Appeal No. 20-6087

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TREVA BACY,
PLAINTIFF/APPELLANT,

v.

CHICKASAW NATION INDUSTRIES, INC., ET AL.,
DEFENDANTS/APPELLEES.,

On Appeal from the United States District Court
For the Western District of Oklahoma
District Court Case No CIV-2019-00512-G
Honorable Charles Goodwin, U.S. District Court Judge

ANSWER BRIEF OF APPELLEES

RESPECTFULLY SUBMITTED THIS 2nd DAY OF NOVEMBER 2020

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NO ORAL ARGUMENT REQUESTED

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1, Appellee Chickasaw Nation Industries, Inc. is not a publicly held corporation. Chickasaw Nation Industries, Inc. is a federally chartered tribal corporation wholly owned by the Chickasaw Nation. CNI Federal Services, LLC's sole member is CNI Government, LLC. CNI Government, LLC's sole member is Chickasaw Nation Industries, Inc.

Dated: November 2, 2020 /s/ Anh Kim Tran

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

I. STATEMENT OF THE ISSUES

The sole issue presented in this appeal is whether the District Court properly granted summary judgment in favor of Appellees Chickasaw Nation Industries, Inc. and CNI Federal Services, LLC (collectively referred to as "CNI") on Treva Bacy's purported race discrimination claims.

II. STATEMENT OF THE CASE

1. Bacy brought the underlying action asserting a variety of claims against CNI and her former supervisor, Sandy Laminack ("Laminack"). Specifically, Bacy alleged race discrimination in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000 *et seq.* ("Title VII") and the Oklahoma Anti-Discrimination Act, 25 O.S. § 1302, et seq. ("OADA"), age discrimination in violation of Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq.("ADEA") and the OADA, and negligence against CNI. She also alleged an intentional infliction of emotional distress claim against Laminack. (App 17-30)

2. On September 29, 2019, Bacy dismissed her intentional infliction of emotional distress claim against Laminack. (App 87-89)

3. Following discovery, CNI filed a motion for summary judgment

asserting that Bacy could not establish a triable issue of fact with respect to any of her claims. (App 90-199)

4. On May 7, 2020, the District Court granted summary judgment to CNI on Bacy's claims of Title VII, ADEA and OADA claims, but declined to exercise supplemental jurisdiction with respect to Bacy's state law negligence claim. (App 382-398)

5. With respect to Bacy's Title VII race based hostile work environment claim, the District Court held that "in addition to failing to produce any evidence of frequent or severe discriminatory conduct in her workplace, Plaintiff failed to demonstrate a genuine dispute as to whether the terms, conditions, or privileges of Plaintiff's employment were altered by the alleged harassment." (App 389)

6. With respect to Bacy's Title VII raced based disparate treatment claim, the District Court held that Bacy "failed to establish a genuine issue of material fact that would preclude summary judgment." (App 394)

7. With respect to Bacy's OADA claim for race discrimination claim, the District Court held that Bacy's claim "fails for the reasons that her Title VII race-discrimination claim fails." (App 397)

8. On June 23, 2020, Bacy filed her Docketing Statement raising nine issues on appeal. [Doc 010110365495]

9. On October 1, 2020, Bacy filed her Opening Brief raising six issues on appeal.

[Doc 010110417258] The issues raised in both Bacy's Opening Brief and Docketing Statement only address the District Court's analysis of her race discrimination claims.

III. STATEMENT OF FACTS

The District Court entered summary judgment based on facts it determined to be uncontroverted as a matter of law. Those uncontroverted facts are set out in the District Court's Opinion and Order. (App. 384-386). CNI incorporates those findings of uncontroverted facts here by reference and provides a brief recitation of only the facts most integral to the District Court's decision. Bacy's Opening Brief does not identify with any specificity which of these facts the Court improperly held as uncontroverted.

1. Sometime in 2017, Plaintiff was conversing with an RPO, RPO Supervisor and a RPO trainee about a white police officer killing an African American motorist during a traffic stop in North Carolina. During the conversation, RPO Supervisor, Laminack interjected with the statement, "if the police ask me to throw my hands up, I would throw my hands up, because I'm not a drug dealer or a gang banger." (App 21-22, 155, 385)

2. On October 9, 2017, Plaintiff called the CNI Ethics Hotline and complained about Laminack's behavior towards a white, male RPO Evan Lambeth. The complaint, which did not concern race or age discrimination, was with respect

to an incident on October 4, 2017, when Bacy overheard Laminack yelling in a RPO lab. (App 160, 166, 183-185)

3. On October 11, 2017. Plaintiff was training a RPO Trainee, Camille Wade. (App 141)

4. Later that day, Mark Pallone, issued a Feedback Form regarding an unidentified RPO working in Stars 1 Lab. (App 143, 186-188, 385)

5. Feedback Forms are issued at the instructor's discretion and contain constructive feedback regarding the performance of a RPO. (App 172, 183-185, 385)

6. Conrad Ennis, a RPO Supervisor for Stars 1 Lab, gave the Feedback Form to Bacy because Bacy was Wade's trainer. (App 144-145, 385)

7. Bacy reviewed the Feedback Form and disagreed with the comments of Pallone. (App 144, 385)

8. Bacy, believing that her supervisor Laminack was responsible for Pallone's comments on the Feedback Form, walked into Laminack's office and confronted her about the comments on the Feedback Form. (App 145-147, 183-185, 189-192, 385)

9. However, Bacy never heard Laminack tell Pallone to write Wade up. Bacy also never asked Pallone if anybody told him to write Wade up. (App 147, 385)

10. At the time of the confrontation, Laminack was on the phone with another RPO supervisor, Sean Wise. (App 145-148, 183-185, 189-192, 385)

11. After exchanging words related to the Feedback Form, Laminack asked Bacy to turn in her headset and badge, but Bacy ignored Laminack's request and chose to return to her lab instead. (App 145-148, 183-185, 189-192, 385)

12. CNI's HR Generalist, Wendy Hutton, was notified about the incident and conducted an investigation. She interviewed Bacy and three supervisors: Laminack, Wise, and Ennis. (App 170-171, 183-185, 189-190, 385-386)

13. Hutton forwarded the information she obtained from her investigation and advised Ryan Groce, CNI's Project Manager, that she believed Bacy had acted in an insubordinate manner towards her supervisor. Based on a review of Hutton's investigation, Groce recommended that Bacy be terminated. (App 130-132, 183-185, 193-194, 386)

IV. SUMMARY OF THE ARGUMENT

All six of Bacy's propositions essentially argue the same thing – that the Court failed to consider all material facts presented – giving more weight to CNI's facts and less weight to her facts. CNI contends that Bacy's propositions all fail for one simple reason: Bacy fails to provide any material facts for the Court to consider. Bacy's Opening Brief never identifies with any degree of specificity the material facts that were improperly overlooked by the District Court. Instead, Bacy provides conclusory statements, broad generalizations about the District Court's error, and her own self-serving sham affidavit in support of her alleged facts. Also absent is

any legal argument that supports the materiality or the admissibility of her alleged facts.

Specifically, Bacy's race discrimination claims fail for lack of evidence as a matter of law. Bacy contends that her supervisor, Laminack, harbored racial animus towards her, subjected her to a hostile work environment, and caused her wrongful termination. However, Bacy provides only one material fact to prove that Laminack subjected her to a hostile work environment - a single statement made by Laminack about a police shooting. Bacy also fails to provide any evidence that Laminack's alleged racial animus towards her affected her employment or altered the conditions of the workplace. Moreover, Bacy fails to provide any facts to prove that Laminack's alleged racial bias caused the decision makers, Hutton and Groce, to recommend her termination. Bacy has provided no evidence to establish a causal link between Laminack's alleged racial animus towards her and her termination by Hutton and Groce.

Therefore, the District Court properly granted summary judgment in favor of CNI because Bacy failed to identify any genuine issues of material fact. CNI respectfully requests that the District Court's Opinion and Order be affirmed as a matter of law.

V. ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

The Tenth Circuit "review[s] the district court's grant of summary judgment *de novo*, applying the same legal standard used by the district court." *Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Services*, 165 F.3d 1321, 1326 (10th Cir.)(citation omitted), cert. denied, 528 U.S. 815, 120 S.Ct. 53, 145 L.Ed.2d 46 (1999). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart*, 144 F.3d 664, 670 (10th Cir. 1998) (internal citations omitted).

To avoid summary judgment, a plaintiff must do far "more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Rather a plaintiff "must present sufficient evidence in specific, factual form for a jury to return a verdict in [her] favor." *Bacchus Indus. Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). Under this standard, it is clear that Bacy did

not and could not meet that burden, and the District Court properly disposed of all her claims on summary judgment.

PROPOSITION I: THE DISTRICT COURT PROPERLY FOUND THAT THERE WERE NO DISPUTED MATERIAL FACTS.

Each of Bacy's propositions argues that the District Court failed to properly weigh the facts produced by the parties. However, a review of each proposition demonstrates that Bacy did not produce any material facts and is unable to articulate what facts were improperly ignored or misinterpreted by the District Court.

Bacy's first argument on appeal is that "the District Court erred in finding that no material facts were in dispute precluding summary judgment." (Doc 010110417258, Appellant's Opening Brief at p. 9.) However, Bacy offered no meaningful analysis of this proposition. She offers a single conclusory statement about her "faithful employment," "promises of continued employment," and the promotion of "an abusive white employee." (Doc 010110417258, Appellant's Opening Brief at p. 17) This single statement, however, stands unsupported because Bacy produces no evidence and directs this Court to no evidence. Bacy cannot expect this Court to hunt through the record to find instances of alleged error. Yet a review of each of the propositions asserted in her Opening Brief does just that – requires this Court to review the record in search for the material facts that were allegedly ignored.

Bacy's second proposition is similar to her first. Bacy argues that the "District Court erred by not considering the relevant facts and circumstances to allow proper evaluation of the evidence in the most favorable light for Appellant." (Doc 010110417258, Appellant's Opening Brief at p. 18-20) Here, Bacy fails to offer anything more conclusory statements. Bacy argues that she was subjected to an atmosphere of racial enmity and hostility. However, Bacy cites to no acts or circumstances that were ignored by the District Court that created such an atmosphere. Instead, Bacy merely asks this Court to extrapolate on its own, the alleged material facts that the District Court failed to consider.

Bacy's third proposition appears to be an expansion of her second argument. She argues in proposition three that the "District Court erred by rejecting evaluation of racially based 'enmities' as being insufficient to be presented to the triers of fact." (Doc 010110417258, Appellant's Opening Brief at p. 20-23) This proposition repeats the same argument in proposition two. This time Bacy argues that she "being a much older black woman had indicated the various alternatives or combination of reasons behind Appellee's decision to immediately terminate her without any investigation as to the real facts and circumstances." (Doc 010110417258, Appellant's Opening Brief at 22-23) However, Bacy never identifies the "various alternatives or combination of reasons" that were overlooked. And though she claims there was no investigation, CNI provided evidence of an investigation that was

conducted. (App 170-171, 183-185, 189-190). The investigation, the interviews conducted, and the individuals involved are facts that have never been disputed and were held to be uncontroverted by the District Court. (App 170-171, 183-185, 189-190) What is actually disputed by Bacy is whether or not the investigation properly examined her "various alternatives or combination of reasons" to which she never actually identifies. Bacy's inability to offer any other plausible facts is the crux of the District Court's dismissal.

Bacy's fourth proposition argues that the "District Court erred by misinterpreting Appellant's factual materials…" (Doc 010110417258, Appellant's Opening Brief at p. 23) Again, Bacy does not identify the factual materials offered that were allegedly misinterpreted by the District Court. Instead of directly addressing the factual materials she presented that were misinterpreted, Bacy argues that "[t]he admissible facts offered by Appellees were contested and or explained in the context that was overlooked." (Doc 010110417258, Appellant's Opening Brief at p. 24) She does not explain how they were contested, nor does she point out what context was overlooked. She then follows with the argument that Bacy, "properly objected to the exhibits offered by Appellees…" with no reference to which exhibits she objected to and no legal authority for why they are inadmissible. (Doc. 010110417258, Appellant's Opening Brief at p. 24) Similar to her previous

propositions, Bacy merely offers conclusory statements with no support or explanation.

Bacy's fifth proposition argues that the "District Court erred by shifting the burden to Appellant to conclusively prove that her termination was pretextual." (Doc. 010110417258, Appellant Opening Brief p. 26). To support this argument, Bacy contends that the "[t]he explanation by Ms. Bacy and circumstantial evidence of pretext and or discriminatory animus was ignored and or discounted was[sic] not being factual." (Doc. 010110417258, Appellant's Opening Brief at p. 27) The missing part of this argument is any discussion of the evidence that was ignored or discounted by the District Court, as well as any argument about why the burden was inappropriately shifted. The only alleged fact identified is Bacy's belief that Ennis, a black RPO Supervisor, owed a her duty "to avoid continuation of discriminatory animus," but failed to do so because "he did not want to stick his neck out to address any claims of racial disparity or mistreatment." (Doc. 010110417258, Appellant's Opening Brief at p. 27) This speculation is provided without any supporting admissible evidence or testimony. This does not constitute evidence of pretext, the necessity of which is addressed more fully in CNI's second proposition below.

Bacy's sixth and final proposition argues that the "District Court erred by determining the admissibility of hearsay evidence or potential theories of admissibility of statements presented…" (Doc. 010110417258, Appellant's

Opening Brief at p. 28) Though not entirely clear, it appears that Bacy disagrees with the District Court's determination that the written statements offered by CNI to establish facts related to the investigation into Bacy's acts of insubordination were admissible. Bacy argues that the District Court's decision to consider that evidence somehow made it impossible for her to challenge the summary judgment.

Here, the District Court properly determined that out of court statements do not constitute hearsay if they are "offered to show [the employer's] state of mind in making its employment decisions," rather than "to prove the truth of the matter asserted." *Faukner v. Super Valu Stores, Inc.* 3 F.3d 1419 (10th Cir. 1993). The contemporaneously made statement of RPO Supervisor, Sean Wise, and the investigation notes of HR Generalist, Wendy Hutton, along with her Affidavit, were introduced to provide the facts that were considered by CNI at the time the decision to terminate Bacy was made. Once offered, Bacy had to opportunity to provide material facts which could demonstrate that the proffered reason was not the true reason. *McCowan v. All Star Maint., Inc.*, 273 F.3d 917, 922 (10th Cir. 2001). Here, like before, Bacy provided nothing to dispute CNI's explanation. And more importantly, has not offered any meaningful discussion about how the District Court's examination of such evidence was improper.

Additionally, any issues not raised and specifically identified on appeal are waived and are not properly before this Court. Bacy has not directly disputed any of

the facts that the District Court deemed uncontroverted; therefore, they should be deemed uncontroverted as a matter of law.

PROPOSITION II: THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON BACY'S DISCRIMINATION CLAIMS AGAINST CNI.

A. Bacy failed to provide any facts to support her race based hostile work environment claims.

To establish that a workplace is hostile, plaintiff must show that the workplace "permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Herrera v. Lufkin Indus. Inc.*, 474 F.3d 675, 680 (10th Cir. 2007). The uncontroverted facts establish that Bacy was subjected to one isolated, allegedly racially charged comment by Laminack. (App. 21-22, 155, 385). Bacy's Opening Brief does nothing to actually challenge this uncontroverted fact. Propositions three and four argue that the District Court improperly ignored her evidence of racial hostility, but then fails to identify the specific facts that were produced by Bacy and ignored. Bacy also offers no discussion or argument about how the alleged racial hostility altered the terms and conditions of her employment. *Trujillo v. Univ. of Colorado Health Scis. Ctr.*, 157 F.3d 1211, 1214 (10th Cir. 1998).

Therefore, the District Court properly dismissed Bacy's race based hostile work environment claim for failing to produce any evidence of frequent or severe

discriminatory conduct in her workplace and failing to demonstrate a genuine dispute as to whether the terms, conditions, or privileges of Plaintiff's employment were altered by the alleged harassment. (App 390)

B. Bacy cannot establish pretext to support her race based disparate treatment claim.

In order to establish her prima facie case for wrongful termination, Bacy was required to demonstrate that "(1) she belongs to a protected class; (2) she was qualified for the job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 969 (10th Cir. 2017)(internal quotation marks omitted). For the purposes of CNI's Motion for Summary Judgment, CNI did not contest that Bacy had met her initial burden. Therefore, the District Court shifted the burden to CNI to provide a legitimate reason for Bacy's termination. (App 391)

Once shifted, CNI produced evidence that Plaintiff was discharged for insubordination. (App 130-132, 149, 195-196) Specifically, the uncontroverted evidence established that Bacy failed to turn in her headset and badge despite being asked to do so by Laminack. (App 148) As the District Court correctly noted, "Defendants are required only to 'explain [their] actions against [Plaintiff] in terms that are not facially prohibited by Title VII." *EEOC v. Flasher Co.*, 986 F.2d 1312, 1317 (10th Cir. 1992). This burden is one of *production* not persuasion. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 101 S. Ct. 1089, 67 L. Ed. 2d 207

(1981). CNI met its burden of production. The uncontroverted evidence produced by CNI establishes that Bacy was terminated by Ryan Groce at the recommendation of Wendy Hutton following Hutton's investigation into the October 11, 2019 incident involving Laminack and Bacy. (App 130-132, 149, 195-196).

In Bacy's sixth proposition, she argues that the use of this evidence to satisfy CNI's burden of production left her without any ability to challenge the evidence. This is false. The District Court's analysis did not end with an examination of CNI's evidence. Moreover, CNI's evidence was not utilized at this stage to prove the truth of the matter asserted. The District Court merely held that CNI's burden of production was satisfied. (App 391-392)

After CNI satisfied its burden of production, the third step of the *McDonnell Douglas* framework requires the burden to shift back to Bacy to prove pretext. *Conroy v. Vilsack*, 707 F.3d 1163, 1171 (10th Cir. 2013). Despite this, Bacy's fifth proposition argues that shifting the burden to her to prove pretext was improper. Bacy argues she should not have been required to provide evidence of pretext, but if it was required, she satisfied that requirement. How she satisfied the requirement is unclear because Bacy identifies no facts in support of her theory of pretext.

Bacy fails to provide any basis to conclude that CNI's legitimate actions were actually pretext for unlawful discrimination. In evaluating pretext, the relevant inquiry is not whether [the] proffered reasons were wise, fair, or correct, but whether

[defendant] honestly believed those reasons and acted in good faith upon those beliefs." *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004). The court's role "is not to second guess an employer's business judgment." *Id.* Here, Bacy presented no evidence that CNI's actions were not undertaken in good faith. Though Bacy disagrees with the decision and believes that her termination should not have occurred in light of what she claims was her "faithful service," her alleged "faithful service" alone does not establish pretext.

Moreover, unsubstantiated assertions, improbable inferences, and unsupported speculation, which are the only things that Bacy relies upon, are insufficient to withstand summary judgment. *Sealock v. Colo.*, 218 F.3d 1205, 1209 (10th Cir. 2000). Bacy did not submit any material evidence, beyond her own inadmissible self-serving Affidavit, in response to CNI's Motion for Summary Judgment. Bacy's Opening Brief argues that her Affidavit was submitted because her "testimony needed to be `clarified." However, the 10th Circuit has rejected and refused to consider "sham affidavits" where plaintiffs provide self-serving statements or contradict prior sworn testimony in order to create sham issues of fact to avoid summary judgment. *Franks v. Nimmo*, 796 F.2d 1230 (10th Cir. 1986). In *Franks*, the court affirmed summary judgment in favor of defendants where the trial court rejected and refused to consider a "sham affidavit" offered by plaintiff in an attempt to avoid summary judgment. The Court held:

> Underlying those decisions [to disregard sham affidavits] is the conclusion that the utility of summary judgment as a procedure for screening out sham fact issues would be greatly undermined if a party could create an issue of fact merely by submitting an affidavit contradicting [her] own prior testimony.

Franks, 796 F.2d at 1237.

In addition to disregarding affidavits that contradict prior testimony, this Court must also disregard an affidavit that is not based upon personal knowledge of the affiant, that contains hearsay, that are non-specific or vague, that are conclusory, and that are self-serving in nature. According to Fed. R. Civ. P. 56(e)(1): "[a] supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible, and show that the affiant is competent to testify on the matters stated." In order to qualify under the personal knowledge standard, "an affidavit is inadmissible if the witness could not have actually perceived or observed that which he testifies to. According, at the summary judgment stage, statements of mere belief in an affidavit must be disregarded." *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006) (internal citations omitted).

She claims, without any personal knowledge or basis in fact, that Laminack somehow orchestrated her termination through the use of a Feedback Form - a Feedback Form she admitted was issued by a third party not employed by CNI. (App. 142-143, 172, 183-188, 385) Here, the lack of facts connecting Bacy's termination to Laminack's alleged racial bias towards her is important because

Bacy's entire disparate treatment claim is predicated on Laminack's racial bias towards her, not the racial bias of her decision makers, Hutton and Groce. Therefore, the District Court properly considered the subordinate bias theory of liability and determined that Bacy had failed to provide any evidence of a causal relationship between Laminack's actions and the employment decision. (App 394) Bacy did not provide any facts during the summary judgment phase, and she has not identified with any specificity what facts she provided that the District Court somehow overlooked.

Based on the foregoing, the District Court's grant of summary judgment on Bacy's race based wrongful termination claim was proper and should be affirmed as a matter of law.

C. Bacy has waived all arguments not raised in her opening brief.

Bacy never countered any of the arguments made by CNI with respect to her age discrimination claim under the ADEA and OADA. Bacy also does not raise any arguments related to the District Court's dismissal of her age discrimination claims in her Docketing Statement or in her Opening Brief. In her Docketing Statement, Bacy raised nine issues of error. *See* page 6 of Doc. 010110365495. In her Opening Brief, Bacy raises only six issues of error. "Issues not raised in the opening brief are deemed abandoned or waived." *Tran v. Trustees of State Colleges in Colarado*, 355 F.3d 1263, 1266 (10th Cir. 2004) citing *Coleman v. B-G Maint. Mgmt. of Colorado,*

Inc., 108 F.3d 1199, 1205 (10th Cir. 1997). "Issues listed in docketing statements generally are waived if they are not also argued in an opening brief." *Davis v. Akin's*, 463 F. App'x 739, 740 n. 2 (10th Cir. 2012).

Additionally, to be properly before this Appellate Court, a litigant must "press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority in the face of contrary authority" and if a litigant fails to do so, it "forfeits the point." *Aguirre v. City of Greeley Police Dep't*, 511 F. App'x 814, 816 (10th Cir. 2013). Thus, on appeal, Bacy has failed to make any arguments regarding her age discrimination claims under the ADEA or OADA. Therefore, Bacy has abandoned any potential argument related to the dismissal of those claims. Accordingly, such issues have been waived on appeal and cannot be considered by this Court.

However, even if this Court finds that Bacy's arguments as to these claims are not waived and/or somehow were addressed, CNI contends that the District Court's dismissal of Bacy's age discrimination claims was proper due to Bacy's overall failure to respond to and failure to provide any evidence in response to CNI's arguments.

CONCLUSION

The District Court properly considered the uncontroverted record detailing the decision to terminate Bacy for her unprofessional conduct and insubordination.

Because Bacy was unable to provide any evidence which raises a genuine issue of material fact with respect to her claims, CNI respectfully requests affirmation of the District Court's Order granting it summary judgment.

Respectfully submitted this 2nd day of November 2020.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 5321 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font size and Times New Roman type style.

/s/ Anh Kim Tran
Anh Kim Tran

CERTIFICATE OF DIGITAL SUBMISSION

Appellee hereby certifies that (a) all required privacy redactions have been made, (b) every document submitted in digital form or scanned PDF format is an exact copy of the document filed with the Clerk; and (c) that the electronic submissions have been scanned for viruses with Symantec Endpoint Protection Version 14, and according to said program, are free of viruses.

/s/ Anh Kim Tran
Anh Kim Tran

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November 2020, a true and correct copy of the foregoing is being filed using the court's CM/ECF system which will send notification of such filing to the following parties listed below:

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