In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1714

TOYA R. CRAIN,

Plaintiff-Appellant,

v.

DENIS R. MCDONOUGH,
Secretary of Veterans Affairs,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 19-cv-03967 — **Richard L. Young**, *Judge*.

ARGUED JANUARY 5, 2023 — DECIDED MARCH 17, 2023

Before FLAUM, ROVNER, and BRENNAN, *Circuit Judges*.

FLAUM, *Circuit Judge*. Toya Crain, a Black female, was reassigned to a new position at the Richard L. Roudebush Veterans' Administration Medical Center (the "VA Center") in Indianapolis, Indiana. Thereafter, she filed employment discrimination and retaliation claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The district

court granted her employer's motion for summary judgment, and Crain now appeals. For the following reasons, we affirm.

I. Background

A. Factual Background

Crain was the Acting Chief of the Environmental Management Service ("EMS") at the VA Center from April 1, 2014, through July 12, 2014.[1] EMS provides janitorial and sanitation services for the VA Center. An HR memorandum with the subject "Stretch Assignment" indicates that Crain took the position as a "learning opportunity" to "shadow the duties performed" in the Chief of EMS position, but that the role "was not supervisory in nature." Crain then assumed the Chief of EMS role on July 13, 2014, subject to a yearlong supervisory probationary period, which, according to the VA Center, began on July 13.

At the time Crain applied for the Chief of EMS position, it was classified as a GS-12 pay grade. Before Crain applied, however, she was told that if she successfully completed her probationary period, the VA Center would try to get the position's pay grade increased to the GS-13 level. Shortly after Crain assumed the Chief of EMS position, her supervisor (Cathy Lee-Sellers) added responsibilities to the role in an effort to justify a higher pay grade. She then asked Elaine Scaife, an HR classification specialist, to upgrade the role to the GS-13 pay grade. Scaife conducted an "extensive review" of the

[1] The VA Center is organized into multiple divisions, known as "services."

position and ultimately concluded that she was unable to "justify anything higher than a GS-12."

Crain alleges that the pay grades of White service chiefs with similar duties and responsibilities were elevated even though hers was not. Specifically, according to Crain, six White service chiefs' pay grades were elevated to the GS-13 or GS-14 level while her pay grade increase was denied. Scaife explained that at one point, the VA Center's Medical Director elevated the pay grade for the Chief of Logistics, who was White, even though Scaife did not agree with the classification. Scaife also testified that the Medical Director restructured positions and services to create a new GS-14 chief position for a White employee.

1. Performance Issues

During Crain's tenure as Chief of EMS, several performance and behavior-related concerns arose.

a. Nurse Uniforms

In October 2014, EMS was responsible for distributing new uniforms to the VA Center nursing staff. VA Center leadership testified that they received many complaints regarding EMS's handling of the project, centering on Crain's failure to adequately staff the project, utilize the appropriate equipment, and effectively distribute the inventory.

b. Profanity Use

During Crain's tenure as Chief of EMS, VA Center leadership received multiple reports of her using profanity in the workplace. On December 8, 2014, Crain and other EMS supervisors received a memo from Lee-Sellers instructing them "to cease and desist immediately from usage of this type of

language." Denouncing such "profan[e] and/or abusive language" as "unacceptable and inappropriate," Lee-Sellers warned that if the behavior continued, disciplinary action would be taken. Despite this admonition, on February 13, 2015, Lee-Sellers received a report that Crain used profanity during a meeting, and in early June 2015, VA Center leadership received additional reports that Crain used profanities and "abusive language" toward EMS employees.

c. Cleaning Solution Change

In the Spring of 2015, Crain decided to switch the cleaning solution used at the VA Center. Shortly after, Lee-Sellers received complaints about the planned change, claiming that it would put the patients and staff at risk. Specifically, members of the Infection Control and Prevention Committee testified that Crain rushed the change without the appropriate level of communication, input, or training.

d. Assistant Chief of EMS Interview Process

In May 2015, the VA Center began interviewing candidates to fill the position of Assistant Chief of EMS, Crain's second-in-command. Crain was on the interview panel and helped draft the interview questions. One of the candidates was Robert Franklin, who had been working as the Acting Assistant Chief under Crain for several months. After the interviews, members of the panel expressed concern that Franklin might have had advance notice of the questions. Franklin ultimately admitted that Crain told him which forms to review and specific topics to research before the interview.

2. *Removal from Chief of EMS Position*

On June 23, 2015, Crain received a memorandum informing her that she had "failed to satisfactorily complete [her

yearlong] supervisory probationary period" for the Chief of EMS position and, as a result, she was being reassigned to a different role with the same salary. The memo identified multiple "performance-based deficiencies" as the basis for the decision, including the poorly managed uniform project, her failure to heed the December 2014 warning regarding her use of profanity, the hasty cleaning solution change, and her interference in the Assistant Chief interview process.

B. Procedural Background

In March 2015, months before her reassignment, Crain initiated an Equal Employment Opportunity Commission ("EEOC") complaint alleging that one of her subordinates "verbally attacked" her and that the VA Center had not responded sufficiently because of her race and sex. In April 2015, she added a charge alleging that she was "not making the same salary as White males who held the same position." After her removal from the Chief of EMS position, Crain added yet another charge alleging that her reassignment was retaliatory.

Crain ultimately filed suit against Denis McDonough, in his official capacity as the Secretary of Veterans Affairs, alleging various Title VII violations. The VA moved for summary judgment on all Crain's claims, and the district court granted that motion. Crain now appeals the following two claims: (1) disparate pay based on her race and (2) that she was removed as the Chief of EMS in retaliation for filing an EEOC complaint.[2]

[2] Crain's opening brief does not advance any arguments regarding the remainder of her claims, and her reply brief does not respond to the VA's contention that this amounts to waiver. As a result, Crain has waived any

II. Discussion

We review the district court's grant of summary judgment de novo. *Zall v. Standard Ins. Co.*, 58 F.4th 284, 291 (7th Cir. 2023). Summary judgment is appropriate if "there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In applying this standard, we read the facts and draw reasonable inferences in the light most favorable to Crain, the non-moving party. *Moran v. Calumet City*, 54 F.4th 483, 491 (7th Cir. 2022).

A. Disparate Pay

Crain contends that her position was discriminatorily kept at a GS-12 pay grade because she is Black, while several White service chiefs' positions were elevated to GS-13 or GS-14 pay grades.[3] Title VII requires that "[a]ll personnel actions affecting [federal] employees … be made free from any discrimination based on race." 42 U.S.C. § 2000e-16(a). So, to hold the VA Center liable, Crain must show that her race "played a part" in the alleged disparity in compensation. *Huff v. Buttigieg*, 42

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challenge to the district court's judgment of her following claims: sexually hostile work environment, disparate pay based on her sex, and any retaliatory act other than her removal from the Chief of EMS position. *See Miller v. Chi. Transit Auth.*, 20 F.4th 1148, 1155 (7th Cir. 2021); *Terry v. Gary Cmty. Sch. Corp.*, 910 F.3d 1000, 1008 n.2 (7th Cir. 2018).

[3] Crain does not allege that Scaife discriminated against her by declining to reclassify her position. Instead, she argues that VA Center leadership discriminatorily refused to raise her pay grade despite Scaife's classification.

F.4th 638, 647 (7th Cir. 2022).[4] She can do so through "direct or circumstantial evidence of discrimination," as "all evidence belongs in a single pile and must be evaluated as a whole." *Igasaki v. Ill. Dep't of Fin. & Pro. Regul.*, 988 F.3d 948, 957 (7th Cir. 2021) (quoting *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 766 (7th Cir. 2016)).

Crain proceeds under the *McDonnell Douglas* burden-shifting framework, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973), "which gives the plaintiff the initial burden to establish a prima facie case of discrimination, after which the burden shifts to the defendant to provide a legitimate justification, before finally shifting back to the plaintiff to establish that such justification was pretextual," *Dunlevy v. Langfelder*, 52 F.4th 349, 353 (7th Cir. 2022). *See Miller v. Saul*, 803 F. App'x 963, 968 (7th Cir. 2020) (applying the *McDonnell Douglas* framework to federal-sector employment discrimination claim).

To shoulder her burden of establishing a prima facie case of discrimination, Crain must identify "another *similarly situated* employee outside of [the plaintiff's] protected class [who] received better treatment from his employer." *Igasaki*, 988 F.3d at 957 (emphasis added). Indeed, "[a]t the very heart of an unequal pay claim is the plaintiff's burden to show

[4] Both parties incorrectly apply the but-for causation standard utilized in private-sector employment cases. *See Huff*, 42 F.4th at 645 ("By express design, the private-sector provisions [of Title VII] do not apply to federal employe[r]s …."). As this Court recently held, federal employers—like the VA Center—are held to a different standard. *See id.* (holding that § 2000e-16 "d[oes] not require but-for causation" and instead prohibits any discrimination based on a protected characteristic that "*play[s] a part* in an employment decision" (emphasis added)).

unequal pay for *equal* work." *Palmer v. Ind. Univ.*, 31 F.4th 583, 590 (7th Cir. 2022); *see Poullard v. McDonald*, 829 F.3d 844, 854 (7th Cir. 2016) ("In the disparate-pay context, this inquiry boils down to a showing of equal work for unequal pay, with the protected class as the distinguishing factor.").

"Although they need not be identically positioned," *Igasaki*, 988 F.3d at 958, "a plaintiff must show the purported comparator was directly comparable to her in all material respects so as to eliminate other possible explanatory variables," *Downing v. Abbott Lab'ys*, 48 F.4th 793, 805 (7th Cir. 2022) (citations and internal quotation marks omitted), *cert. denied*, No. 22-649, 2023 WL 2357388 (Mar. 6, 2023) (mem.). "Relevant factors include whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications …." *David v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 846 F.3d 216, 226 (7th Cir. 2017) (citation and internal quotation marks omitted).

Crain asserts that other non-medical service chiefs—like the Chiefs of Logistics, Police, and Food and Nutrition Services—are valid comparators because they each lead a service at the VA Center, are on the same managerial level, and report to VA Center executive management. She maintains it is irrelevant that these chiefs perform distinct functions and types of work. However, this is plainly incorrect. *See id.* at 226–27 (noting that a comparator's job description and responsibilities are relevant to the disparate pay inquiry and concluding that employee with different position was not a valid comparator where "even a cursory comparison" of their duties revealed differences). Indeed, the record reflects that each service chief performs different work and is subject to a different set of

standards and that, as such, their pay grades are not directly comparable.

This is not to say, as Crain contends, that simply because she is the only Chief of EMS at the VA Center, no valid comparators exist. *See Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 743 (7th Cir. 1999) ("An employer cannot insulate itself from claims of racial discrimination simply by providing different job titles to each of its employees."). Rather, Crain has failed to carry her burden of demonstrating that she shares "enough common factors" with the other service chiefs "to allow for a meaningful comparison." *Palmer*, 31 F.4th at 590 (citation omitted). On this record, the differences between Crain and the other service chiefs "overwhelm the similarities." *Downing*, 48 F.4th at 806.

"Without any comparator in the record against whom [she] was underpaid, the totality of the evidence simply does not support a reasonable inference of race discrimination against [Crain] when it came to [her] pay." *Palmer*, 31 F.4th at 592.[5]

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[5] Crain also articulates various ways in which she allegedly met the VA Center's expectations and reasons why she claims the VA Center's justifications for not raising her pay grade are pretextual. *See Dunlevy*, 52 F.4th at 353 (identifying that employee "met h[er] employer's legitimate job expectations" as element of prima facie case of discrimination (citation and internal quotation marks omitted)). However, because Crain fails to put forth a sufficient comparator, we need not address these arguments. *See Brooks v. Avancez*, 39 F.4th 424, 435 (7th Cir. 2022) ("[I]t is not always necessary to march through this entire process if a single issue proves to be dispositive." (citation omitted)); *Palmer*, 31 F.4th at 592 ("[A]n unequal pay claim begs for some comparator evidence: *unequal to what*?").

B. Retaliation

Next, Crain argues that VA Center leadership removed her from the Chief of EMS position in retaliation for her filing an EEOC complaint. To prove her claim, Crain must muster enough direct and/or circumstantial evidence "to show that her employer's action was retaliatory." *Huff*, 42 F.4th at 646. Such circumstantial evidence may include "suspicious timing … or evidence the employer's proffered reason for the adverse action was pretextual." *Rozumalski v. W.F. Baird & Assocs., Ltd.*, 937 F.3d 919, 924 (7th Cir. 2019) (citation omitted). For Crain's claim to succeed, the record "must permit the factfinder to conclude the employer's retaliatory animus played a part in [the] adverse employment action." *Huff*, 42 F.4th at 647.

Crain primarily argues that the VA Center's stated reasons for removing her as Chief of EMS are pretextual—that is, "an attempt to mask a discriminatory reason with a legitimate excuse." *Brooks*, 39 F.4th at 434. Pretext is not "just faulty reasoning or mistaken judgment on the part of the employer; it is [a] lie, specifically a phony reason for some action." *Burton v. Bd. of Regents of Univ. of Wis. Sys.*, 851 F.3d 690, 698 (7th Cir. 2017) (alteration in original) (citation omitted). Thus, "[a]n inquiry into pretext requires that we evaluate the honesty of the employer's explanation, rather than its validity or reasonableness." *Rozumalski*, 937 F.3d at 927 (alteration in original) (citation omitted). To demonstrate pretext, Crain "must identify such weaknesses, implausibilities, inconsistencies, or contradictions in [the VA Center's] stated reason[s] that would permit a reasonable person to conclude that the stated reason[s] [are] unworthy of credence." *Robertson v. Dep't of Health Servs.*,

949 F.3d 371, 380 (7th Cir. 2020) (citation and internal quotation marks omitted).

Although the briefing leaves Crain's argument opaque, she seems to suggest that a jury would be more likely to conclude that the VA Center's stated reasons for reassigning her are pretextual because the VA Center "dishonest[ly]" miscalculated her probationary period. The June 2015 memo informing Crain of her reassignment asserts that she was still within her yearlong supervisory probationary period, which began when she assumed the Chief position. Crain counters that the period began when she assumed the Acting Chief position, meaning that the period was already over when she was reassigned for "fail[ing] to satisfactorily complete" it. Crain's primary support comes from her reading of 5 C.F.R. § 315—a regulation pertaining to civil service personnel in the federal sector.

Yet, we need not wade into the parties' competing regulatory interpretations because Crain fails to present any evidence to suggest her EEOC activity played a part in the VA Center's alleged miscalculation.[6] Rather, the Stretch Assignment memo documenting Crain's acceptance of the Acting Chief position—dated months before she filed her EEOC complaint—explicitly provides that the role "was not supervisory in nature." It therefore documents the VA Center's

[6] Regardless, an employer's misinterpretation of a policy or regulation is generally only evidence of pretext where it is so far afield to be unworthy of credence. *See Huff*, 42 F.4th at 648–49 (determining reasonable juror could find pretext where the employee was "fired for sending emails instead of making phone calls on merely five occasions over a one-year period" even though the policy "did not expressly prohibit email communication"). Here, that is not the case.

belief—*before* Crain engaged in any EEOC activity—that Crain's time in that role would not accrue toward her year-long supervisory probationary period. *See Rozumalski*, 937 F.3d at 926 (concluding plaintiff "ha[d] an insurmountable problem with timing" where employer's documented belief "predate[d] any of her complaints"). At bottom, Crain comes up short because she does not "tak[e] the added, necessary step of pointing to evidence that the purported lie masked a proscribed reason" for her reassignment. *Xiong v. Bd. of Regents of Univ. of Wis. Sys.*, No. 22-1271, 2023 WL 2421710, at *3 (7th Cir. Mar. 9, 2023).

Crain also takes aim at the following "performance-based deficiencies" the VA Center cited in support of removing her as Chief of EMS: (1) the poorly managed uniform project, (2) Crain's failure to heed the December 2014 warning regarding her use of profanity, (3) the hasty cleaning solution change, and (4) her interference in the Assistant Chief interview process. We address each in turn.

1. Nurse Uniforms

Crain points out that multiple employees testified to her hard work on the uniform project, deeming it "unfair" to blame her entirely for the rocky rollout. However, when analyzing whether a proffered reason is pretextual, "we do not evaluate whether [it] was accurate or even whether it was unfair. Our sole focus is on whether the employer's stated reason can be characterized as a falsehood rather than an honestly held belief." *Brooks*, 39 F.4th at 435 (citation omitted). Crain puts forth no evidence to suggest that the VA Center did not

honestly believe Crain's handling of the uniform project was inadequate.

2. Profanity Use

Crain denies using profane or abusive language in the manner alleged in the December 2014 memo and disputes the underlying complaints regarding her language. But disagreement with "the basis for the warning … or the substance of the employees' complaints is irrelevant to our inquiry. The only question that matters is whether [the VA Center] actually believed it had a legitimate basis" to reassign Crain. *Lauth v. Covance, Inc.*, 863 F.3d 708, 717 (7th Cir. 2017).

Crain also points to her coworkers' testimony that other VA Center employees, including management, used profanity at work and were apparently not disciplined. However, Crain has not put forth any evidence to suggest that these employees were subject to the same warning as her—specifically cautioning her that continued use of profane language would lead to disciplinary action—or that their use of profanity even led to complaints in the first place. *See Rozumalski*, 937 F.3d at 927 (rejecting unequal discipline argument where "the record [wa]s lacking critical details" about the alleged comparators' performance history).

Most importantly, the fact that the VA Center informed Crain of its concerns regarding her use of profanity months before she filed any EEOC charges "rules out any suggestion that [the VA Center] fabricated its criticism of [Crain's] [language] after the fact." *Bragg v. Munster Med. Rsch. Found. Inc.*, 58 F.4th 265, 272 (7th Cir. 2023); *see Rozumalski*, 937 F.3d at 926–27 (concluding that plaintiff's retaliation claim failed where, by the time her supervisors learned of her protected

activity, "there were already four months of documented performance issues on her record"). In short, a reasonable juror could not conclude that the VA Center's decision to follow through on a warning—issued *before* Crain initiated any EEOC activity—was a lie to cover up her supervisors' retaliatory animus.

3. Cleaning Solution Change

Crain maintains that she received the necessary approvals before switching the cleaning solution and that the change was beneficial to the VA Center. But, again, this argument "is a distraction … because the question is not whether the employer's reasons for a decision are *right* but whether the employer's description of its reasons is *honest*." *Brooks*, 39 F.4th at 436 (alteration in original) (citation and internal quotation marks omitted). Crain points to no evidence that the VA Center did not honestly believe she failed to follow the proper procedure when making the change. Instead, the record reflects that Crain's supervisors were genuinely concerned with the hasty rollout of the new cleaning solution.

4. Assistant Chief of EMS Interview Process

Bolstering the VA Center's decision to reassign Crain was the fact that it received complaints that Crain may have helped prepare Franklin, the Acting Assistant Chief of EMS, for the interview process. Crain disputes this, claiming Franklin denied that she gave him "any inside hints at what the interview questions" would be. However, Crain's challenge misses the mark for the same reason as her others: Irrespective of whether Crain *actually* interfered in the interview process, what matters is whether her supervisors genuinely *believed* she did. *See Abebe v. Health & Hosp. Corp. of Marion Cnty.*, 35

F.4th 601, 607 (7th Cir. 2022) ("[T]he fact that [the employee] disagrees with her supervisor's assessment [of a situation] does not establish pretext."). Crain provides no evidence to suggest otherwise.

In sum, Crain has failed to identify any "weaknesses, implausibilities, inconsistencies, or contradictions in [the VA Center's] stated reason[s] that would permit a reasonable person to conclude that the stated reason[s] [are] unworthy of credence." *Robertson*, 949 F.3d at 380 (citation and internal quotation marks omitted). Crain's argument boils down to: "because, in [her] view, [her] supervisors' concerns were mistaken or misplaced, the actions they took must have been retaliatory." *Lauth*, 863 F.3d at 717. This is insufficient to create a genuine dispute of material fact considering the "abundant evidence of [Crain's] substandard performance" put forth by the VA Center. *Bragg*, 58 F.4th at 271.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.