Circuit Court for Montgomery County
Case No. 426120-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1623

September Term, 2017

KIMBERLY PRICE

v.

GIANT FOOD, INC.

Wright,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 23, 2019

Kimberly Price, a self-represented litigant, appeals from the order of the Circuit Court for Montgomery County granting summary judgment in favor of Giant Food, Inc. ("Giant"), appellee, with respect to her complaint alleging employment discrimination and retaliation. She contends that the court erred in granting summary judgment because there were disputed facts regarding: (1) "whether she was treated less favorably than similarly-situated employees outside the protected class"; and (2) "whether she engaged in protected activity" and "suffered an adverse job action."[1]

For the reasons set forth below, we shall affirm the judgment of the circuit court.[2]

[1] Ms. Price raised the following two issues in her brief:

1. Did the trial court err in granting Defendant's Motion for Summary Judgment on Plaintiff's age discrimination claim when there were disputed facts as to whether she was treated less favorably than similarly-situated employees outside the protected class when her work hours were reduced, when her work end time was increased, when she was only allowed to use the restroom during formal breaks, and when she was questioned about her age?

2. Did the trial court err in granting Defendant's Motion for Summary Judgment on Plaintiff's retaliation claim when there were disputed facts as to whether she engaged in a protected activity by complaining to Defendant about her immediate supervisor's behavior, and subsequent thereto, she suffered from an adverse job action when her work schedule was altered to make her work later at night?

[2] Giant raises additional questions in its brief, but based on our resolution of the case, we need not address those issues.

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 2016, Ms. Price filed a complaint in the Circuit Court for Montgomery County, alleging that Giant: (1) created a hostile work environment; (2) unlawfully discriminated against her on the basis of age, in violation of Md. Code (2014 Repl. Vol.) § 20-606 of the State Government Article ("SG"); and (3) engaged in behavior that amounted to unlawful retaliation, in violation of SG § 20-606.[3] Prior to filing the complaint in circuit court, Ms. Price filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), and a charge of discrimination with the Maryland Commission on Civil Rights ("Commission").

On January 12, 2017, Giant filed its Answer and Affirmative Defenses to Plaintiff's Complaint, in which it: (1) denied that any discriminatory or retaliatory acts occurred; (2) denied Ms. Price's allegations that she had exhausted administrative remedies prior to filing the Complaint; and (3) asserted that Ms. Price's claims were "barred by the applicable statute of limitations." Ms. Price's attorney subsequently filed a Motion to Withdraw, which the circuit court granted on February 8, 2017.[4]

[3] Ms. Price did not address a claim of hostile work environment in her brief, and therefore, she has waived any issues related to that claim. *See Rosales v. State*, 463 Md. 552, 569–70 (2019) ("'[A] question not presented or argued in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review.'") (quoting *Hobby v. State*, 436 Md. 526, 542(2014)).

[4] Ms. Price continued as a self-represented litigant, a status which she has maintained to date.

On June 9, 2017, counsel for Giant deposed Ms. Price.[5] Ms. Price stated that she began working for Giant in 1993 as a cashier at the Virginia store. After working in that position for "seven or eight years," she transferred to other stores in Bethesda, White Oak, Silver Spring, Potomac, and Rockville, Maryland. Her pay at Giant increased each year that she was employed, and at the time of the deposition, her pay was $20.88 per hour.

While employed at the Silver Spring store, Ms. Price worked as a "full-time flex" cashier, which meant that her work hours varied according to the availability of staff. After Ms. Price's manager, Jeff Marconi, reduced Ms. Price's hours for several weeks, Ms. Price requested a transfer to the Potomac store. The request was granted, and, at some point between April and June 2015, she began working at the Potomac store as a full-time flex employee.

Shortly after Ms. Price began working at the Potomac store, Donna Marconi became her manager.[6] At some point, Ms. Marconi reduced Ms. Price's Sunday work hours, cutting "three hours a day" for "four or five weeks," approximately 12-15 hours in total. Ms. Price stated that she called Paul Barry, and he told Ms. Marconi not to reduce her hours, and Ms. Price was reimbursed for those lost wages.[7]

[5] The record extract contains the portion of the deposition that Giant included with its motion for summary judgment.

[6] Donna Marconi and Jeff Marconi are married.

[7] The record does not reflect Mr. Barry's job title.

Ms. Price also met with Steve Lerman, the HR manager, in April or May 2015. She complained about her work hours, but she did not discuss any other topic. Ms. Price also made the same complaint to her union representative, Mike Balliston. Ms. Price stated that she had no facts to show that Ms. Marconi knew that Ms. Price had made complaints against her. And she admitted that her hours were not reduced in response to any complaint.

Ms. Price stated, however, that "shortly after" meeting with Mr. Lerman, Ms. Marconi scheduled her to work late shifts that ended at 11:00 p.m., or one hour later than her normal schedule. She admitted that the change in her work hours was not outside the terms and conditions of her employment as a full-time flex employee. When counsel asked whether she was alleging any other retaliation as a result of her call to Mr. Barry, Ms. Price stated that Ms. Marconi made other cashiers afraid to talk to her. She did not, however, have any knowledge or facts that her complaint to Mr. Lerman prompted Ms. Marconi to tell the other cashiers not to talk to Ms. Price.

Ms. Price stated that Ms. Marconi had harassed her at the Potomac store because of her "race and age."[8] She subsequently clarified that she was not pursuing a racial discrimination claim.

In support of her claim, she cited a single conversation she had with Ms. Marconi sometime between April and October 2015, which she described at the deposition, as follows:

[8] Ms. Price did not assert a claim of racial discrimination in the Complaint.

> [MS. PRICE]: . . . [Ms. Marconi asked] like how many pairs of shoes do you have.
>
> [COUNSEL]: So that was the first thing [Ms. Marconi] said.
>
> [MS. PRICE]: Yeah, because [Ms. Marconi] looked down at my feet. She was looking down at my feet.
>
> [COUNSEL]: And then you told her 20 or 30.
>
> [MS. PRICE]: I said maybe 20 or 30. I'm not really sure.
>
> [COUNSEL]: And then what did [Ms. Marconi] say?
>
> [MS. PRICE]: And then [Ms. Marconi's] like how old are you. And I said at the time maybe 47. And I was like why do you ask. She's like oh, I was just asking because she said I don't look my age.[9]

Ms. Price responded: "[W]hy are you asking me about my age. I mean I'm . . . a grown woman, I'm not a child, you know. And then she was like oh, okay," and Ms. Marconi walked away.

Ms. Price believed that Ms. Marconi's remarks were discriminatory because Ms. Marconi had no reason to ask her about her age. She asserted that Ms. Marconi was discriminating against her because Ms. Price was "younger than [Ms. Marconi]." When asked whether Ms. Marconi's comment about her youthful appearance could have been a compliment, Ms. Price stated: "I can look at it that way and I can look at it another way."

Ms. Price, who was 48 years old at the time of the deposition**,** did not know Ms. Marconi's exact age, although she indicated that Ms. Marconi was "much older" than her.

[9] The comment subsequently was characterized as saying that Ms. Price did not look that old.

Ms. Price stated that, other than the comment that she did not look 47, there were no other facts supporting her claim that she was discriminated against because of her age.

When asked about the "similarly situated" employees that she had described in her complaint, Ms. Price stated that each of them worked as part-time cashiers.[10] They also were younger than her.

On June 28, 2017, Giant filed a Motion for Summary Judgment. Giant alleged that it was entitled to summary judgment because: (1) Ms. Price failed to exhaust her administrative remedies; (2) her claims were time barred; (3) the discrimination claim failed because (a) there were no facts that showed that any change in her hours was because of her age and (b) there was no evidence that a similarly situated employee was treated more favorably; and (4) the retaliation claim failed because Ms. Price did not engage in protected activity that caused an adverse employment action.

Ms. Price opposed the motion. She did not, however, specifically address any of Giant's contentions.

On September 6, 2017, based on the pleadings, the circuit court granted Giant's motion. The order stated:

> Upon consideration of the Defendant's Motion for Summary Judgment, any opposition thereto, and the record herein, it is hereby
>
> **ORDERED** that the Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff Kimberly Price's Complaint is dismissed in its entirety, with prejudice; and it is

[10] The "similarly situated" employees listed were Robiul Hossain, Lahiruappuhami Gangodavila, and Seumi Dinesdurage.

FURTHER ORDERED, that judgment be entered in favor of Defendant.

This appeal followed.

STANDARD OF REVIEW

Maryland Rule 2-501(f) governs motions for summary judgment and states that a trial court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." *See Fox v. Fidelity First Home Mortg. Co.*, 223 Md. App. 492, 507–08, *cert. denied*, 445 Md. 20 (2015). "A material fact is 'one that will somehow affect the outcome of the case."' *Id.* at 508 (quoting *Commercial Union Ins. Co. v. Harleysville Mut. Ins. Co.*, 110 Md. App. 45, 51 (1996)). "We review a grant of summary judgment without deference, and construe the facts, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party." *Calvo v. Montgomery Cty.*, 459 Md. 315, 323 (2018).

DISCUSSION

Ms. Price contends that the court erred in granting Giant's Motion for Summary Judgment because there were genuine disputes of material fact regarding her discrimination and retaliation claims. With respect to the discrimination claim, she asserts that there were "disputed facts as to whether she was treated less favorably than similarly-situated employees outside the protected class when her work hours were reduced, when her work end time was increased, when she was only allowed to use the restroom during formal breaks, and when she was questioned about her age[.]" With respect to the retaliation

claim, she asserts that there were disputed facts as to whether "she engaged in protected activity by complaining to [Giant] about her immediate supervisor's behavior, and subsequent thereto, she suffered an adverse job action when her work schedule was altered to make her work later at night[.]"

Giant contends that the court properly granted its Motion for Summary Judgment. With respect to the discrimination claim, it asserts that Ms. Price "cannot demonstrate that a similarly situated employee was treated differently because of age, and [Ms. Price] has not offered any facts that might create an inference that she was discriminated against her because of her age." With respect to the retaliation claim, Giant contends that Ms. Price failed to offer any facts supporting a claim that she suffered an adverse action that was caused by a protected activity.

We begin with the discrimination claim. To prove a *prima facie* case of employment discrimination based on a disparate treatment theory, an employee must show that he or she: (1) is a member of a "protected class"; (2) had a "satisfactory job performance"; (3) suffered an "adverse employment action"; and (4) the employer treated him or her differently from "similarly situated employees outside the protected class." *Coleman v. Md. Ct. App.*, 626 F.3d 187, 190 (4th Cir. 2010), *aff'd*, 566 U.S. 30 (2012). *Accord Belfiore v. Merch. Link, LLC,* 236 Md. App. 32, 45 (2018); *Dobkin v. Univ. of Balt. Sch. of Law*, 210 Md. App 580, 593 (2013). *See also Levitz Furniture Corp. Prince George's Cty.*, 72 Md. App. 103, 112 (establishing *prima facie* case requires showing that adverse employment action occurred "under circumstances which, if unexplained, would support an inference" that the adverse action "was 'based upon a consideration of impermissible

factors'") (quoting *Furnco Constr. Co. v Waters*, 438 U.S. 567, 577 (1978)), *cert. denied*, 311 Md. 286 (1987).

Giant notes, initially, that Ms. Price stated at her deposition that her discrimination claim was limited to the one comment by Ms. Marconi that Ms. Price did not look her age. When counsel for Giant asked: "Other than the comment about you don't look that old, do you have any facts that would support your claim that you were discriminated against because of your age," Ms. Price responded, "No." Under these circumstances, we agree that Ms. Price's claim of discrimination should be limited to this one comment, which does not show discrimination.

In any event, even considering Ms. Price's claim that restrictions on her use of the restroom or her ability to talk to other cashiers constituted adverse employment actions in support of her discrimination claim, we conclude that the circuit court properly granted summary judgment. Initially, we note that Ms. Price presented no facts that these actions were based on her age. *See Clark v. O'Malley*, 434 Md. 171, 194 (2013) ("[A]fter the moving party has produced sufficient evidence in support of summary judgment, the non-movant 'must demonstrate that there is a genuine dispute of material fact by presenting facts that would be admissible in evidence.'") (quoting *Gross v. Sussex, Inc.*, 332 Md. 247, 255 (1993)).

Moreover, Giant argues that Ms. Price has failed to set forth facts "demonstrating [an] inference of discrimination" because she cannot show that "a similarly situated

employee was treated differently" or that she suffered an "adverse employment action." Again, we agree.

A plaintiff "seeking to prove unlawful discrimination in employment will generally need to produce evidence of comparators or similarly-situated employees" who are outside the protected class and "who have been treated differently." *Netter v. Barnes*, 908 F.3d 932, 939 (4th Cir. 2018). *See Haas v. Lockheed Martin Corp.*, 396 Md. 469, 481 n.8 (2007) (Maryland courts look to federal law for guidance in construing Maryland employment discrimination laws). "[E]mployees are similarly situated if they are similar in all relevant respects." *Bateman v. Am. Airlines, Inc.*, 614 F.Supp. 2d 660, 674 (E.D. Va. 2009). If co-workers have different job responsibilities or circumstances, they may not be similarly situated. *Booth v. Leggett*, 186 F.Supp. 3d 479, 486 (D. Md. 2016).

Here, we agree with Giant that Ms. Price has failed to show that she was treated differently from similarly-situated comparators. The comparators Ms. Price identified were part-time employees. She offered no evidence that they were similarly situated to Ms. Price, who was a full-time flex employee. *See Johnson v. Univ. of Iowa*, 431 F.3d 325, 330 (8th Cir. 2005) ("Generally, part-time employees are not similarly situated to full-time employees."); *Geist v. Gill/Kardash P'ship*, 671 F.Supp.2d 729, 737 (D. Md. 2009) (full-time employee different from part-time employee).

Moving to Giant's contention that Ms. Price "did not suffer an adverse employment action," we note that an "adverse employment action is a discriminatory act that 'adversely affect[s] the terms, conditions, or benefits of the plaintiff's employment.'" *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (quoting *James v. Booz-Allen*

& Hamilton, Inc., 368 F.3d 371, 375 (4th Cir. 2004)), *cert. denied*, 552 U.S. 1102 (2008). "'[M]erely changing [a plaintiff's] hours, without more, does not constitute an adverse employment action.'" *Stout v. Kimberly Clark Corp.*, 201 F.Supp.2d 593, 603 (M.D.N.C. 2002) (quoting *Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir. 1998)). Rather, the action "'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Turner v. District of Columbia*, 383 F.Supp.2d 157, 173 (D.D.C. 2005) (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)).

Here, under the circumstances, the change in Ms. Price's hours did not amount to an adverse employment action. As Giant notes, Ms. Price "was compensated for all hours worked, and that as a flex cashier, her schedule was subject to change." *See Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 58 (2d Cir. 2004) (no adverse employment action when plaintiff experienced a temporary reduction in work hours but made no showing that the reduction in hours resulted in "lost wages" or "economic harm"). *See also Cepada v. Bd. of Educ. of Balt. Cty.*, 814 F.Supp.2d 500, 510 (D. Md. 2011) (Plaintiff who alleged that he "was not given promised reduced teaching schedule" did not suffer adverse action because he did not allege "a loss of pay, benefits, job title, or responsibility."). Moreover, that Ms. Marconi made Ms. Price work later hours, i.e., until 11 p.m., does not constitute an adverse employment action where, as Ms. Price admitted during her deposition, the change was permitted under the terms and conditions of her employment. And Ms. Price has cited no case supporting the contention that Ms. Marconi's conduct in monitoring her actions while at work constituted an adverse employment action. *See Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997) (no adverse employment action

when manager "yelled" at employee and "told others to ignore and to spy on her" when there was no evidence that "the terms, conditions, or benefits of her employment were adversely affected"), *cert. denied*, 522 U.S. 1116 (1998).

Accordingly, Ms. Price failed to make a *prima facie* case for age discrimination based on disparate treatment. Under these circumstances, the circuit court properly granted the Motion for Summary Judgment on the discrimination claim.

Turning next to the retaliation claim, Ms. Price contends that the circuit court erred in granting Giant's summary judgment motion because there were disputes of material fact regarding whether Giant retaliated against her for engaging in protected activities. She asserts that her complaints to Mr. Lerman and others about her hours being cut were "protected activities," and she suffered adverse employment actions as a result, including Ms. Marconi's actions in changing her work end time to 11 p.m. for approximately three to four months, stating that Ms. Price did not look her stated age, and not allowing Ms. Price to speak with other cashiers or use the restroom without a formal break.

Giant contends that, in addition to failing to show an adverse employment action, discussed *supra*, Ms. Price failed to prove retaliation because she did not engage in a protected activity. Specifically, it argues that, because Ms. Price did not complain to Mr. Lerman or others about alleged discrimination, her complaints could not have constituted protected activity for purposes of a retaliation claim.

To prove "a *prima facie* case of discrimination based on retaliation," a plaintiff must show that (1): "she engaged in a protected activity"; (2) "her employer took an adverse action against her"; and (3) "her employer's adverse action was causally connected to her

protected activity." *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 199 (2013), *cert. denied*, 434 Md. 313 (2013). *Accord Taylor v. Giant of Md., LLC*, 423 Md. 628, 658 (2011). When an employee complains, formally or informally, about an employer's allegedly discriminatory conduct, he or she has engaged in a protected activity, as long as the employee '"held a good faith, subjective, and objectively reasonable belief that the employer engaged in discriminatory conduct."' *Lockheed Martin Corp. v. Balderrama*, 227 Md. App. 476, 506 (quoting *Edgewood*, 212 Md. App. 177, 201–02 (2013)), *cert. denied*, 448 Md. 724 (2016). To constitute a protected activity, however, the complaint cannot allege "mere prejudice or general unfairness," but it must assert "discrimination connected to a protected class." *Id.* at 507.

Here, although Ms. Price complained to Mr. Lerman and others about Ms. Marconi's reduction of her total work hours, she testified at her deposition that she did not discuss any other topic, and there was no other evidence that she told them that Ms. Marconi had engaged in any discriminatory conduct. Accordingly, Ms. Price's complaints did not constitute a protected activity, and therefore, she failed to establish a *prima facie* case of retaliation. The circuit court did not err in entering summary judgment in favor of Giant.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.