In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1593

SYLVESTER WINCE,

Plaintiff-Appellant,

v.

CBRE, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:19-cv-01546 — **Steven Charles Seeger**, *Judge*.

ARGUED NOVEMBER 8, 2022 — DECIDED MAY 2, 2023

Before SYKES, *Chief Judge,* and WOOD and SCUDDER, *Circuit Judges*.

WOOD, *Circuit Judge*. Sylvester Wince worked for almost two decades maintaining buildings and repairing equipment at Northwestern Memorial Hospital. Wince, who is Black, argues that his employer, CBRE, Inc., racially discriminated against him and then constructively discharged him. But at the summary judgment stage, Wince had to back up these

serious allegations with evidence. Because he failed to do so, we affirm.

I

In 2001, Wince began work as a maintenance mechanic in the facilities department at Northwestern Memorial Hospital. Initially, he worked as an employee of the Hospital, but in 2010 Northwestern decided to contract with an outside firm to provide these services; it chose CBRE. After the hand-off, CBRE allowed Wince to keep his job under a new title, Stationary Engineer. His duties included preventative maintenance, equipment repairs, and less technical tasks such as plumbing. Wince is well-qualified for the position; he is a licensed Stationary Engineer, has a bachelor's degree in organizational science, and holds certificates in electricity, air quality, and refrigeration. Collective bargaining agreements between CBRE and the International Union of Operating Engineers of Chicago, Illinois and Vicinity Local 399 (the Union) governed Wince's employment.

Wince alleges that CBRE and some of its employees racially discriminated against him. First, he complains that CBRE denied him a promotion because of his race. Generally, the path for internal promotion of Stationary Engineers at CBRE is hierarchical: a person first becomes Lead Engineer, next Assistant Chief Engineer, and then Chief Engineer. In 2015, although he had no prior experience as a Lead Engineer, Wince applied for a position as an Assistant Chief Engineer at Northwestern's Lavin Family Pavilion; in so doing, he was in effect asking to bypass the Lead Engineer level. CBRE did not select him; the job went instead to Andrew Brudniak, who is White. At the time, Brudniak worked as an Assistant Chief Engineer at Northwestern's Prentice Women's Hospital, and so

his move was a lateral transfer. Like Wince, Brudniak held a Stationary Engineer's license and similar certificates in air conditioning, heating, and refrigeration.

In 2016, CBRE rebid Brudniak's position. Both Wince and Brudniak applied for the vacancy again, but CBRE rehired Brudniak. Sean Holland, who was at the time the Director of Facilities for CBRE at Northwestern, stated that management selected Brudniak because of his previous tenure and performance as Assistant Chief Engineer in the same pavilion.

In further support of his race discrimination claim, Wince testified that he was the subject of racist slurs and a discriminatory nickname. In 2016 or 2017, unknown persons wrote the n-word on his lunchbox, along with cruel phrases such as "you don't belong here" and "we don't want you here." Wince never reported this spiteful incident to CBRE. He did, however, informally take issue with the nickname his coworkers gave him — "Sly," short for Sylvester. He thought the name was racially derogatory because, in his view, it suggested he was sneaky. After Wince told his coworkers he disliked the nickname, they stopped using it.

Wince also accuses CBRE's management of making comments that revealed racial bias. During a meeting, Richard Saulig, Director of Facilities, flatly told Wince, "[W]e don't like you." On another occasion, Ernie Pierz, Alliance Director of Facilities, told Wince that there were no leadership positions available, and so he was probably better off looking for immediate promotions outside the company. Yet at the same time, Pierz encouraged Wince to enroll in a project management course and requested approval for unscheduled paid time off to enable Wince to take the course.

Wince finally claims that he filed various grievances accusing CBRE of denying him holidays, overtime, promotions, and paid time off, and that CBRE failed to address any of them. In November 2018, Wince filed a charge of discrimination with the Equal Employment Opportunity Commission. The EEOC dismissed the claim later that month and issued Wince a Notice of Right to Sue.

In March 2019, Wince filed this lawsuit against CBRE and a number of its employees, individually and in their official capacities. The employees included Joe Hernandez (Senior Manager of Facilities), Maya Nash (Human Resources Manager), Sean Holland (Senior Manager of Facilities), Ernie Pierz (Alliance Director of Facilities), Pedro Ravelo (Alliance Director of Facilities), and Richard Saulig (Director of Facilities). He included counts for racial discrimination and retaliation under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as well as breach of the collective bargaining agreement, the Fair Labor Standards Act, and the Illinois Wage Payment and Collections Act. In the district court, he also argued that CBRE denied him overtime, holidays, paid time off, bonus payments, and other promotions. He does not pursue the latter claims on appeal, however, and so we do not address them.

The filing of the lawsuit did not put a stop to the discriminatory acts, as Wince sees things. He contends that the day after his filing, Chief Assistant Engineers Joe Hernandez and Alejandro Corona gave him a verbal warning for failing to respond to a work order about a water leak in a kitchen. The warning came with no loss of pay or other tangible consequence. Similarly, Wince complains that Hernandez unfairly assigned him to clean drains, which Wince saw as a

demeaning trainee-level task. In October 2019, Wince quit CBRE for a position as an HVAC supervisor at another hospital.

In 2020, Wince amended his complaint to include these additional accusations of discrimination, as well as a claim for constructive discharge. The district court granted CBRE's motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the counts based on CBRE's alleged breach of the collective bargaining agreements, the Fair Labor Standards Act, and the Illinois Wage Payment and Collections Act. After discovery, the court granted summary judgment in favor of all defendants with respect to Wince's remaining discrimination, retaliation, and constructive discharge claims.

On appeal, Wince challenges only the court's dismissal of the claim based on the collective bargaining agreement and its entry of summary judgment on the racial discrimination and constructive discharge claims.

II

We can be brief with the alleged breach of the collective bargaining agreement. We consider the court's grant of a motion to dismiss under Rule 12(b)(6) *de novo*, viewing the complaint in the light most favorable to the plaintiff and accepting all well-pleaded facts as true. *Lax v. Mayorkas*, 20 F.4th 1178, 1181 (7th Cir. 2021).

The district court held that section 301 of the Labor Management Relations Act (LMRA) completely preempts Wince's state-law claim. See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393–94 (1987). Such a claim, the court correctly noted, is regarded as inherently federal; section 301 sweeps aside any state law that purports to regulate the rights or liabilities

created by a collective bargaining agreement. See *Healy v. Metro. Pier & Exposition Auth.*, 804 F.3d 836, 841 (7th Cir. 2015).

To succeed on a section 301 claim, a plaintiff must allege that he exhausted the relevant grievance procedures before filing suit in federal court, and that the union breached its duty of fair representation. See *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 913–14 (7th Cir. 2013).[1] Such a breach occurs "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Wince's complaint alleged that CBRE's handling of his grievances fell below that standard. But nowhere does his complaint explain what exactly CBRE did (or failed to do) that was so deficient. Merely reciting the elements of the claim is not enough to meet Rule (12)(b)(6)'s standard. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The district court correctly dismissed this part of Wince's case on the pleadings.

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[1] Although Wince did not name the Union as a defendant, this does not prevent us from considering his section 301 claim against CBRE. The Supreme Court has held that "an employee may bring suit against both the employer and the union" under section 301, but that "[t]he employee *may, if he chooses*, sue one defendant and not the other." *DelCostello v. Int'l Broth. of Teamsters*, 462 U.S. 151, 164 (1983) (emphasis added); see also *Yeftich* , 722 F.3d at 914 ("The breach-of-fair-representation requirement applies whether or not the plaintiffs name the union as a defendant in their LMRA suit."); *Bell v. DaimlerChrysler Corp.*, 547 F.3d 796, 804 (7th Cir. 2008) ("Whether the plaintiff has sued his employer, his union, or both … he must prove that his union breached its fiduciary obligation *and* that his employer breached the collective bargaining agreement.") (citing *DelCostello*, 462 U.S. at 165).

III

Next Wince argues that the district court erred in granting summary judgment to the defendants on his federal racial discrimination and state-law constructive discharge theories. "We evaluate grants of summary judgment *de novo*, viewing all facts in the light most favorable to the non-moving party." *Miles v. Anton*, 42 F.4th 777, 780 (7th Cir. 2022). A moving party may prevail by showing an absence of evidence to support the nonmoving party's claims. *Tyburski v. City of Chicago*, 964 F.3d 590, 597 (7th Cir. 2020) (quoting *Parkey v. Sample*, 623 F.3d 1163, 1165 (7th Cir. 2010)).

A

For race-discrimination claims at the summary judgment stage, we look to see "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race … caused the discharge or other adverse employment action." *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). Wince may prove discrimination in a holistic fashion, by proffering "direct or circumstantial evidence of intentional racial discrimination." See *Bagwe v. Sedwick Claims Mgmt. Servs., Inc.*, 811 F.3d 866, 879 (7th Cir. 2016) (quoting *Tank v. T-Mobile, USA, Inc.*, 758 F.3d 800, 805 (7th Cir. 2014)). Alternatively, he may rely on the burden-shifting framework under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (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). To support a prima facie case, a plaintiff must show that "(1) he is a member of a protected class; (2) he met his employer's

legitimate job expectations; (3) he suffered an adverse employment action; and (4) similarly situated employees outside of the protected class were treated more favorably." *Id.* (internal quotation marks and alterations omitted) (quoting *Naficy v. Ill. Dep't of Human Servs.*, 697 F.3d 504, 511 (7th Cir. 2012)).

In the district court, it seemed that Wince was discussing the evidence as a whole, as he was entitled to do under *Ortiz*. But at some points it seemed that he was trying to use the *McDonnell Douglas* approach. The problem with this is not the failure to choose one of those two heuristics for the case—there well may be more than two. It is instead that Wince never presented any theory of the case that gathered the evidence, organized it, and explained how and why a trier of fact could conclude that it added up to race discrimination. The district court complained about this, but Wince has not fixed the problem on appeal. Instead, once again he has recited both standards without specifying how either or both could support a finding of race discrimination. It was his burden to proffer that evidence. We will, however, try to discern what the record shows, both through the *McDonnell Douglas* lens and through the *Ortiz* model, to ensure that Wince was not wrongly deprived of a trial.

Helpfully, the district court issued a well-reasoned opinion that gave close attention to each of Wince's discrimination allegations. The court concluded that the record was devoid of evidence showing that the incidents Wince spotlighted were either racially motivated or linked to defendants' conduct. Our own examination of the summary judgment materials satisfies us, too, that a reasonable factfinder could not return a verdict in Wince's favor.

Wince first asserts that CBRE failed to promote him to Assistant Chief Engineer in 2015 because he is Black. A failure to promote can be a materially adverse employment action. See *Riley v. Elkhart Cmty. Schs.*, 829 F.3d 886, 892 (7th. Cir. 2016). Using the burden-shifting approach, Wince's first task was to show that CBRE promoted a non-Black person who was not better qualified for the position. See *id.*

Wince proposes Brudniak, the White employee hired for the Assistant Chief Engineer position at Lavin Family Pavilion, as such a comparator. But there was no material difference in the qualifications of the two men. Brudniak, like Wince, was a licensed Stationary Engineer and held certificates in air conditioning, heating, and refrigeration. Wince alleges that he had a better educational background than Brudniak because he held a bachelor's degree, but there is no evidence in the record showing that college education was either required or relevant for the position. Crucially, Brudniak was a lateral transfer, because he was already an Assistant Chief Engineer in another wing of the hospital. In other words, he had more relevant experience for the job. When the position opened again in 2016, CBRE rehired Brudniak precisely because he knew the ins and outs of the post.

In contrast, Wince had never worked as an Assistant Chief Engineer. In fact, he had not progressed through CBRE's promotion order because he had never been a Lead Engineer. The record shows only that Wince lost out to a qualified candidate. His attempt to make a prima facie case of discrimination on this basis thus fails.

Next we turn to Wince's allegations that he was subjected to racist slurs and discriminatory nicknames. "Conditions of employment designed to harass and humiliate an employee

because she is a member of one of Title VII's protected classes may constitute an adverse employment action." *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 466 (7th Cir. 2002). But once again, Wince's evidentiary showing falls short.

No one disputes Wince's testimony that unknown people wrote racist slurs on his lunchbox. This incident is appalling. But an employer is not liable for coemployees' racial harassment if the plaintiff fails to inform the employer that a problem exists. *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 478 (7th Cir. 2004); *Durkin v. City of Chicago*, 341 F.3d 606, 612–13 (7th Cir. 2003). For reasons undisclosed in the record, Wince never reported the incident to any of his supervisors. And there was no other evidence from which a trier of fact could conclude that CBRE realized that this abuse had taken place. The district court correctly held that the incident, troubling though it was, could not form the basis of employer liability.

Nor can the nickname to which Wince objected carry the day for him. "Sly," which Wince's coworkers said was short for Sylvester, is a nonracial name. And as soon as Wince showed discomfort, his coworkers dropped its use. No trier of fact could conclude, on this record, that the nickname was "designed to harass and humiliate" Wince, much less in a racial way. See *Hilt-Dyson*, 282 F.3d at 466.

Wince further contends that Saulig told him that he was not liked and that Pierz told him that he did not have a future in the company. But Saulig's comment was at most rude or unpleasant; "nothing … about [its] context suggests that [it was] racially motivated." See *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1106 (7th Cir. 2012); see also *Yancick v. Hanna Steel Corp.*, 653 F.3d 532, 546 (7th Cir. 2011) (holding no discrimination where coworker's hostile and aggressive

attitude was not linked to racial animus). And Pierz's comment did not indicate imminent termination. To the contrary, he encouraged Wince to look for other opportunities for immediate promotion elsewhere and helped him obtain approval for a project management course. These race-neutral remarks are not adverse actions.

Finally, Wince's latest allegations regarding work assignments and the verbal warning meet a similar fate. His supervisors assigned him to clean drains, which Wince argues was a degrading trainee-task. His supervisors also reprimanded him for failing to fulfill a work assignment. But cleaning drains falls squarely within the duties of a Stationary Engineer, which include all aspects of plumbing. And the verbal reprimand did not come with a loss of pay or other tangible consequence. See *Boss v. Castro*, 816 F.3d 910, 919 (7th Cir. 2016) ("Unfair reprimands or negative performance reviews, unaccompanied by tangible job consequences, do not suffice" for adverse employment action.). Neither requiring an employee to do his job nor scolding him amount to an adverse action.

Viewing the evidence as a whole, no reasonable factfinder could find that CBRE or its employees discriminated against Wince on the basis of his race. No tinge of race discrimination attaches to CBRE's choice of Brudniak for the Assistant Chief Engineer position; Wince immediately succeeded in having his coworkers stop calling him by the nickname that offended him; he was ordered to fulfill a task within his job duties; and he was reprimanded for refusing to fulfill a job order. Wince has not pointed to any evidence linking these episodes to racial animus. He once was subjected to racist slurs at his workplace, but his failure to report the incident dooms that claim.

B

Wince also alleges that CBRE constructively discharged him in violation of Illinois law. The district court granted summary judgment in favor of defendants because Illinois law does not recognize an independent cause of action for constructive discharge. See *Thomas v. Guardsmark, Inc.*, 381 F.3d 701, 708 (7th Cir. 2004) ("[T]he [Illinois Supreme Court] 'has thus far declined to recognize a cause of action for retaliatory constructive discharge.'") (quoting *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 467–68 (1999)). Wince's failure to address the basis of the court's holding on appeal means he has waived his claim.

In any case, the district court considered the facts on which Wince relies for this claim when it evaluated his evidence of race discrimination. Wince argues that he faced an adverse employment action through constructive discharge. That allegation was relevant to both discrimination and constructive discharge. The court correctly held that Wince failed to carry his burden for summary judgment purposes.

A constructive discharge qualifies as an adverse employment action. It occurs when a plaintiff is forced to resign because of unbearable working conditions. *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010). Wince attempted to prove constructive discharge through discriminatory harassment, which required him "to show working conditions even more egregious than that required for a hostile work environment claim because employees are generally expected to remain employed while seeking redress[.]" *Id.*

As we explained earlier, the lunch box incident was the only racist episode that finds support in the record. Although

severe, it was an isolated incident that did not repeat itself, and Wince did not give CBRE the opportunity to redress it. Indeed, it seems not to have rendered his working conditions unbearable, because after it occurred Wince continued working at CBRE for another two or three years. He voluntarily resigned only after securing a comparable job at another hospital. On this record, no reasonable jury could conclude that CBRE or its employees constructively discharged Wince.

IV

We AFFIRM the judgment of the district court.