United States Court of Appeals
For the Eighth Circuit

No. 20-1966

Randy R. Henson

Plaintiff - Appellant

v.

Union Pacific Railroad Company; Foster B. McDaniel

Defendants - Appellees

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: February 18, 2021
Filed: July 8, 2021

Before SMITH, Chief Judge, WOLLMAN and STRAS, Circuit Judges.

WOLLMAN, Circuit Judge.

Randy Henson began working for the predecessor of Union Pacific Railroad Company (Union Pacific) in 1979. Following more than thirty years with the railroad, Henson filed a charge with the Missouri Commission on Human Rights (the Commission) and the Equal Employment Opportunity Commission (EEOC) in October 2017, alleging a hostile work environment and ongoing age discrimination and retaliation. Henson asserted that he had been subjected to position changes and

harassing comments. Henson retired effective August 1, 2018, at the age of sixty-three. Soon thereafter, Henson received a requested right-to-sue letter from the Commission.

As relevant to this appeal, Henson filed suit against Union Pacific in Missouri state court, alleging age discrimination, constructive discharge, and hostile work environment[1] claims under the Missouri Human Rights Act (MHRA). Henson also sued Missouri resident Foster B. McDaniel, claiming that McDaniel aided and abetted Union Pacific in its discriminatory acts. Union Pacific removed the case to federal district court[2] on the basis of diversity, claiming that McDaniel had been fraudulently joined. McDaniel moved to dismiss the claims against him, claiming that Henson's complaint failed to state a claim. Henson moved to remand the case to state court.

Determining that McDaniel had been fraudulently joined to destroy diversity jurisdiction, the district court granted McDaniel's motion to dismiss and denied Henson's motion to remand. After answering the complaint, Union Pacific moved for judgment on the pleadings, which was granted on Henson's constructive discharge claim and corresponding age discrimination and retaliation claims. The district court later granted Union Pacific's motion for summary judgment on Henson's hostile work environment claim. We affirm.

I. Motion to Dismiss

Henson argues that the district court erred in denying his motion to remand and in dismissing his aiding-and-abetting claims against McDaniel. We review *de novo*

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[1]Henson's hostile work environment claim was added via amended complaint filed in federal court. The amended complaint set forth no new facts.

[2]The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

a fraudulent joinder challenge, Wilkinson v. Shackelford, 478 F.3d 957, 963 (8th Cir. 2007), "resolv[ing] all facts and ambiguities in the current controlling substantive law in the plaintiff's favor," Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 811 (8th Cir. 2003). "[I]t is well established that if it is clear under governing state law that the complaint does not state a cause of action against the nondiverse defendant, the joinder is fraudulent and federal jurisdiction of the case should be retained." Iowa Pub. Serv. Co. v. Med. Bow Coal Co., 556 F.2d 400, 406 n.6 (8th Cir. 1977). "However, if there is a 'colorable' cause of action—that is, if the state law *might* impose liability on the resident defendant under the facts alleged—then there is no fraudulent joinder." Filla, 336 F.3d at 810 (footnote omitted).

The MHRA prohibits both discrimination in employment on the basis of age, Mo. Rev. Stat. § 213.055(1)(a), and retaliation for opposing unlawful discrimination, id. § 213.070.1(2). It provides in relevant part that "[i]t shall be an unlawful discriminatory practice for an employer . . . [t]o aid[or] abet . . . the commission of acts prohibited under this chapter." Id. § 213.070.1(1). Missouri law defines "aiding and abetting" as "affirmatively act[ing] to aid the primary tortfeasor" by giving "substantial assistance or encouragement" to him. Bradley v. Ray, 904 S.W.2d 302, 315 (Mo. Ct. App. 1995); see also Markham v. Wertin, 861 F.3d 748, 755 (8th Cir. 2017). To the extent that the MHRA provided for individual liability prior to August 2017,[3] "Missouri cases have only allowed for [such liability] when the individuals directly oversaw or were actively involved in the discriminatory conduct." Reed v. McDonald's Corp., 363 S.W.3d 134, 139 (Mo. Ct. App. 2012).

[3]The MHRA was amended effective August 2017. Bram v. AT&T Mobility Servs., LLC, 564 S.W.3d 787, 794 (Mo. Ct. App. 2018). The district court applied the current version, but Henson argues that the pre-August 2017 version should apply. We conclude that dismissal was proper under either standard, and thus we will assume without deciding that the pre-2017 version applies here. See R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420, 425 n.3 (Mo. 2019) (en banc).

Henson's complaint fails to make a colorable claim that McDaniel directly oversaw or was actively involved in discrimination. The complaint and administrative charge allege only two McDaniel-related specific facts: (1) McDaniel is a Missouri resident who supervises at least six employees, and (2) "On or abut [sic] June 21, 2017, Plaintiff confronted manager Foster B. McDaniel, as to what would happen to him. Mr. McDaniel replied, 'don't worry, this job will be yours as long as you want it. After you retire the job will be eliminated.'" Although Henson asserts that McDaniel's statement was false, this allegation fails to show that McDaniel aided and abetted by providing "substantial assistance or encouragement" to Union Pacific in its allegedly discriminatory actions. See Stoker v. Lafarge N. Am., Inc., No. 4:12-cv-0504-DGK, 2013 WL 434049, at *3 (W.D. Mo. Feb. 5, 2013) (complaint failed to state a claim of aiding and abetting discrimination when it alleged only that the defendant had made statements indicating that he "was out to get" the plaintiff and had a close relationship with the discriminating party). The complaint likewise fails to allege any McDaniel-specific facts related to Henson's protected activity—filing his administrative charge—and thereby does not make a colorable claim that McDaniel retaliated or aided and abetted retaliation against Henson. Cf. Keeney v. Hereford Concrete Prods., Inc., 911 S.W.2d 622, 625 (Mo. 1995) (en banc) ("Section 213.070 prohibits retaliation 'in any manner.' To retaliate is to 'inflict in return.'" (citation omitted)). The complaint's remaining references to McDaniel are broad, conclusory allegations, which are insufficient to state a claim against him. See Block v. Toyota Motor Corp., 665 F.3d 944, 950 (8th Cir. 2011) ("The conclusory allegations in the complaint . . . are insufficient . . . ."). Dismissal on the basis of fraudulent joinder was therefore proper.

II. Motion for Judgment on the Pleadings

Henson argues that the district court erred in granting Union Pacific's motion for judgment on the pleadings on Henson's constructive discharge claim. The district court determined that Henson had failed to administratively exhaust the claim because

he resigned from Union Pacific after filing his charge and never filed an amendment expressly alleging constructive discharge. The district court further determined that such a discrete claim could not be "reasonably related" to the charged claims.

We review *de novo* a grant of "judgment on the pleadings, viewing all facts pleaded by the nonmoving party as true and granting all reasonable inferences in favor of that party." Clemons v. Crawford, 585 F.3d 1119, 1124 (8th Cir. 2009) (cleaned up). Judgment on the pleadings is proper when "no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." Id. (citation omitted).

Missouri law requires plaintiffs to exhaust their administrative remedies prior to bringing MHRA claims. Mo. Rev. Stat. § 213.075.1. "[E]xhaustion requires a claimant to give notice of all claims of discrimination in the administrative complaint, but administrative complaints are interpreted liberally in an effort to further the remedial purposes of legislation that prohibits unlawful employment practices." Alhalabi v. Mo. Dep't of Nat. Res., 300 S.W.3d 518, 525 (Mo. Ct. App. 2009). Because "administrative remedies are deemed exhausted as to all incidents of discrimination that are like or reasonably related to the allegations of the administrative charge[,] . . . the scope of the civil suit may be as broad as the scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination." Id. However, "it is not reasonable to expect the [investigating agency] to look for and investigate [discrete] adverse employment actions if they are nowhere mentioned in the administrative charge." Parisi v. Boeing Co., 400 F.3d 583, 586 (8th Cir. 2005); see also Lin v. Ellis, 594 S.W.3d 238, 242 (Mo. 2020) (en banc) ("In deciding a case under the MHRA, [state] appellate courts are guided by both Missouri law and federal employment discrimination caselaw that is consistent with Missouri law." (citation omitted)).

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