FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENNETT K. MACINTYRE, *Plaintiff-Appellant*, v. CARROLL COLLEGE, *Defendant-Appellee.*	No. 21-35642 D.C. No. 6:19-cv-00042-SHE OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Submitted August 11, 2022*
Seattle, Washington

Filed September 8, 2022

Before: Morgan Christen, Kenneth K. Lee, and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Lee

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* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

SUMMARY[**]

Employment Discrimination

The panel reversed the district court's summary judgment in favor of the defendant in a Title IX retaliation suit and remanded.

Bennett MacIntyre sued Carroll College, alleging that it refused to renew his contract as a golf coach after he complained about gender inequity at the college's athletic department. The district court ruled that MacIntyre failed to make the prima facie case that the nonrenewal of the contract was an adverse employment action.

The panel reversed, holding that the refusal to renew a contract may be an adverse employment action for a Title IX retaliation claim because it could deter a reasonable employee from reporting discrimination. The panel remanded the case to the district court to consider Carroll College's alternative bases for summary judgment.

COUNSEL

Dylan M. McFarland, Knight Nicastro MacKay LLC, Missoula, Montana, for Plaintiff-Appellant.

Marcia Davenport and John M. Semmens, Crowly Fleck PLLP, Helena, Montana, for Defendant-Appellee.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

LEE, Circuit Judge:

Golf is a game of frustration and suffering. That could also be said about Bennett MacIntyre's experience as a golf coach at Carroll College, at least according to his lawsuit. He sued the school for Title IX retaliation, claiming that it refused to renew his contract after he complained about gender inequity at the college's athletic department. Carroll College, however, insists that a bleak budget forecast required cuts at the school.

The district court granted summary judgment for Carroll College, ruling that MacIntyre failed to make the prima facie case that the nonrenewal of the contract was an adverse employment action. We reverse and hold that the refusal to renew a contract may be an adverse employment action for a Title IX retaliation claim. We remand for the district court to consider the remaining issues, including whether Carroll College's proffered legitimate and nondiscriminatory reason for the nonrenewal was pretextual.

BACKGROUND

Carroll College is a Catholic liberal arts college in Helena, Montana. Between 2006 and 2016, Carroll College employed Bennett K. MacIntyre as a Community Living Director and then later as Associate Athletics Director. Besides these roles, MacIntyre received a stipend for serving as the head coach for the school's golf team.

In September 2015, MacIntyre provided his employee self-evaluation in which he stated that he aimed to "[a]ssist Carroll Athletics in becoming Title IX compliant." Title IX of the Education Amendments of 1972 generally bars sex-

based discrimination in schools receiving federal funding. 20 U.S.C. §§ 1681–88. Then in January 2016, MacIntyre informed Renee McMahon—the Title IX Coordinator and the Director of Human Resources at Carroll College—about potential Title IX violations. MacIntyre also alleged workplace harassment, hostile work environment, and discrimination involving Kyle Baker, the Interim Director of Athletics, and Dr. Tom Evans, the President of Carroll College.

The next month, Baker submitted a performance review of MacIntyre, giving him the lowest possible score in each category. MacIntyre then filed a formal grievance, alleging (among other things) discrimination and hostile work environment.

To resolve MacIntyre's complaints informally, Carroll College and MacIntyre signed a settlement agreement in which the school agreed to (1) remove Baker's negative review from MacIntyre's file, (2) pay MacIntyre $15,000 in back pay, (3) and hire MacIntyre as a full-time golf coach under a two-year employment contract ("Contract").

In the meantime, Charlie Gross, the new Athletic Director, learned of MacIntyre's grievances and Title IX complaints from various memos and from MacIntyre directly.[1] MacIntyre also said that he discussed his concerns about gender equity with Bill War, a member of Carroll's Board of Trustees, in November 2017.[2]

[1] Gross, however, did not recall his conversation with MacIntyre specifically referencing Title IX or gender equality.

[2] War has no recollection of MacIntyre discussing Title IX or disparate treatment of male and female athletes.

MacIntyre's Contract was ultimately signed and was effective from July 1, 2016, through June 30, 2018. It stated that employment would expire at the end of the term and lacked any renewal provisions. The parties dispute the proper characterization of the Contract: while Carroll College calls it a "one-time" contract, MacIntyre emphasizes that it was not expressly described as a "one-time" contract and that he expected it to be renewed.

Around this time, Carroll College started experiencing budget problems because of declining enrollment. In June 2017, Lori Peterson—Vice President of Finance, Administration & Facilities—emailed Gross about the need for budget cuts in the athletic department and asked, "[d]o we need a head [golf] coach for the position or is this a stipend position[?]" Two months later, Gross proposed nearly $200,000 in reductions to the athletic department budget, including the recommendation to make the golf coach a stipend-only position. The Budget Committee of the Board of Trustees adopted those recommendations. Because his Contract was not renewed, MacIntyre's pay plummeted from $38,000 to $14,000 and he lost some of his employment benefits.

Gross testified that MacIntyre's Contract was not renewed as part of the budget cuts. MacIntyre disputes that, pointing out that Carroll College raised the salary for Harry Clark, the track and field coach, who was being courted by another school.

After learning that the Contract would not be renewed, MacIntyre filed another grievance in June 2018, alleging retaliation for complaining about Title IX violations. After investigating the claim, a consultant retained by Carroll College could not determine by a preponderance of the evidence that the alleged violations occurred.

After discovery, Carroll College moved for summary judgment on various grounds. The district court granted summary judgment for Carroll College after determining that MacIntyre failed to allege a prima facie case of retaliation under Title IX. Specifically, the district court held that the nonrenewal of the Contract was not an adverse action.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). The moving party is entitled to summary judgment upon showing that no genuine issue of material fact exists. *See* Fed. R. Civ. P. 56(a). We view the facts and reasonable inferences drawn from the facts in the nonmovant's favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631–32 (9th Cir. 1987).

ANALYSIS

"Retaliation against a person because that person has complained of sex discrimination is [a] form of intentional sex discrimination encompassed by Title IX's private cause of action." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). In retaliation claims under Title IX, we apply the "familiar framework used to decide retaliation claims under Title VII." *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9th Cir. 2012), *as amended*, 698 F.3d 715 (9th Cir. 2012). "[A] plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two." *Id.* (citing *Brown v. City of Tucson*, 336 F.3d 1181, 1192 (9th Cir. 2003)). "[T]o make out a prima facie case, a plaintiff

need only make a minimal threshold showing of retaliation." *Id.* The requisite degree of proof "does not even need to rise to the level of a preponderance of the evidence." *Id.* (quoting *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008)).

"Once a plaintiff has made the threshold prima facie showing, the defendant must articulate a legitimate, non-retaliatory reason for the challenged action." *Id.* at 1224 (citing *Davis*, 520 F.3d at 1089). "If the defendant does so, the plaintiff must then 'show that the reason is pretextual either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* (quoting *Davis*, 520 F.3d at 1089).

I. The district court erred when it concluded that the nonrenewal of MacIntyre's two-year contract was not prima facie evidence of an adverse employment action.

An adverse employment action is one that "well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination." *Id.* at 1225 (alteration in original) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). As a result, retaliation "claims may be brought against a much broader range of employer conduct than substantive claims of discrimination." *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1021 (9th Cir. 2018).

For example, we have held that the following conduct may constitute an adverse employment action:

- forcing an employee to use a grievance procedure to get overtime work assignments that were routinely awarded to others, *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 848 (9th Cir. 2004);

- assigning an employee more hazardous work than her co-workers, *Davis*, 520 F.3d at 1089–90;

- transferring away an employee's job duties and assigning undeserved poor performance ratings, *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987);

- resigning as a Ph.D. candidate's dissertation chair, *Emeldi*, 673 F.3d at 1225; and

- intentionally assigning a teacher a subject that the teacher disliked, *Campbell*, 892 F.3d at 1022.

The nonrenewal of an employment contract is comparably likely to deter a reasonable employee from reporting discrimination. *Emeldi*, 673 F.3d at 1225. Indeed, common sense suggests that an employee may be dissuaded from alerting the company of discrimination if his or her contract may not be renewed as a result of it. Carroll College points out that the Contract did not have a renewal provision, but MacIntyre testified that he expected it to be renewed and one other Carroll College coach testified that he expected his own limited term-contracts to be renewed.[3] And the

[3] Nonrenewal of an employment agreement might not reasonably deter someone from reporting discrimination where the evidence shows

evidentiary standard for making a prima facie case for Title IX is low. *Emeldi*, 673 F.3d at 1223 (requiring only a "minimal threshold showing"). We thus hold that MacIntyre met his prima facie case that he suffered an adverse employment action when his Contract was not renewed.

The district court determined that the nonrenewal was not an adverse action because MacIntyre had no entitlement to a renewal, citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972), and *Seitz v. Clark*, 524 F.2d 876, 879–80 (9th Cir. 1975). But those cases involved due process claims under the Fourteenth Amendment. We have never required adverse employment actions to rise to the level of a denial of an entitlement. On the contrary, employment actions can be adverse for retaliation claims even if they relate to purely discretionary decisions. For example, the decisions to hire a new employee, terminate an at-will employee, or promote someone are discretionary. But we have long held that any of those actions may be adverse actions if an employer takes them for discriminatory reasons or in retaliation for reporting discrimination. *See, e.g.*, *Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 785 (9th Cir. 1986) (failure to hire); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996) (termination); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 n.19 (9th Cir. 2004) (failure to promote).

Here, too, even if an employer is under no legal obligation to renew an employment contract, its decision not to do so may be an adverse action because it is "reasonably likely to deter employees from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1237 (9th Cir.

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that the parties neither expected nor desired a renewal (*e.g.*, the employee intends to move, change jobs, and so on). But that is not the case here.

2000). As the Second Circuit explained in *Leibowitz v. Cornell University*, "[a]n employee seeking a renewal of an employment contract, just like a new applicant or a rehire after a layoff, suffers an adverse employment action when an employment opportunity is denied and is protected from discrimination." 584 F.3d 487, 501 (2d Cir. 2009). The opposite conclusion would lead to the nonsensical result that "*current* employees seeking a renewal of an employment contract are not entitled to the same statutory protections under the discrimination laws as *prospective* employees." *Id.*

The district court thus erred when it concluded that MacIntyre failed to make a prima facie case of an adverse employment action when Carroll College did not renew his Contract.

II. We remand the case to the district court to consider Carroll's alternative bases for summary judgment.

Carroll argues that we should affirm the grant of summary judgment on three other grounds: (1) an inadequate pleading of protected activity; (2) a lack of a causal link between any alleged protected activity and the nonrenewal of MacIntyre's employment contract; (3) a failure to adduce evidence that Carroll's legitimate, nondiscriminatory reason for the nonrenewal was pretextual.

While we may affirm summary judgment "on any ground supported by the record," *U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004), "[w]hether, as a prudential matter, we should do so depends on the adequacy of the record and whether the issues are purely legal, putting us in essentially as advantageous a posture to decide the case as would be the district court." *Golden Nugget, Inc. v. Am. Stock Exch., Inc.*, 828 F.2d 586, 590 (9th Cir. 1987).

Here, the remaining issues are not purely legal and require us to determine whether the evidence creates a genuine issue of material fact. The district court is thus better suited to consider these issues in the first instance.

We reverse the district court's grant of summary judgment to Carroll College and remand for the district court to consider Carroll College's alternative grounds for summary judgment.

REVERSED; REMANDED.