TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00756-CV

Manor Independent School District, Appellant

v.

Kenya Boson, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT
NO. D-1-GN-15-003577, HONORABLE TIM SULAK, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

In this interlocutory appeal, the Manor Independent School District (MISD) appeals the trial court's denial of its combined plea to the jurisdiction and motion for summary judgment as to Kenya Boson's claims asserting a hostile work environment both based on racial and retaliatory harassment stemming from the statutorily protected activity of reporting workplace sexual harassment. MISD contends that Boson failed to produce evidence necessary to create a fact issue on the prima facie elements of her claim. For the following reasons, we will reverse the trial court's denial of MISD's plea to the jurisdiction and render judgment in favor of MISD, dismissing Boson's hostile-work-environment claims.

BACKGROUND[1]

Boson began her employment with MISD in 2011, when she was hired as a grant funded "at risk" counselor for Manor High School. She worked in that position for three school years until the grant funding expired, at which time the then-superintendant renewed her contract and assigned her to the position of "College and Career Readiness Counselor" at the Manor Excel Academy.

In April 2012 Boson approached the then-principal of Manor High School with a complaint of sexual harassment against another MISD employee, Matthew Tryon, a security guard at the high school. Later that year, Boson again complained about the same employee's alleged sexual harassment, this time to Willie Watson, the school district's Human Resources (HR) Director. While Boson now alleges that during the meeting Watson exhibited "animus" towards her complaint and "turned the tables on her" by accusing *her* of harassing a different employee, Boson never filed any complaints about Watson's handling of her allegations.

Between the time of her complaint to Watson and May 2014, when she filed a charge of racial discrimination with the Equal Employment Opportunity Commission (EEOC), Boson, who is African-American, alleges that various MISD employees engaged in harassing conduct, creating for her a hostile work environment, and that the conduct was both racially motivated and in retaliation for her reporting of sexual harassment.[2] Boson's EEOC charge cited the following

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[1] The facts in this background section are taken from Boson's pleadings and her deposition, which was attached to her response to MISD's combined plea to the jurisdiction and motion for summary judgment.

[2] The specific conduct about which Boson complains will be detailed in the "Discussion" section of this opinion.

actionable conduct: disparate treatment compared to white employees; ridicule by her superior lead counselor, Tabitha Gutierrez; criticism by Gutierrez for Boson's reports of sexual harassment; "singling out" by principal Jesse Perez for "not being a team player" and "not doing [her] job"; being "kept out" of various meetings and "denied access" to information needed to perform her job; and not being informed of three available permanent positions until after they had been filled.

The Texas Workforce Commission issued Boson a right-to-sue-notice in June 2015, prompting this lawsuit. In this suit, Boson alleged violations of the Texas Commission on Human Rights Act (TCHRA), *see* Tex. Lab. Code §§ 21.0511–.055, based on several theories: racial discrimination, retaliation, and racially and retaliatory hostile work environment. MISD filed a combined motion for summary judgment and plea to the jurisdiction asserting governmental immunity from suit. The trial court granted MISD's motion and plea as to Boson's discrimination and retaliation claims but denied them as to Boson's hostile-work-environment claims. MISD then filed this interlocutory appeal.[3]

DISCUSSION

In its sole issue on appeal, MISD contends that the trial court erred in finding that it had jurisdiction over Boson's hostile-work-environment claims under the TCHRA because, it argues, Boson failed to produce evidence necessary to create a fact issue on three of the prima facie elements of such a claim. *See Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 646 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (listing elements of prima facie case of hostile work

[3] Boson has not filed a cross-appeal challenging the trial court's grant of MISD's plea and summary-judgment motion on her discrimination and retaliation claims.

environment); *see also Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012) (plaintiff must plead facts comprising prima facie case under TCHRA, defendant may present evidence negating those facts, and plaintiff must then present evidence raising fact question on jurisdictional elements); *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228–32 (Tex. 2004) (if plaintiff fails to raise fact issue on jurisdictional issue after defendant presents evidence demonstrating that court has no subject-matter jurisdiction, court must grant plea to jurisdiction). MISD also posits that it is unclear whether Texas courts even recognize a claim for "retaliatory hostile work environment"[4] but that, in any event, Boson has not made a prima facie case for hostile work environment based either on race or retaliation.

Specifically, MISD contends that after it submitted evidence attached to its combined plea to the jurisdiction and motion for summary judgment, Boson's response with attached evidence failed to raise a fact issue on the following elements of her claim: (1) the harassment that she complains of was based on a protected characteristic (her race) or activity (her making reports of sexual harassment); (2) the harassment she complains of affected a term, condition, or privilege of employment; and (3) the employer knew or should have known of the harassment in question and

[4] Boson has not cited any Texas cases recognizing claims for "retaliatory hostile work environment" but does cite some federal cases to support such a claim. *E.g.*, *Noviello v. City of Boston*, 398 F.3d 76, 92–93 (1st Cir. 2005) (noting that retaliatory harassment "requires a more nuanced analysis" than discriminatory harassment and cannot be based on merely hurtful actions, unpleasantness, or "commonplace indignities" in workplace but on actions "directed at a complainant[ ] that stem from a retaliatory animus" and constitute "severe or pervasive harassment"). We will assume without deciding that Texas recognizes such claims. *See Ogden v. Brennan*, 657 F. App'x 232, 236 n.2 (5th Cir. 2016) (on review of district court's summary judgment for employer United States Postal Service, refraining from deciding "whether such a cause of action [retaliatory hostile work environment] exists because [employee] cannot show his work environment was hostile").

failed to take prompt remedial action. *See Anderson*, 458 S.W.3d at 646. The second challenged element "entails ongoing harassment, based on the plaintiff's protected characteristic, so sufficiently severe or pervasive that it has altered the conditions of employment and created an abusive working environment." *Id.*

In determining whether an abusive work environment exists, courts look to the totality of the circumstances, including the frequency and severity of the discriminatory conduct and whether it unreasonably interfered with the employee's work performance. *Id.* (citing *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 806 (Tex. 2010)). The conduct must be both objectively and subjectively hostile or abusive. *Esparza v. University of Tex. at El Paso*, 471 S.W.3d 903, 913 (Tex. App.—El Paso 2015, no pet.); *Gardner v. Abbott*, 414 S.W.3d 369, 382 (Tex. App.—Austin 2013, no pet.) (citing *Waffle House, Inc.*, 313 S.W.3d at 806). "A hostile-work-environment claim is designed to address conduct that is so severe or pervasive that it destroys an employee's opportunity to succeed in the workplace." *Gardner*, 414 S.W.3d at 382 (citing *City of Houston v. Fletcher*, 166 S.W.3d 479, 489 (Tex. App.—Eastland 2005, pet. denied)). Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—one that a reasonable person would find hostile or abusive—is not actionable. *Esparza*, 471 S.W.3d at 913.

We first consider the evidence pertaining to the second challenged element of Boson's prima face claim: the extent of hostility or abusiveness of Boson's work environment. Boson cites the following evidence from her deposition testimony, which was attached to her response to MISD's combined plea to the jurisdiction and motion for summary judgment, in support of this element. According to Boson:

- Beginning in 2011 and continuing through early 2012, a co-worker security guard, Matthew Tryon, made sexually harassing comments to Boson, including repeatedly asking her out on dates despite her refusals and warning other employees to "be careful" and "stay away" from her because she would file sexual-harassment complaints against them.

- After Boson spoke with the assistant principal, Jon Bailey, about Tryon's conduct, the harassment stopped for a period of time but "started up again" in the spring of 2012.

- Upon Tryon's renewed harassment, Boson went to speak with the HR director, Willie Watson, during which conversation Watson "turned the tables" on her by bringing a counter-accusation of sexual harassment allegedly leveled against her by a different employee, demonstrating an "animus" towards Boson, which caused her to "lose confidence" in the HR department.

- On an occasion in late 2013, Tabitha Gutierrez, Boson's "lead counselor," "criticized" Boson in front of other MISD staff members by alluding to unidentified employee complaints of sexual harassment and "smirking" at Boson when saying, "You can't say it's harassment if you wanted it."

- Boson inferred that Gutierrez must have informed a newly hired full-time counselor about Boson's lodging of sexual-harassment complaints, evidenced by the new employee's comment to Boson, in the context of "random conversation" about sexual harassment in the workplace at an August 2013 staff meeting, "What happened in your situation?"

- In response to general conversation during the August 2013 staff meeting about how to handle complaints of sexual harassment in the workplace, Gutierrez replied, "You just have to ignore it."

- Around August or September 2013, an assistant principal, Jesse Perez, "singled out" Boson during a meeting and questioned her ability to do her job, asking her, "What do you do all day?" and remarking that she was not a "team player."

- After the 2013–2014 school year began, Boson claims that she was "no longer invited" to "attendance and transition meetings for students," and that Gutierrez "no longer included [her]" in weekly counseling meetings.

- At the senior graduation ceremony of her third year at the school, Boson was "excluded" from participation in handing out diplomas and calling out student names, while the other counselors appeared to have been given "posts" or

tasks to perform (such as calling out student names) and to have rehearsed them ahead of time, as all of the counselors had done in past years.

- Shortly after Boson filed her EEOC complaint, Watson informed her that her position for the 2014–2015 school year would be a teaching position rather than a counseling position, and even though her job duties remained counseling in nature, she (1) reported to a department other than the counseling department, (2) did not receive the customary "step increase" in salary that she believed counselors received each year, and (3) was treated with less "esteem" by her colleagues because they considered her a "teacher" rather than a counselor.

- Boson felt that Watson's remarks to her at the graduation ceremony, asking whether she'd considered working in a different school district and city, "offensive."

To succeed on a TCHRA claim of hostile work environment, the complained-of conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Waffle House, Inc.*, 313 S.W.3d at 806 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). An abusive environment arises when the workplace is permeated with discriminatory intimidation, ridicule, and insult. *Id.*; *Twigland Fashions, Ltd. v. Miller*, 335 S.W.3d 206, 219 (Tex. App.—Austin 2010, no pet.). Courts look to all the circumstances in determining whether a hostile work environment exists, including the frequency of the discriminatory conduct and whether it unreasonably interfered with the employee's work performance. *Waffle House, Inc.*, 313 S.W.3d at 806 (citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002)). "The Supreme Court has described the 'abusiveness' standard as requiring 'extreme' conduct." *Twigland Fashions, Ltd.*, 335 S.W.3d at 219 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). Abusiveness is said to "take[ ] a middle path between

making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

Based on this controlling law, we conclude that Boson's evidence—viewed as a whole and in the light most favorable to her—is not sufficient to constitute an objectively abusive or hostile working environment.[5] *See Anderson*, 458 S.W.3d at 647 (affirming trial court's summary judgment in favor of employer on employee's hostile-work-environment claim because employer challenged "severe and pervasive nature" of complained-of workplace conduct, and employee's evidence did not raise fact issue that such conduct was severe and pervasive enough to alter conditions of employment and create abusive working environment). The occasional comments by Boson's co-workers and superiors disapprovingly alluding to her reports of sexual harassment were not objectively severe, extreme, or frequent so as to permeate the work environment and alter it to the point of its becoming abusive. The alleged change in Boson's work position and exclusion of her from meetings and graduation duties, even in conjunction with the occasional "harassing" comments, also cannot be said to have created an abusive working environment, especially considering that Boson does not cite any evidence that her work performance suffered as a result. The extent of severity, hostility, and pervasiveness here is minimal, equivalent to the levels

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[5] Because we have determined that the entirety of the conduct about which Boson complains is not sufficient to meet her prima facie burden, we need not reach MISD's argument that some of the complained-of conduct is time barred. *See Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 515–16 (Tex. 2012) (noting that conduct occurring more than 180 days before plaintiff files EEOC charge is jurisdictionally time barred); *see also University of Tex.-Pan Am. v. Miller*, No. 03-10-00710-CV, 2013 WL 4818355, at *7 (Tex. App.—Austin Aug. 28, 2013, no pet.) (mem. op.) (noting that "continuing violation doctrine" may apply to bring in otherwise time-barred conduct for hostile-work-environment claim, but plaintiff has burden of showing "organized scheme" of harassment leading to present violation).

previously found insufficient by this and other Texas appellate courts to support a prima facie case. *See Donaldson v. Texas Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 444–46 (Tex. App.—Houston [1st Dist.] 2016, pet. filed) (affirming grant of summary judgment where plaintiff did not present evidence creating fact issue on whether complained-of conduct was severe or pervasive enough that it altered conditions and employment and created abusive work environment); *Harris Cty. Hosp. Dist. v. Parker*, 484 S.W.3d 182, 198 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (reversing district court's denial of employer's plea to jurisdiction because employee had failed to establish that alleged harassment was sufficiently pervasive that it affected term, condition, or privilege of employment); *Twigland Fashions, Ltd.*, 335 S.W.3d at 225 ("Considering the infrequency of [supervisor]'s alleged conduct, its lack of relative severity, and the limited degree to which it impacted [employee]'s work performance, [employee] has failed to raise a fact issue that she suffered such a deprivation as understood in the applicable jurisprudence.").

Because Boson did not present evidence creating a prima facie case of hostile work environment,[6] the trial court erred in denying MISD's plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 227–28 (holding that if relevant evidence fails to raise fact question on jurisdictional issue, trial court must grant plea to jurisdiction as matter of law).

[6] Due to our determination regarding the severity and abusiveness of Boson's work environment, we need not reach the question of whether she created a fact issue on the other two challenged elements of her claim: whether the claimed harassment was based on a protected characteristic or activity and whether MISD knew or should have known of the harassment but failed to take remedial action.

CONCLUSION

For the foregoing reasons, we reverse the trial court's order denying MISD's plea to the jurisdiction on Boson's claims for hostile work environment and render judgment in favor of MISD on those claims.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Reversed and Rendered

Filed: March 29, 2017