would show that Clean Harbors stated reason for terminating Mr. Edwin, namely his failed drug test as he sought to return to work, was pretextual.

As a final note, Mr. Edwin argues that Clean Harbors failed to meet its policy by investigating if his violation of the Alcohol and Drug Policy was "related to any disability which Clean Harbors [had] a duty to accommodate." Id. at CH0170. However, it is undisputed that Clean Harbors did, in fact, review this issue, including the doctor's note discussing Mr. Edwin's marijuana usage, but determined that terminating Mr. Edwin remained the correct decision. Rec. Doc. 105-4, p. 190-191; Rec. Doc. 71-2, Exhibit 17 at CH0078. Thus, it appears that this policy would not protect Mr. Edwin either.

*4 Ultimately, upon reconsideration, the Court agrees with Clean Harbors that Mr. Edwin has not met his burden of proving that the decision to terminate Mr. Edwin for his violation of the Alcohol and Drug Policy was pretextual. There are no facts to dispute the contention that Clean Harbors had a consistent internal policy to terminate

individuals in safety-sensitive positions who violated the policy. As such, Mr. Edwin's Title VII retaliation claim should be dismissed.

IV. Conclusion

As a result of the foregoing analysis, Defendant's Motion for Reconsideration (Rec. Doc. 122) is GRANTED. Therefore, Plaintiff's remaining claim for retaliation under Title VII is DISMISSED WITH PREJUDICE. The instant ruling dismisses Plaintiff's final claim and the case is thus closed.

IT IS SO ORDERED.

THUS DONE AND SIGNED, in Shreveport, Louisiana, on this 31st day of March, 2022.

All Citations

Slip Copy, 2022 WL 990530

End of Document