TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00687-CV

Rhejeanne Bermudez, Appellant

v.

Texas Mutual Insurance Company, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT
NO. D-1-GN-16-001418, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING

MEMORANDUM OPINION

Rhejeanne Bermudez appeals from an order granting summary judgment to her former employer, Texas Mutual Insurance Company (Texas Mutual). Bermudez brought suit under the Texas Commission on Human Rights Act (TCHRA) alleging that Texas Mutual fired her in retaliation for reporting that a coworker sexually harassed her. *See* Tex. Labor Code § 21.055. For the reasons that follow, we will affirm the district court's order.

BACKGROUND[1]

Bermudez worked for Texas Mutual from 2010 until October of 2014 as an administrative specialist. She was paid hourly and, every two weeks, filled out an electronic time card reporting her hours worked. If she did not work all of her scheduled hours, she could use her

[1] We take these facts from the parties' pleadings and the evidence attached to Texas Mutual's motion for summary judgment.

accrued vacation or sick leave to cover the absence. The time card system required her to "code" each absence by the type of leave taken.

Texas Mutual's Employee Handbook of Policies and Procedure (Handbook) contained a non-exclusive list of reasons why employees would be subject to "corrective action, up to and including termination." The list included unexcused absences, insubordination, "[r]epeated tardiness or frequent early departures, or no notice or improper notice of an absence, late arrival, or early departure," and "[r]outinely taking all leave as it is accrued." An unexcused absence was defined as "any absence from work that is not approved by [the employee's] immediate supervisor," including a late arrival or early departure from work.

In February of 2012, Bermudez began reporting to Tim Riley, the supervisor of the Special Investigations department. In November of 2013, Riley issued to Bermudez a "Stage Two Performance Notification" citing unexcused absences, insubordination, and repeated late arrivals and early departures.[2] According to the notification, Riley had previously instructed her to obtain permission before arriving late, leaving early, or working overtime. Bermudez's time card for October 25, 2013 reflected that she did not obtain permission for such acts five times in the preceding two weeks. On separate occasions, Bermudez failed to return to work after an errand, left work early without Riley's approval, and left work early despite his refusal to give permission.[3] The notification instructed Bermudez to reduce the number of her absences, "including early departures and late arrivals," adhere to her regular schedule of working hours, "request leave at least 24 hours

[2] There is no explanation in the record of the significance, if any, of the "Stage Two" designation.

[3] Bermudez does not dispute any of factual statements in the performance notification.

in advance," and "only take leave that she received approval for." Her failure to meet these expectations would "result in further disciplinary action, up to and including termination."

On May 5, 2014, Bermudez reported that she had been sexually harassed by a coworker in the same department. Texas Mutual staff investigated and concluded that Bermudez was "significantly more credible" than the coworker, who resigned shortly afterwards. Bermudez testified at a deposition in this case that she had "no complaints" with Texas Mutual's handling of the investigation.

Texas Mutual terminated Bermudez on October 28, 2014. The written notice stated that the decision was due to her "ongoing failure, despite coaching and corrective action, to follow [Riley]'s directives and adhere to attendance policies and thereafter sustain an acceptable attendance record." On the same day, Riley placed a memo in Bermudez's personnel file detailing Bermudez's behavior that allegedly led to the termination. According to the memo, Bermudez had eight unexcused absences between January and October of 2014. Riley nevertheless approved her request to take a week's vacation in October 2014 but warned her that it would use up almost all of her remaining leave. Bermudez did not return to work on October 20 as scheduled but sent Riley and others a text message saying she was ill. Riley apparently did not receive the message but sent her an email the same day instructing her to stick to her normal schedule when she returned. According to her time card for that period, Bermudez exhausted her remaining leave by using it to cover that absence. On October 22, Bermudez emailed Riley to let him know that she had arrived late due to a road closure and stated that she would work overtime.

Bermudez subsequently brought suit under the TCHRA alleging that Texas Mutual fired her in retaliation for making the harassment complaint. Texas Mutual filed a traditional motion for summary judgment, which the district court granted without stating its reasons.[4] This appeal ensued.

ANALYSIS

In one issue, Bermudez argues that the district court erred in granting summary judgment on her retaliation claim.

Standard of Review

We review a grant of summary judgment de novo. *Texas Workforce Comm'n v. Wichita Cty.*, 548 S.W.3d 489, 492 (Tex. 2018). Summary judgment is proper when there are no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). "A genuine issue of material fact exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 219 (Tex. 2017) (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). We review the summary-judgment record in the light most favorable to the non-movant, credit evidence favorable to the non-movant if a reasonable juror could and disregard contrary evidence unless a reasonable juror could not. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276, 279 (Tex. 2017).

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[4] The district court also granted summary judgment on Bermudez's claim of disability discrimination, but she addresses only her retaliation claim in her briefing to this Court.

TCHRA

The TCHRA prohibits retaliation against employees for engaging in certain protected activities, including reporting sexual harassment. *See* Tex. Labor Code § 21.055(1); *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 137 (Tex. 2015). In retaliation cases under the TCHRA, Texas courts follow federal cases construing and applying equivalent federal statutes such as Title VII of the Civil Rights Act. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 781 (Tex. 2018). Accordingly, an employee can establish retaliation by either direct or circumstantial evidence. *Id.* at 781-82.

When direct evidence is lacking, as it is here, the *McDonnell Douglas* burden-shifting framework enables the employee to prove a violation by circumstantial evidence. *Id.* at 782 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973)). Under this framework, the employee bears the initial burden to establish a prima face case of retaliation. *Id.* If the employee can establish a prima face case, the burden shifts to the employer to produce "evidence of a legitimate, nondiscriminatory reason for the disputed employment action." *Id.* If the employer produces such evidence, the burden then returns to the employee to raise a fact issue that the employer's stated reason is a pretext for retaliation. *Id.* Even though the burdens of production shift as described, the burden of persuasion always remains with the employee. *Id.*

Discussion

Bermudez argues that summary judgment was improper because she established a prima facie case of retaliation and raised a fact issue as to whether Texas Mutual's stated reason for terminating her was pretextual. Assuming without deciding that Bermudez could establish a prima

facie case, we will turn to whether Texas Mutual produced evidence of a legitimate, non-retaliatory reason. Texas Mutual asserts, as it did in its motion for summary judgment, that Bermudez was fired for repeated violations of attendance policies and failure to follow Riley's instructions. Bermudez replies that Texas Mutual "wholly failed to identify the person who actually made the termination decision" because Riley had testified it "was a product of group think." Consequently, Bermudez argues, Texas Mutual is "unable to articulate a reason why the person did it."

Texas Mutual's summary-judgment evidence included an affidavit from Riley and an excerpt from his deposition explaining the process that led up to her termination. Riley testified that after Bermudez arrived late on October 22, 2014, he did not intend to fire her but "drafted a counseling request, similar to the Stage Two Notification from 2013." The Handbook required that he consult with the Human Resources Department as part of this process because termination was an option, and he discussed the matter with Stacie Gonzalez, a Human Resources Consultant, and Joe Yurkovich, his immediate superior at the time. After those discussions, Riley decided to fire Bermudez because her behavior "was substantially similar to the behavior" that prompted the prior notification. Riley specified that he decided to fire her because she "failed to adhere to attendance policy and did not sustain satisfactory attendance after she had been counseled on it," "continually ran her leave balances down to virtually zero," and "failed to adhere to her agreed-to schedule." Riley's testimony is consistent with the termination memo in Bermudez's personnel file, which was signed by Riley, Gonzalez, Yurkovich, and Texas Mutual's President. Texas Mutual carried its burden to articulate a legitimate reason for terminating Bermudez's employment. *See Hernandez v. American Tel. & Tel. Co.*, 198 S.W.3d 288, 292-93 (Tex. App.—El Paso 2006, no pet.) (holding

that company's evidence of employee's unsatisfactory attendance record was evidence of non-retaliatory reason for discharge).

Having concluded that Texas Mutual satisfied its burden of production, we turn to whether Bermudez raised a fact issue that Texas Mutual's asserted reason was a pretext. At this stage, Bermudez had the burden to produce evidence that she would not have been terminated but for her harassment complaint. *Bedgood v. Texas Educ. Agency*, No. 03-14-00030-CV, 2015 WL 739635, at *3 (Tex. App.—Austin Feb. 19, 2015, pet. denied) (mem. op.) (stating that at pretext stage of a retaliation claim, the plaintiff must produce evidence "that she would not have suffered an adverse employment action 'but for' engaging in the protected activity" (quoting *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 685 (5th Cir. 2001)); *see Datar v. Nat'l Oilwell Varco, L.P.*, 518 S.W.3d 467, 477-78 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). We determine whether she met this burden by examining all the circumstances, including the "temporal proximity between the protected activity and the adverse action, knowledge of the protected activity, expression of a negative attitude toward the employee's protected activity, failure to adhere to relevant established company policies, discriminatory treatment in comparison to similarly situated employees, and evidence the employer's stated reason is false." *Alamo Heights*, 544 S.W.3d at 790.

"Temporal proximity is relevant to causation when it is 'very close.'" *Id.* (quoting *Strong v. University Healthcare Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007)). Bermudez argues that the five-month period between her complaint and termination is probative of causation. On these facts, a five-month delay between the protected activity and the adverse employment action has little, if any, probative value. *See Jackson v. Honeywell Int'l, Inc.*, 601 Fed. Appx. 280, 286-87

(5th Cir. 2015) (holding five-month gap was too long to prove causal connection); *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 471-72 (5th Cir. 2002) (same); *Donaldson v. Texas Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 444 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (holding six-month gap was not probative of causation).

Bermudez testified at her deposition that Riley treated her differently after she made the complaint, a change she attributes to Riley's friendship with the person whom she accused. She described how Riley refused to take meetings with her and generally viewed her as a troublemaker. As evidence, she testified that he asked her, but no one else, if she was the source of an anonymous complaint he received that a coworker's dresses were too short.[5] However, Bermudez also admitted that Riley supported a pay increase for her a month after she made the complaint and gave her an above-average rating on her September performance evaluation. Bermudez's testimony effectively amounts to her subjective belief that Riley blamed her for making the complaint, but a plaintiff's subjective beliefs of retaliation are not competent summary-judgment evidence. *See Texas Div.-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994); *Cardenas v. Bilfinger TEPSCO, Inc.*, 527 S.W.3d 391, 402-03 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

Bermudez also argues that she was treated differently from a similarly-situated employee, Lisa Bonner. "Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 584 (Tex. 2017). "The situations and conduct of the employees in

[5] Bermudez also testified that Riley allocated "[s]ome of the job duties I had . . . to other people" but did not explain further.

question must be 'nearly identical.'" *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 594 (Tex. 2008). Bermudez argues that she was treated differently from Bonner, another administrative specialist under Riley's supervision. According to Bermudez, Bonner was also late to work on October 22, 2014 because of the same road closure but suffered no adverse consequences. Bermudez, however, admitted that she did not know if Bonner had previous attendance issues or any disciplinary history at all. Employees with different disciplinary records do not qualify as "nearly identical." *See Rincones*, 520 S.W.3d at 584. And even if Bonner had attendance issues in the past, the record indicates that she had 140 hours of accrued leave at the time while Bermudez had none. *See id.* (noting that plaintiff must prove that there are no "differentiating or mitigating circumstances as would distinguish" treatment of similarly situated employees). Texas Mutual's treatment of Bonner therefore does not raise an issue of material fact as to whether the stated reason for terminating Bermudez was a pretext for retaliation.

The record also contains no evidence that Texas Mutual failed to follow relevant policies with respect to the handling of Bermudez's sexual-harassment complaint. Similarly, no evidence shows that Texas Mutual's stated reason was false. Relying principally on Gonzalez's deposition testimony, Bermudez argues that her attendance issues were not the real reason behind her termination because Texas Mutual "does not even know if she had used up all of her accrued leave." Gonzalez, however, only testified that she could not recall whether Bermudez had leave remaining—Riley testified several times that she had exhausted all of her leave. Bermudez insists that she "still had plenty" of leave remaining, but she refers to her authorized leave under the Family Medical Leave Act (FMLA). Texas Mutual had previously approved her request under the FMLA

to take intermittent leave when she experienced migraine headaches, but FMLA leave cannot be used to cover unrelated absences.[6] Bermudez does not contend she had non-FMLA leave remaining.

Bermudez also contends that a fact issue exists because Riley testified that he never intended to terminate her employment. Bermudez sees this as an inconsistency, but each of the statements Bermudez relies on refer to Riley's intentions on October 22, the day of the late arrival. As set out above, the record demonstrates that he decided later to terminate her after discussions with others. The record bears no evidence that Texas Mutual's asserted reasons were a mere pretext.

After reviewing the record in the light most favorable to Bermudez, we must conclude no fact issue exists that Bermudez would not have been terminated but for her complaint. Bermudez's sole issue on appeal is overruled.

CONCLUSION

We affirm the district court's order granting summary judgment.

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Cindy Olson Bourland, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: August 30, 2018

[6] Bermudez argues that she informed Riley that she did not return to work on October 20 because of migraines, but it is undisputed that she did not code her absence on that day as FMLA leave.