No. 10-3155

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EMETRIA WHEELER

Plaintiff-Appellant,

vs.

BNSF RAILWAY COMPANY AND MIKE D. HARDING

Defendants-Appellees

Appeal from the United States District Court
for the District of Kansas

The Honorable Kathryn H. Vratil
District Court No. 09-2270-KHV

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

ARGUMENTS AND AUTHORITIES 1

I. THE SUFFICIENCY OF THE EVIDENCE TO ESTABLISH AN "ADVERSE" EMPLOYMENT ACTION IN THE CONTEXT OF MS. WHEELER'S DISCRIMINATION CLAIM 1

Sanchez v. Denver Public Schools,
164 F.3d 527, 532 n. 6 (10th Cir. 1998) 1

II. THE SUFFICIENCY OF THE EVIDENCE TO ESTABLISH AN "ADVERSE" EMPLOYMENT ACTION IN THE CONTEXT OF MS. WHEELER'S RETALIATION CLAIM 3

A. The Failure to Transfer Ms. Wheeler From Lincoln to Topeka 3

Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53, 68-69 (2006) 3

B. The Less Favorable Treatment of Ms. Wheeler After She Had Returned to Topeka 5

III. ALTERNATIVE GROUNDS FOR AFFIRMING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS 6

CONCLUSION 8

CERTIFICATE OF COMPLIANCE WITH RULE 32 8

CERTIFICATE OF DIGITAL SUBMISSION 9

CERTIFICATE OF SERVICE 10

ARGUMENTS AND AUTHORITIES

In their answer brief, the defendants/appellees, BNSF Railway Company and Mike D. Harding, make several arguments which require a response from the plaintiff/appellant, Emetria Wheeler. These arguments relate to one or another of the three issues raised in this appeal: (1) the sufficiency of the evidence to establish an "adverse" employment action in the context of Ms. Wheeler's discrimination claim; (2) the sufficiency of the evidence to establish an "adverse" employment action in the context of Ms. Wheeler's retaliation claim; and (3) alternative grounds for affirming summary judgment in favor of the defendants. These three topics will be addressed in order.

I. THE SUFFICIENCY OF THE EVIDENCE TO ESTABLISH AN "ADVERSE" EMPLOYMENT ACTION IN THE CONTEXT OF MS. WHEELER'S DISCRIMINATION CLAIM

In regard to Ms. Wheeler's discrimination claim, the defendants contend that the evidence is not sufficient to establish any "adverse" employment action, since any transfer from the BNSF facility in Lincoln, Nebraska, to another BNSF facility in either Topeka or Kansas City, Kansas, would merely constitute a lateral transfer. The defendants assert:

> 'If a transfer is truly lateral and involves no significant changes in an employee's conditions of employment, the fact that the employee views the transfer either positively or negatively does not of itself render the denial or receipt of the transfer [an] adverse employment action.' Sanchez v. Denver Public Schools, 164 F.3d 527, 532 n. 6 (10th Cir. 1998).

(Aplee. Br. at pp. 25-26)

This court's decision in Sanchez does not compel the conclusion that the failure to transfer Ms. Wheeler from Lincoln to either Topeka or Kansas City did not constitute an adverse employment action. The Sanchez court went on to explain:

> The Tenth Circuit liberally defines the phrase 'adverse employment action.' [Citations omitted]. Such actions are not simply limited to monetary losses in the form of wages or benefits. [Citation omitted.] Instead, we take 'a case-by-case approach,' examining the unique factors relevant to the situation at hand.

164 F.3d at 532. Emphasis added.

Based on two "unique factors" present here, a reasonable jury could find that the failure to transfer Ms. Wheeler from Lincoln to either Topeka or Kansas City did constitute an adverse employment action. The first unique factor is that from October of 2002 through June of 2008, nineteen employees chose to transfer from Lincoln to Topeka. (Aplt. App. at 93, 99, 100, 207) A reasonable jury could infer from the choice made by nineteen employees that a position in the Topeka facility was objectively more desirable than a position in the Lincoln facility.

The second unique factor here consists of Ms. Wheeler's testimony that she and the other employees who had transferred from Topeka considered the Lincoln facility to be "a big step back in time," in comparison to the Topeka facility. (Aplt. App. at 97) A reasonable jury could infer from this testimony that the Topeka facility was more modern than the Lincoln facility, and therefore the

working conditions in the Topeka facility were more favorable than those in the Lincoln facility.

II. THE SUFFICIENCY OF THE EVIDENCE TO ESTABLISH AN "ADVERSE" EMPLOYMENT ACTION IN THE CONTEXT OF MS. WHEELER'S RETALIATION CLAIM

A. The Failure To Transfer Ms. Wheeler From Lincoln to Topeka

In regard to Ms. Wheeler's retaliation claim, the defendants agree that "the standard for assessing whether a given action is an 'adverse employment action' sufficient to support a retaliation claim is sensitive to the particular circumstances of each case," citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68-69 (2006). (Aplee. Br. at p. 27) However, the defendants go on to argue that even under this standard, the failure to transfer Ms. Wheeler from Lincoln to Topeka after June of 2007 (when she filed her administrative charge with the Topeka Human Relations Commission) does not rise to the level of an "adverse" employment action. The defendants contend:

> As set forth above, the 'denial' of a transfer to a position which bears no difference in responsibilities, pay or benefits does not constitute an 'adverse action' to support a retaliation claim under Title VII.

(Aplee. Br. at p. 29)

A similar argument was made by BNSF in Burlington N. & Santa Fe Ry. Co. v. White. One of the retaliatory acts found by the jury there was that after Ms. White had complained about sexual harassment, she was removed from her forklift duty and assigned to perform only standard track laborer tasks. 548 U.S.

at 58. BNSF argued that "a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description." 548 U.S. at 70. The Supreme Court rejected BNSF's argument, explaining:

> Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found '[r]etaliatory work assignments' to be a classic and 'widely recognized' example of 'forbidden retaliation.' . . .
>
> To be sure, reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.'

548 U.S. at 70-71. Emphasis added.

Applying the above analysis to the facts here, a reasonable jury could find that a reasonable person in Ms. Wheeler's position would consider the failure to transfer her from Lincoln to Topeka after June of 2007 was materially adverse, based upon two circumstances. One circumstances is the uncontroverted fact that from October of 2002 through June of 2008, nineteen employees chose to transfer from Lincoln to Topeka. (Aplt. App. at 93, 99, 100, 207) The other circumstance consists of Ms. Wheeler's testimony that she and the other

employees who had transferred from Topeka considered the Lincoln facility to be "a big step back in time," in comparison to the Topeka facility. (Aplt. App. at 97) A reasonable jury could infer from this evidence that the working conditions in the Lincoln facility were "more arduous," when compared with "the easier and more agreeable" working conditions in the Topeka facility.

B. The Less Favorable Treatment Of Ms. Wheeler After She Had Returned To Topeka

The defendants further argue that the less favorable treatment of Ms. Wheeler after she had returned to Topeka in August of 2008 does not rise to the level of an "adverse" employment action. BNSF contends:

> It is undisputed that Wheeler has not been disciplined or reprimanded since her transfer and that she has equivalent duties, pay and benefits as existed prior to her transfer. Wheeler simply fails to show any materially adverse [action] that could dissuade a reasonable employee from making or supporting a charge of discrimination.

(Aplee. Br. at 30)

As discussed above (p. 4), a similar argument was made by BNSF in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. at 70. The Supreme Court rejected BNSF's argument there, emphasizing that "[r]etaliatory work assignments" are a classic example of "forbidden retaliation." 548 U.S. at 71. Here, a reasonable jury could find that after Ms. Wheeler had filed her administrative charges (Aplt. App. at 95, 211), BNSF made her work

assignments more arduous and difficult, in comparison to Rick Barnes' work assignments.

A reasonable jury could find that BNSF made Ms. Wheeler's work assignments more arduous and difficult by giving her unusually short time requirements, which forced her to work through her breaks and lunch. (Aplt. App. at 142-143) A reasonable jury could further find that BNSF made Ms. Wheeler's work assignments more arduous and difficult by refusing to communicate with her, by refusing to give her keys to the facility, and by refusing to give her a vehicle to use. (Aplt. App. at 142-143) A reasonable jury could further make the ultimate finding that BNSF's conduct in making Ms. Wheeler's work assignments more arduous and difficult was materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. at 68.

III. ALTERNATIVE GROUNDS FOR AFFIRMING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS

The defendants lastly contend that there are alternative grounds for affirming summary judgment in favor of the defendants. These alternative grounds were argued to, but not decided by, the district court.

The first alternative ground advanced by the defendants for affirming summary judgment is that Ms. Wheeler cannot demonstrate differing treatment among similarly situated employees. (Aplee. Br. at pp. 31-33) This contention

raises a disputed issue of material fact. Ms. Wheeler presented evidence from which a reasonable jury could find that she was treated less favorably than John Rangel, Rick Barnes, and William Galloway. (Aplee. App. II at 302-313, 316-317, 459-461)

The second alternative ground asserted by the defendants for affirming summary judgment is that none of the employment actions about which Ms. Wheeler complains give rise to an inference of discrimination. (Aplee. Br. at pp. 33-37) This argument likewise raises a disputed issue of material fact. Ms. Wheeler presented four pieces of circumstantial evidence from which a reasonable jury could infer a discriminatory animus: (1) false explanations given by the defendants for their adverse employment actions; (2) the use of subjective criteria; (3) inconsistent or contradictory explanations given by the defendants for their adverse employment actions; and (4) deviations from normal company procedures. (Aplee. App. II at 302-313, 317-319, 463-466)

The third alternative ground asserted by the defendants for affirming summary judgment is that Ms. Wheeler cannot show a causal connection between her protected conduct and the adverse employment actions taken against her. (Aplee. Br. at p. 38) This argument also raises a disputed issue of material fact. In order to establish a retaliatory motive, Ms. Wheeler relied on the same pieces of circumstantial evidence on which she relied to establish a discriminatory motive. (Aplee. App. II at 302-313, 316-310, 463-466) In addition, Ms. Wheeler further relied on the close temporal proximity between her protected

conduct and the defendants' adverse actions. (Aplee. App. II at 310-311, 320-321, 466-468, 488-494)

In summary, the three alternative grounds for affirming summary judgment advanced by the defendants all raise disputed issues of material fact. The district court did not analyze these alternative grounds, and this court should likewise decline to do so in the first instance.

CONCLUSION

For the reasons discussed above, the district court erred in granting summary judgment in favor of BNSF on Ms. Wheeler's claim of discrimination and on her claim of retaliation. Accordingly, the judgment in favor of BNSF on these two claims must be reversed, and the case remanded to the district court for further proceedings.

CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Fed. R. App. Pro. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 2,121 words. I relied on my word processor to obtain this count, and it is Microsoft Word 2000.

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I herby certify that on the 23rd day of November, 2010, I delivered a copy of the foregoing document via electronic mail to the following parties:

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