UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	SACV 17-01999 AG (DFMx)	Date	February 25, 2019
Title	CHRISTINA POULUS V. ELAINE DUKE		

Present: The Honorable	ANDREW J. GUILFORD	
Melissa Kunig	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

Proceedings: **[TENTATIVE] ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Pro se Plaintiff Christina Poulus filed this retaliation lawsuit against Defendant Elaine Duke (acting in her official capacity as former Secretary of the Department of Homeland Security), asserting one claim under Title VII of the Civil Rights Act of 1964. (*See generally* Compl., Dkt. No. 1.) Defendant now moves for summary judgment.

The Court GRANTS Defendant's motion for summary judgment. (Mot., Dkt. No. 24.) The court will separately sign and enter Defendant's proposed judgment. (Proposed Judgment, Dkt. No. 24-17.)

1. BRIEF BACKGROUND

The following facts are undisputed unless otherwise noted.

Plaintiff started working for the United States Citizenship and Immigration Services in 2003. (Defendant's Statement of Uncontroverted Facts ("DSUF"), Dkt. No. 24-16 at 1.) Three years later, Plaintiff was promoted to USCIS's Director of the California Services Center ("CSC"). (*Id.* at 2.) Though Plaintiff disputes this, Plaintiff's job as CSC Director primarily involved processing and adjudicating visa and naturalization petitions and applications for asylum or refugee status. (*Id.* at 4; Plaintiff's Statement of Controverted Facts ("PSCF"), Dkt. No. 28 at 2.)

In February 2010, while serving as CSC Director, Plaintiff reported to the USCIS's Office of Inspector General that a "high-level" political appointee was trying to get CSC to approve petitions and applications filed by the appointee's friends. (DSUF at 5.) A few months after making this report, Plaintiff was told that she was being redirected from her position as CSC Director to Director of San Francisco's District Office. (*Id.* at 6.) Plaintiff was told this assignment change was due to USCIS's plan to rotate certain employees. (*Id.*)

But Plaintiff didn't want to move to San Francisco for the position. (*Id.* at 7.) So Plaintiff instead requested that she be assigned to a different position in the Los Angeles area. (PSCF at 7.) Plaintiff was ultimately offered the position of Chief of CSC's Immigration Training Branch—a lesser role than her prior position. (DSUF at 7.) Plaintiff accepted. (*Id.*) But, following Plaintiff's appointment to this new position, Plaintiff filed whistleblower retaliation complaints with both the USCIS's Office of Special Counsel ("OSC") and the Equal Employment Opportunity Commission ("EEOC"). (*Id.* at 8.) Those complaints challenged USCIS's decision to redirect Plaintiff to the San Francisco position. (*Id.*)

Amid all this, something else was happening. In 2008 and 2009, another USCIS employee was being investigated for sexual misconduct and for his alleged involvement in a hit-and-run. (*Id.* at 12.) That employee (who the Court refers to as "Mr. Smith") was the CSC Deputy Director. (*Id.*at 9.) As Deputy Director, Mr. Smith was Plaintiff's direct subordinate. (*Id.*) But more importantly, Plaintiff also considered Mr. Smith a "friend" and an "esteemed colleague". (*Id.* at 10.)

Plaintiff was interviewed as part of the investigation into Mr. Smith. (*Id.* at 17.) During that interview, Plaintiff admitted she was aware of the allegations against Mr. Smith. (*Id.*) But instead of waiting for the internal investigation of Mr. Smith to conclude, Plaintiff issued a letter of reprimand to Mr. Smith. (*Id.* at 18.) The letter was based on the same allegations as the internal investigation. (*Id.*) Though Plaintiff disputes this, Defendant says Plaintiff issued the letter without the required advice and guidance of the Labor and Employment Relations Office. (*Id.* at 19-20.)

The reprimand was issued two days before the internal investigation wrapped up. (*Id.* at 29.) And, once the internal investigation wrapped up, USCIS tried to discipline Mr. Smith. (*Id.* at 35-37, 39.) But USCIS couldn't discipline Mr. Smith because Plaintiff had already disciplined

Mr. Smith for the same conduct through the reprimand letter. (*Id.*) And USCIS policy provides that an employee can't be disciplined more than once for the same conduct. (*Id.* at 37.) It's Defendant's belief that Plaintiff issued the reprimand letter to protect Mr. Smith from the more serious discipline that likely would've resulted from the internal investigation. (*Id.* at 50-51.)

Circling back to Plaintiff's OSC and EEOC complaints, Plaintiff ultimately reached a settlement with USCIS and retired. (*Id.* at 52.) But following Plaintiff's retirement, Plaintiff again applied to be the CSC Director. (*Id.* at 57, 61.) Plaintiff didn't get the job. (*Id.* at 64.) Defendant claims Plaintiff wasn't chosen because Plaintiff's actions regarding Mr. Smith undermined Plaintiff's integrity and leadership ability. (*Id.* at 62.) But Plaintiff claims she wasn't hired in retaliation for her prior OSC and EEOC complaints. (Opp'n, Dkt. No. 27 at 18.)

Based on these facts and others, Plaintiff filed this case against Defendant, asserting one claim for retaliation in violation of Title VII of the Civil Rights Act of 1964. Defendant now moves for summary judgment.

2. LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the non-moving party, shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Material facts are those necessary to the proof or defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," based on the issue. *See id.* In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50.

The burden is first on the moving party to show an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party satisfies this burden either by showing an

absence of evidence to support the nonmoving party's case when the nonmoving party bears the burden of proof at trial, or by introducing enough evidence to entitle the moving party to a directed verdict when the moving party bears the burden of proof at trial. *See Celotex*, 477 U.S. at 325; *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). If the moving party satisfies this initial requirement, the burden then shifts to the nonmoving party to designate specific facts, supported by evidence, showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324.

3. ANALYSIS

Before turning to the merits of Defendant's motion, there's an important issue to be addressed. Plaintiff's papers are often confusing and difficult to follow. Sympathetic to the fact that Plaintiff is proceeding *pro se*, the Court does its best to distill Plaintiff's arguments and evidence. But it isn't the Court's duty to make Plaintiff's arguments for her. *See United States v. Aguilar*, 782 F.3d 1101, 1108 (9th Cir. 2015); *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010); *Guatay Christian Fellowship v. Cty. of San Diego*, 670 F.3d 957, 987 (9th Cir. 2011) (quoting *Greenwood v. FAA,* 28 F.3d 971, 977 (9th Cir. 1994)). Nor is it the Court's duty to "comb the record" to find some evidence creating a triable issue of fact, "where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found." *See Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029–31 (9th Cir. 2001) (quoting *Forsberg v. Pac. N.W. Bell Tel. Co.,* 840 F.2d 1409, 1418 (9th Cir. 1988)). With these considerations in mind, the Court begins by summarizing the relevant law.

Retaliation claims made under Title VII of the Civil Rights Act of 1964 are governed by the burden-shifting framework outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1105 (9th Cir. 2008). Under this framework, the burden is first on the plaintiff to establish a prima facie claim of retaliation. *McDonnell Douglas*, 411 U.S. at 802. If the plaintiff establishes a prima facie claim, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its actions. *Id.* If the defendant is successful, the burden shifts back to the plaintiff to show that the defendant's stated reason is in fact pretext. *Id.* at 804.

Based on this, Defendant makes two arguments in favor of summary judgment. First, Defendant argues Plaintiff has failed to present a prima facie case of retaliation. (Mot. at 11.)

Second, Defendant argues Plaintiff doesn't provide evidence of pretext. (*Id.* at 14.) For clarity, the Court separately addresses these arguments.

3.1 Whether Plaintiff Makes a Prima Facie Case of Retaliation

To establish a prima facie claim of retaliation, the plaintiff must show that (1) she engaged in protected activity; (2) she suffered a materially adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. *Pardi v. Kaiser Found. Hosp.*, 389 F.3d 840, 849 (9th Cir. 2004).

Defendant doesn't dispute that Plaintiff engaged in protected activity when she filed her OSC and EEOC complaints. Nor does Defendant dispute that Plaintiff suffered a materially adverse employment action when she wasn't selected for the CSC Director position. Instead, Defendant targets the third element, arguing Plaintiff hasn't shown the requisite causal connection between the protected activity and the adverse employment action. (Mot. at 11.)

For her prima facie claim, Plaintiff must show but-for causation. *See University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 360 (2013) ("Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . .") To prove but-for causation, Plaintiff must show "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Id.* This means that, to defeat summary judgment, Plaintiff must identify evidence raising a triable issue about whether Plaintiff would've been selected to the CSC Director position had she not filed the OSC and EEOC complaints. Plaintiff hasn't met this burden here.

Plaintiff's supposed evidence of retaliation for her OSC and EEOC complaints is twofold. First, Plaintiff points to the length of time between filing her OSC and EEOC complaints and her non-selection for the CSC Director position. (Opp'n at 18, 19-21, 34.) Second, Plaintiff relies on her belief that the selecting official for the CSC Director position gave false and unreliable reasons for not hiring Plaintiff. (*Id.*) Neither piece of evidence creates a triable issue of fact regarding causation.

Plaintiff filed the complaints two years before the CSC Director position became available and three years before Plaintiff was passed over for the job. (DSUF at 8, 57, 64.) This large gap in

time hardly suggests but-for causation. Nor does it account for when the events surrounding Mr. Smith's reprimand letter occurred. (*Id.* at 52.) To this point, Plaintiff issued the reprimand letter the very same month she filed the OSC and EEOC complaints. (*Id.* at 8, 18.) This is important because Defendants claim (and the undisputed evidence suggests) Plaintiff wasn't selected for the CSC Director position because of the reprimand letter, not because of the OSC and EEOC complaints. (*Id.* at 62.) So because the filing of the complaints coincided with the reprimand letter, the timing of Defendant's adverse employment action doesn't create a triable issue regarding but-for causation.

Plaintiff likewise fails to create a triable issue by attacking the credibility of the selecting official for the CSC Director position, Lori Scialabba. (*Id.* at 58.) Plaintiff claims Ms. Scialabba's statements regarding the reason Plaintiff wasn't selected for the CSC Director are conflicting and therefore false. (Opp'n 23-26.) But the undisputed evidence implores the opposite conclusion. Ms. Scialabba was only marginally involved with the filing and settlement of Plaintiff's OSC and EEOC complaints. (DSUF at 54-55.) Ms. Scialabba wasn't the subject of Plaintiff's complaints, nor was Ms. Scialabba a witness to the complaints. (*Id.* at 53.) To the contrary, Ms. Scialabba wasn't even aware of the basis for the complaints. (*Id.* at 55.) But Ms. Scialabba *was* aware of Plaintiff's actions concerning Mr. Smith. (*Id.* at 40-51, 62.) In fact, Ms. Scialabba was the deciding official on whether Mr. Smith would be disciplined. Thus, Ms. Scialabba was "intimately aware" of Plaintiff's decision to preemptively reprimand Mr. Smith to (allegedly) protect him from more severe punishment. (Mot. at 13; *see also* DSUF at 40-51.) Since Ms. Scialabba knew so little about the complaints, yet knew so much about the reprimand letter, her statements (though somewhat conflicting) don't create a triable issue regarding causation.

3.2 Whether Plaintiff Presents Sufficient Evidence of Pretext

Even assuming Plaintiff could show a prima facie case of retaliation, Defendant would still be entitled to summary judgment. Based on evidence already mentioned, Defendant could clearly establish a "legitimate, nondiscriminatory reason" for Plaintiff's non-selection to the CSC Director position. *See McDonnell Douglas*, 411 U.S. at 802. This means that Plaintiff must show that Defendant's asserted reasons for not picking Plaintiff (namely, that Plaintiff's action surrounding Mr. Smith exhibited a lack of integrity and leadership skills) were only pretexts. *See id.* at 804. And if Plaintiff's only evidence on this point is circumstantial, it must also be

"both specific and substantial." *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002) (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998)). Plaintiff therefore can't show pretext, considering the evidence already mentioned, as well as all the evidence directly undermining Plaintiff's claim that the actions against her were based on any retaliatory reasons at all. A few examples follow.

For one thing, Plaintiff points to Defendant's decision not to discipline Plaintiff for issuing the reprimand letter as showing pretext. (Opp'n at 11-12.) But around the same time Plaintiff applied for the CSC Director position, Plaintiff was involved in settlement negotiations for her complaints. (DSUF at 52; Reply, Dkt. No. 32 at 9.) And once a settlement was reached, Plaintiff retired. (DSUF at 52.) So the fact that Defendant didn't discipline Plaintiff for issuing the reprimand letter doesn't show pretext because it's not clear that anyone expected Plaintiff to remain at USCIS, which explains why no disciplinary action was taken.

Further, Plaintiff claims Defendant's stated reason for not selecting Plaintiff for the CSC Director position was pretextual because Plaintiff was more qualified than the candidate USCIS eventually hired. (Opp'n at 6.) Still, employers have some discretion when judging the qualifications of applicants and are only subject to Title VII liability where the employer's hiring decisions are discriminatory or retaliatory. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981). And the undisputed evidence here shows Defendant didn't think Plaintiff was best suited for the position because ofher actions involving Mr. Smith. So this also fails to create a triable issue regarding pretext.

In a nutshell, Plaintiff can't show pretext because all the supposed evidence she has on this issue consists of her own feelings of retaliation, which themselves are contradicted by all the available admissible evidence. And as this Court searches the record unsuccessfully for evidence of retaliation, a popular quote from the Seventh Circuit comes to mind: "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam).

The Court therefore GRANTS Defendant's motion for summary judgment.

4. DISPOSITION

The Court GRANTS Defendant's motion for summary judgment. (Mot., Dkt. No. 24.) The court will separately sign and enter Defendant's proposed judgment. (Proposed Judgment, Dkt. No. 24-17.)

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