

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of September, two thousand twenty-one.

PRESENT:

JOHN M. WALKER, JR.,
GUIDO CALABRESI,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

DR. WEN-TING ZHENG-SMITH,

Plaintiff-Appellant,

v.

20-3544-cv

NASSAU HEALTH CARE
CORPORATION, DBA NUHEALTH
SYSTEM, DR. VICTOR POLITI, DR.
JOHN RIGGS, Individually,

Defendants-Appellees,

1
2 County of Nassau,

3
4 *Defendant.*
5
6

7 FOR PLAINTIFF-APPELLANT:

Wen-Ting Zheng-Smith,
pro se, Lutz, FL.

10 FOR DEFENDANTS-APPELLEES:

Rachel Demarest Gold,
Esq., Abrams,
Fensterman,
Fensterman, Eisman,
Formato, Ferrara Wolf &
Carone, LLP, Lake
Success, NY.

18 Appeal from a judgment of the United States District Court for the Eastern
19 District of New York (Nicholas G. Garaufis, *Judge*).

20 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
21 AND DECREED that the judgment of the District Court is AFFIRMED.

22 In October 2017 Appellant Dr. Wen-Ting Zheng-Smith was terminated from
23 her employment with Nassau Health Care Corporation (“NHCC”) as an obstetrics
24 and gynecology (“OB/GYN”) resident at Nassau University Medical Center
25 (“NUMC”). In 2018, through counsel, she sued NHCC, its CEO, Dr. Victor Politi,

1 and her former supervisor, Dr. John Riggs, asserting race and national origin
2 discrimination, hostile work environment, and retaliation claims under Title VII
3 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the New York State Human
4 Rights Law (“NYSHRL”), N.Y. Exec. Law § 290 et seq., and 42 U.S.C. § 1981. On
5 September 15, 2020, the District Court granted summary judgment to Defendants
6 on all of her claims. Zheng-Smith, now pro se, appeals. We assume the parties’
7 familiarity with the underlying facts and the record of prior proceedings, to which
8 we refer only as necessary to explain our decision to affirm.

9 We review a grant of summary judgment de novo, “resolv[ing] all
10 ambiguities and draw[ing] all inferences against the moving party.” Garcia v.
11 Hartford Police Dep’t, 706 F.3d 120, 126–27 (2d Cir. 2013). “Summary judgment
12 is proper only when, construing the evidence in the light most favorable to the
13 non-movant, there is no genuine dispute as to any material fact and the movant is
14 entitled to judgment as a matter of law.” Doninger v. Niehoff, 642 F.3d 334, 344
15 (2d Cir. 2011) (quotation marks omitted). In reviewing a district court’s
16 judgment, we consider only “the original papers and exhibits filed in the district

court.” Fed. R. App. P. 10(a)(1).¹

I. Discrimination Under Title VII, 42 U.S.C. § 1981, and the NYSHRL

Discrimination claims under Title VII, 42 U.S.C. § 2000e-2(a)(1), 42 U.S.C. § 1981(a), and the NYSHRL, N.Y. Exec. L. § 296(1)(a), are analyzed under the McDonnell Douglas burden-shifting framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Littlejohn v. City of New York, 795 F.3d 297, 312 (2d Cir. 2015) (Title VII and § 1981); Spiegel v. Schulmann, 604 F.3d 72, 80 (2d Cir. 2010) (NYSHRL). First, the plaintiff must “establish a prima facie case of discrimination by showing that: (1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination.” Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 83 (2d Cir. 2015) (quotation marks omitted). Once an employee has demonstrated a prima facie case, “[t]he burden

¹ This Court may consider extra-record evidence in “extraordinary circumstances,” as permitted under Federal Rule of Appellate Procedure 10(e)(2). Int’l Bus. Machs. Corp v. Edelstein, 526 F.2d 37, 45 (2d Cir. 1975); Fed. R. App. P. 10(e)(2); see Loria v. Gorman, 306 F.3d 1271, 1280 n.2 (2d Cir. 2002). Here, we find no extraordinary circumstances warranting our consideration of the new evidence Zheng-Smith presents for the first time on appeal. She was represented by counsel in the District Court and does not assert that the evidence submitted for the first time in her appendix on appeal was omitted from the record by error or accident.

1 then shifts to the employer to ‘articulate some legitimate, nondiscriminatory
2 reason’ for the disparate treatment.” Id. (quoting McDonnell Douglas Corp., 411
3 U.S. at 802). “If the employer articulates such a reason for its actions, the burden
4 shifts back to the plaintiff to prove that the employer’s reason was in fact pretext
5 for discrimination.” Id. (quotation marks omitted).

6 We conclude that Zheng-Smith failed to establish the fourth element of a
7 prima facie case. Her only allegations that might raise an inference of race or
8 national origin discrimination were that non-Chinese residents who
9 underperformed were not put in remediation or on probation, and that Riggs
10 ridiculed and mocked her accent. We consider each of these in turn.

11 To raise an inference of discrimination through comparison to another
12 employee outside the protected class, the plaintiff must show that the comparator
13 “engaged in comparable conduct.” Ruiz v. Cnty. of Rockland, 609 F.3d 486, 493–
14 94 (2d Cir. 2010) (quotation marks omitted). Here, Zheng-Smith claims that non-
15 Chinese residents had lower test scores than she had but were not penalized. But
16 we conclude that these unnamed residents are not suitable comparators because
17 Zheng-Smith’s performance was determined to be deficient in several job

1 categories that risked patient safety. The only specific comparator Zheng-Smith
2 proffered on summary judgment was Rachel Chamberlain, a white resident who,
3 like Zheng-Smith, was accused of surreptitiously recording other doctors in the
4 workplace and who was the subject of some performance-related concerns. But
5 Zheng-Smith's employment was terminated not only because she allegedly made
6 the audio recording. The decision was also based on numerous serious concerns
7 about her performance of essential duties and more extensive disciplinary history.
8 We therefore agree with the District Court that the comparison with Chamberlain
9 does not raise an inference of discrimination. See id.

10 We turn next to Zheng-Smith's claims arising from Riggs's conduct. Even
11 if Zheng-Smith could establish a prima facie case of national origin discrimination
12 based on Riggs's conduct, the District Court correctly granted summary judgment
13 for Defendants on her discrimination claims. That is because NUMC
14 demonstrated that it had legitimate reasons for terminating her employment,
15 which Zheng-Smith failed to show were pretextual. At this second step of the
16 McDonnell Douglas analysis, the Court considers whether the defendants have
17 "introduced evidence that, taken as true, would permit the conclusion that there

1 was a nondiscriminatory reason.” Holcomb v. Iona Coll., 521 F.3d 130, 141 (2d
2 Cir. 2008) (quotation marks omitted). NUMC satisfied this burden. For the
3 following reasons, Zheng-Smith has not demonstrated that the nondiscriminatory
4 reason for her termination was a pretext for discrimination.

5 In March 2016 a number of Zheng-Smith’s supervisors and coworkers at a
6 different hospital wrote to NUMC to express grave concerns about her
7 performance and recommended that her employment be terminated immediately
8 because her continued employment posed a serious risk to patients’ safety.
9 NUMC did not follow this recommendation. Instead, it continued to employ her,
10 giving her more than a year and a half to demonstrate that she could adequately
11 perform her job. Her performance was reviewed by several supervisors, and the
12 decision to keep her on probation was reached by “a consensus” of the faculty.
13 Record on Appeal (“ROA”) doc. 33 at 10. It is also undisputed that the decision
14 to terminate her employment was made by a “unanimous vote” of supervising
15 faculty, and not by Riggs alone. Id. at 11. We agree with the District Court that
16 no reasonable jury could find that these serious performance-related concerns
17 expressed by the entire supervising faculty were a pretext for national origin

1 discrimination by Riggs.

2 **II. Hostile Work Environment Under Title VII and the NYSHRL**

3 “Hostile work environment claims under both Title VII and
4 the NYSHRL are governed by the same standard.” Summa v. Hofstra Univ., 708
5 F.3d 115, 123–24 (2d Cir. 2013). “To prove a hostile work environment claim . . .
6 a plaintiff must establish that the workplace is permeated with discriminatory
7 intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter
8 the conditions of the victim’s employment and create an abusive working
9 environment.” Legg v. Ulster Cnty., 979 F.3d 101, 114 (2d Cir. 2020) (quotation
10 marks omitted). “[M]istreatment at work . . . is actionable under Title VII only
11 when it occurs because of an employee’s . . . protected characteristic” —here, race
12 or national origin. Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001). “In
13 considering whether a plaintiff has met this burden, courts should examine the
14 totality of the circumstances, including: the frequency of the discriminatory
15 conduct; its severity; whether it is physically threatening or humiliating, or a mere
16 offensive utterance; and whether it unreasonably interferes with the victim’s job
17 performance.” Rivera v. Rochester Genesee Reg’l Transp. Auth., 743 F.3d 11, 20

(2d Cir. 2014) (quotation marks omitted).

The only alleged mistreatment with a nexus to Zheng-Smith's race or national origin concerns Riggs's treatment of her accent. Riggs's conduct provides some evidence of ridicule and insult based on national origin. But Zheng-Smith failed to demonstrate in her affidavit or deposition that his conduct was "sufficiently severe or pervasive" to amount to a hostile work environment. Legg, 979 F.3d at 114 (quotation marks omitted). "Isolated incidents generally will not suffice to establish a hostile work environment unless they are extraordinarily severe." Kaytor v. Elec. Boat Corp., 609 F.3d 537, 547 (2d Cir. 2010). Accordingly, the District Court correctly granted summary judgment to Defendants on her hostile work environment claim.

III. Retaliation under Title VII and the NYSHRL

Title VII and the NYSHRL also prohibit employers from retaliating against an employee because she has opposed an unlawful discrimination practice. 42 U.S.C. § 2000e-3(a); N.Y. Exec. L. § 296(7). Retaliation claims under Title VII and the NYSHRL, like discrimination claims, are analyzed under the McDonnell Douglas burden-shifting framework. Summa, 708 F.3d at 125. A prima facie

1 case of retaliation is established by showing that “defendants discriminated—or
2 took an adverse employment action—against [the plaintiff]” and that “the adverse
3 action would not have occurred in the absence of the retaliatory motive.” Vega,
4 801 F.3d at 90–91 (quotation marks omitted).

5 Zheng-Smith asserts that her employment was terminated in October 2017
6 in retaliation for her September 29, 2017 demand letter complaining of
7 discrimination. Even if she could establish a prima facie case of retaliation, the
8 District Court correctly granted summary judgment to Defendants on this claim
9 because—as previously discussed—Defendants articulated a nondiscriminatory
10 reason for terminating her employment, and Zheng-Smith failed to present
11 evidence from which a reasonable factfinder could conclude that this reason was
12 pretext for retaliation against her for complaining of discrimination. And
13 Defendants presented un rebutted evidence that, between September 20 and
14 Zheng-Smith’s suspension without pay on October 3, two significant events—a
15 meeting to discuss her “unexcused absence from work,” ROA doc. 33 at 11, and a
16 report from a doctor that she was audio recording other doctors and patients
17 without their knowledge—provided additional reasons to terminate her already

