# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
**FILED**
May 14, 2021
Lyle W. Cayce
Clerk

No. 20-20463

ELIJAH ANTHONY OLIVAREZ,

*Plaintiff—Appellant*,

*versus*

T-MOBILE USA, INCORPORATED; BROADSPIRE SERVICES, INCORPORATED,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
No. 4:19-CV-4452

Before SMITH, STEWART, and HO, *Circuit Judges*.

JAMES C. HO, *Circuit Judge*:

We withdraw the court's prior opinion of May 12, 2021 and substitute the following opinion.

Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing]" against any individual with respect to employment "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Under *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination under Title VII. Accordingly, a plaintiff who alleges transgender discrimination is

entitled to the same benefits—but also subject to the same burdens—as any other plaintiff who claims sex discrimination under Title VII.

Elijah Olivarez alleges transgender discrimination under Title VII. But Olivarez does not allege facts sufficient to support an inference of transgender discrimination—that is, that T-Mobile would have behaved differently toward an employee with a different gender identity. So we are left with this: An employer discharged a sales employee who happens to be transgender—but who took six months of leave, and then sought further leave for the indefinite future. That is not discrimination—that is ordinary business practice. And Olivarez's remaining issues on appeal are likewise meritless. We accordingly affirm.

## I.

Olivarez was employed as a retail store associate for T-Mobile from approximately December 21, 2015 to April 27, 2018.

During the first half of 2016, a supervisor allegedly made demeaning and inappropriate comments about Olivarez's transgender status. Second Amended Complaint, ¶¶ 7–8. Olivarez filed a complaint with human resources. *Id.* at ¶8. In response, T-Mobile allegedly retaliated by reducing Olivarez's hours to part-time from September to November 2016. *Id.* at ¶ 9.

In September 2017, Olivarez stopped coming to work in order to undergo egg preservation and a hysterectomy. *Id.* at ¶ 10. The next month, Olivarez requested leave to be applied retroactively from September to December 2017. *Id.* Broadspire Services administers T-Mobile's leave programs. *Id.* It granted Olivarez unpaid leave from September 23 to December 17, and paid medical leave from December 17 to December 31. *Id.* at ¶¶ 11, 13. In addition, the company granted Olivarez's request for an extension of leave through February 18, 2018. *Id.* at ¶ 14. But it denied a further extension of leave in March 2018. *Id.* at ¶ 15–16.

T-Mobile fired Olivarez on April 27, 2018. The Equal Employment Opportunity Commission issued a right-to-sue letter to Olivarez on August 15, 2019.

On November 12, 2019, Olivarez filed suit against T-Mobile and Broadspire. The first complaint asserted (1) interference, discrimination, and retaliation under the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, (2) discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and (3) discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*

The district court granted Olivarez's motion to amend the complaint on November 22, 2019, and Olivarez filed a First Amended Complaint the same day. The amended complaint asserted the same claims and allegations.

On February 13, 2020, the district court entered a scheduling order pursuant to Federal Rule of Civil Procedure 16. That order set a deadline of March 13 to amend pleadings "with leave of court." Both T-Mobile and Broadspire moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Olivarez opposed both motions and asserted the right to further amend the complaint under Federal Rule of Civil Procedure 15(a).

On March 27, 2020, the district court denied T-Mobile's and Broadspire's motions without prejudice and allowed Olivarez to further amend the complaint by April 17. The district court expressly stated that Olivarez's pleadings were deficient and granted leave to amend the complaint "so that it is responsive to the issues raised by the Moving Defendants' motions to dismiss."

Olivarez filed a Second Amended Complaint on April 16, 2020. As relevant to this appeal, that complaint presented the same facts and claims. On April 30, T-Mobile and Broadspire moved to dismiss under Rule 12(b)(6).

Olivarez opposed these motions, but did not request leave to further amend the complaint.

The district court granted both motions to dismiss. The court dismissed the Title VII discrimination claim on the ground that the Second Amended Complaint failed to allege that Olivarez was treated less favorably than similarly situated employees outside Olivarez's protected class. The court dismissed the ADA discrimination claim because the Second Amended Complaint did not allege sufficient facts to show Olivarez was disabled.

Olivarez filed a motion for reconsideration of the final judgment pursuant to Federal Rule of Civil Procedure 59(e) and a motion to further amend the complaint under Rule 15(a). The district court denied both motions. The district court's order did not discuss the reasons for denying reconsideration, but it stated that it denied the motion to amend pursuant to Rule 16(b). Olivarez timely appealed, but raises only the Title VII and ADA claims.

We "review the grant of a motion to dismiss under Rule 12(b)(6) de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff[]." *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018) (quotation omitted). Rule 12(b)(6) governs dismissal for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' . . . it demands more than . . . 'labels and conclusions.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). And "[a] complaint survives a motion to dismiss only if it pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Meador*, 911 F.3d at 264 (quotation omitted).

## II.

At the Rule 12(b)(6) stage, our analysis of the Title VII claim is governed by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)—and not the evidentiary standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *Swierkiewicz*, we have explained, "there are two ultimate elements a plaintiff must plead to support a disparate treatment claim under Title VII: (1) an adverse employment action, (2) taken against a plaintiff *because of* her protected status." *Cicalese v. Univ. of Texas Med. Branch*, 924 F.3d 762, 767 (5th Cir. 2019) (quotations omitted) (citing *Raj v. La. State Univ.*, 714 F.3d 322, 331 (5th Cir. 2013)).

But "[a]lthough [a plaintiff does] not have to submit evidence to establish a prima facie case of discrimination [under *McDonnell Douglas*] at this stage, he [must] plead sufficient facts on all of the ultimate elements of a disparate treatment claim to make his case plausible." *Chhim v. Univ. of Texas at Austin*, 836 F.3d 467, 470 (5th Cir. 2016). And when a plaintiff's Title VII disparate treatment discrimination claim depends on circumstantial evidence, as Olivarez's does, the plaintiff "will 'ultimately have to show' that he can satisfy the *McDonnell Douglas* framework." *Cicalese*, 924 F.3d at 767 (quoting *Chhim*, 836 F.3d at 470). "In such cases, we have said that it can be 'helpful to reference' that framework when the court is determining whether a plaintiff has plausibly alleged the ultimate elements of the disparate treatment claim." *Id.* (quoting *Chhim*, 836 F.3d at 470).

Under *McDonnell Douglas*, a plaintiff must establish a prima facie case of discrimination. 411 U.S. at 802. Specifically, a plaintiff must allege facts sufficient to support a finding "that he was treated less favorably than others *outside of his protected class*." *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 427 (5th Cir. 2017).

Accordingly, when a complaint purports to allege a case of circumstantial evidence of discrimination, it may be helpful to refer to *McDonnell Douglas* to understand whether a plaintiff has sufficiently pleaded

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