De Oliveira v. Cairo-Durham Cent. Sch. Dist.

United States Court of Appeals for the Second Circuit

February 23, 2016, Decided

No. 14-3710-cv

Reporter
634 Fed. Appx. 320 *; 2016 U.S. App. LEXIS 3087 **; 26 Wage & Hour Cas. 2d (BNA) 31

DONNA SCARPINATI DE OLIVEIRA, Plaintiff-Appellant, v. CAIRO-DURHAM CENTRAL SCHOOL DISTRICT, CAIRO-DURHAM BOARD OF EDUCATION, CAIRO-DURHAM TEACHERS' ASSOCIATION, SUSAN KUSMINSKY, Individually and as President of the Board of Education as aider and abettor, JUSTIN KARKER, Individually and as President of the Cairo-Durham Teachers' Association as aider and abettor, SALLY SHARKEY, Individually and as Superintendent of School as aider and abettor, Defendants-Appellees.*

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: On remand at, Summary judgment denied by, Without prejudice, Motion granted by, in part, Motion denied by, in part *De Oliveira v. Cairo-Durham Cent. Sch. Dist., 2016 U.S. Dist. LEXIS 159469 (N.D.N.Y., June 9, 2016)*

Prior History: **[**1]** Appeal from a judgment of the United States District Court for the Northern District of New York (Norman A. Mordue, Judge).

De Oliveira v. Cairo-Durham Cent. Sch. Dist., 2014 U.S. Dist. LEXIS 137593 (N.D.N.Y., Sept. 30, 2014)

Core Terms

summary judgment, restoration, rights

Case Summary

Overview

HOLDINGS: [1]-As to the teacher's failure-to-provide-notice interference claim under the Family and Medical Leave Act (FMLA), the district court erred in granting the school district and others summary judgment; [2]-Under the district's policies, practices, and agreements, plaintiff was to be restored to an equivalent position after FMLA leave but would not continue to accrue service credit during unpaid FMLA leave; [3]-The policy served as a "basis for restoration"; [4]-The district therefore had a duty under *29 C.F.R. § 825.604* to inform the teacher in writing about the policy before she took FMLA leave. Having failed to do so, it violated notice requirements of *29 C.F.R. §§ 825.300(c)(1)(vi)*, *825.604*; [5]-There was a genuine issue of material fact as to whether the violation constituted an interference with, restraint, or denial of exercise of her FMLA rights, *29 C.F.R. § 825.300(e)*.

Outcome

The court affirmed the judgment of the district court with respect to all of the teacher's claims other than her failure-to-provide-notice interference claim under the FMLA, vacated the district court's summary judgment to defendants on that claim, and remanded the cause to the district court for further proceedings.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN1[] **Entitlement as Matter of Law, Appropriateness**

* The Clerk of Court is directed to amend the caption of the order as set forth above.

The appellate court reviews de novo an order granting summary judgment and resolves all ambiguities and draws all permissible factual inferences in favor of the party against whom summary judgment is sought. A defendant is entitled to summary judgment where the plaintiff has failed to come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on an essential element of a claim on which the plaintiff bears the burden of proof. Conclusory statements or mere allegations are not sufficient to defeat a summary judgment motion.

Business & Corporate Compliance > ... > Family & Medical Leaves > Scope & Definitions > Restoration of Benefits & Positions

HN2[] **Family & Medical Leaves, Restoration of Benefits & Positions**

Under *29 C.F.R. § 825.604*, established school board policies and practices and collective bargaining agreements, among other things, govern the determination of how an employee is to be restored to an equivalent position upon return from leave under the Family and Medical Leave Act (FMLA), *29 U.S.C.S. § 2601 et seq.* *29 C.F.R. § 825.604*. Moreover, the established policies and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. *29 C.F.R. § 825.604*.

Business & Corporate Compliance > ... > Labor & Employment Law > Leaves of Absence > Family & Medical Leaves

HN3[] **Leaves of Absence, Family & Medical Leaves**

See *29 C.F.R. § 825.300(e)*.

Counsel: FOR PLAINTIFF-APPELLANT: PHILLIP G. STECK (Carlo A. C. de Oliveira, on the brief), Cooper Erving & Savage LLP, Albany, NY.

FOR DEFENDANTS-APPELLEES CAIRO-DURHAM CENTRAL SCHOOL DISTRICT, CAIRO-DURHAM BOARD OF EDUCATION, SUSAN KUSMINSKY, AND SALLY SHARKEY: RYAN P. MULLAHY (Patrick J. Fitzgerald III, on the brief), Girvin & Ferlazzo, P.C., Albany, NY.

FOR DEFENDANTS-APPELLEES CAIRO-DURHAM TEACHERS' ASSOCIATION AND JUSTIN KARKER: ANTHONY J. BROCK (Richard E. Casagrande, on the brief), Office of General Counsel, New York State United Teachers, Latham, NY.

Judges: PRESENT: JOSE A. CABRANES, ROSEMARY S. POOLER, DENNY CHIN, Circuit Judges.

Opinion

[*321] SUMMARY ORDER

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED** in part, and **VACATED** in part, and the cause is **REMANDED** for further proceedings consistent with this order.

Plaintiff-appellant Donna Scarpinati de Oliveira, an elementary-school teacher formerly employed by defendant Cairo-Durham Central School District, appeals a September 30, 2014 order of the District Court **[**2]** granting summary judgment to defendants and denying summary judgment to plaintiff. Plaintiff asserted claims against defendants Cairo-Durham Central School District (the "District") and its superintendent Sally Sharkey, Cairo-Durham Board of Education and its president Susan Kusminsky, and Cairo-Durham Teachers' Association and its president Justin Karker, arising out of plaintiff's dismissal from the District, due to inferior seniority status, as part of budget-driven layoffs.

On appeal, plaintiff challenges the dismissal of her claims arising under the Family and Medical Leave Act, *29 U.S.C. § 2601 et seq.* ("FMLA"); Title VII of the Civil Rights Act, *42 U.S.C. § 2000e et seq.* ("Title VII"); the Pregnancy Discrimination Act, *42 U.S.C. § 2000e(k)* ("PDA"); *42 U.S.C. § 1983* ("*Section 1983*"); and Title IX of the Education Amendments of 1972, *20 U.S.C. §§ 1681-88* ("Title IX"). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

HN1[] We review *de novo* an order granting summary judgment and "resolv[e] all ambiguities and draw[] all permissible factual inferences in favor of the party against whom summary judgment is sought." *Burg v. Gosselin, 591 F.3d 95, 97 (2d Cir. 2010)* (internal quotation marks omitted). "A defendant is entitled to summary judgment where the plaintiff has failed to come forth with evidence sufficient to permit a reasonable **[**3]** juror to return a verdict in his or her favor on an essential element of a claim on which the plaintiff[] bear[s] the burden of proof." *Selevan v. N.Y. Thruway Auth., 711 F.3d 253, 256 (2d Cir. 2013)* (alterations

and internal quotation marks omitted). "[C]onclusory statements or mere allegations [are] not sufficient to defeat a summary judgment motion." *Davis v. New York, 316 F.3d 93, 100 (2d Cir. 2002)*.

Upon *de novo* review of the record on appeal and upon consideration of the arguments advanced by the parties, substantially for the reasons set forth in the District Court's well-reasoned September 30, 2014 opinion, *see De Oliveira v. Cairo-Durham Cent. Sch. Dist., No. 11-cv-393 (NAM/RFT), 2014 U.S. Dist. LEXIS 137593, 2014 WL 4900403 (N.D.N.Y. Sept. 30, 2014)*, we affirm insofar as the judgment of the District Court denied plaintiff's motion for summary judgment, and also insofar as it granted defendants' motions for summary judgment with respect to the FMLA interference and retaliation **[*322]** claims—except the failure-to-provide-notice interference claim—as well as the Title VII claim, PDA claim, *Section 1983* claim, and Title IX claim; but we vacate the District Court's grant of summary judgment to defendants with respect to plaintiff's failure-to-provide-notice interference claim under the FMLA.

With respect to plaintiff's failure-to-provide-notice interference claim under the FMLA, we conclude that the District **[**4]** Court erred in granting defendants summary judgment. ***HN2***[↑] Under *29 C.F.R. § 825.604*, "established school board policies and practices . . . and collective bargaining agreements," among other things, govern "[t]he determination of how an employee is to be restored to an equivalent position upon return from FMLA leave." *29 C.F.R. § 825.604* (internal quotation marks omitted). Moreover, "[t]he established policies and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave." *Id.* (internal quotation marks omitted).

Here, under the District's policies, practices, and agreements, plaintiff was to be restored to an equivalent position after FMLA leave but would not continue to accrue service credit during *unpaid* FMLA leave. Although this policy did not, as plaintiff argues, diminish plaintiff's restoration rights upon her return—indeed, she retained the same tenure she held before taking unpaid FMLA leave, even if others increased their tenure during that time and thereby gained seniority—the policy nonetheless served as a "basis for restoration" insofar as plaintiff's **[**5]** restoration rights included retention of the same tenured position she held before she took unpaid FMLA leave. The District therefore had a duty under *§ 825.604* to inform plaintiff in writing about the policy before she took FMLA leave. Having failed to do so, it violated the notice requirements of *§§ 825.300(c)(1)(vi)* and *825.604*.

As a result, after drawing all permissible factual inferences in favor of plaintiff, we conclude that there is a genuine issue of material fact as to whether the notice violation ***HN3***[↑] "constitute[d] an interference with, restraint, or denial of the exercise of [plaintiff's] FMLA rights," *29 C.F.R. § 825.300(e)*—for instance, whether the plaintiff would have taken unpaid FMLA leave had she been properly notified about the policy regarding restoration of tenure, *see, e.g.*, App. 848. If the failure to provide notice is found to have constituted an interference, under *§ 825.300(e)*, the "employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered." *29 C.F.R. § 825.300(e)*. We therefore vacate the District Court's judgment insofar **[**6]** as it granted defendants summary judgment on this claim, and we remand the cause to the District Court for further proceedings.

CONCLUSION

Having considered all of the parties' remaining arguments, for the foregoing reasons, we **AFFIRM** the September 30, 2014 judgment of the District Court with respect to all of plaintiff's claims other than her failure-to-provide-notice interference claim under the FMLA, **VACATE** the District Court's summary judgment to defendants on that claim, and **REMAND** the **[*323]** cause to the District Court for further proceedings consistent with this order.

End of Document