Opinion filed August 31, 2017

In The

Eleventh Court of Appeals

No. 11-15-00110-CV

MELISSA K. FERGUSON, Appellant
V.
TEXAS DEPARTMENT OF TRANSPORTATION, Appellee

On Appeal from the 35th District Court
Brown County, Texas
Trial Court Cause No. CV14-01-006

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

Melissa K. Ferguson appeals the trial court's summary judgment in favor of her previous employer, the Texas Department of Transportation. In her first four issues, Ferguson contends that she established a prima facie case of failure to accommodate, disability discrimination, and retaliation and that TXDOT's stated reasons for her termination were false and pretextual. In her final two issues, she asserts that the trial court abused its discretion when it denied her motion to strike

new evidence and that the trial court's judgment is void because the assigned trial judge could not properly preside over the case. We affirm.

I. *Introduction and Procedural History*

In April 1996, Ferguson began employment with TXDOT as a receptionist. After six months, Ferguson moved to the accounting department and, after several years, was promoted to an Account Specialist II, where she remained until her date of termination in 2012. Ferguson's job duties included paying vendor invoices and providing customer service. In September 2013, Ferguson filed suit in Travis County against TXDOT and alleged claims for failure to accommodate, disability discrimination, and retaliation. In response, TXDOT moved to transfer venue to Brown County, which was granted. TXDOT also filed a plea to the jurisdiction and filed a combined no-evidence and traditional motion for summary judgment. In March 2015, Judge Stephen Ellis recused himself, and retired Judge Frank E. Griffin was assigned to preside over the case. After a hearing, Judge Griffin granted TXDOT's motion for summary judgment. Ferguson appeals.

II. *Overview of Summary Judgment Evidence*

A. TXDOT's Reorganization from District to Regional Offices

In late 2009 or early 2010, TXDOT underwent a reorganization process where the agency switched from district to regional offices. As a result, TXDOT employees experienced an increased workload, and their supervisors began to evaluate them under a stricter standard. Many employees either retired or quit because of the increased workload. In addition, Ferguson's lead worker changed from David Haley to Erma Windham. At that time, Ferguson also had to report to Michelle Cravotta, Accounting Manager for the North Region, and to Kysha Holland, Accounting Supervisor.

B. Ferguson's Requests

In July and August 2011, Ferguson contacted North Region directors, Tim Powers and Gus Khankarli, to inquire about a possible transfer into another department. Ferguson requested another transfer in November 2011 because of the "hostile and unsatisfactory working environment" created by Windham and Cravotta. Ferguson stated that Windham treated her differently from a certain male employee; Ferguson also asserted that her working environment adversely affected her physical and mental health. In support of her mental and physical claims, she attached medical documents, which indicated that her depression worsened while at work and caused hair loss, nausea, and anxiety.

After being diagnosed with severe clinical depression in October 2011, Ferguson requested an accommodation for her illness in December of that year. She alleged in her Americans with Disabilities Act accommodation request that she could perform her essential work functions with a supervisory change. As part of her request, she attached a medical evaluation from Dr. Michael Schultz, who supported her medical claims. TXDOT denied this request and stated that "your request that your supervisor be replaced [is] not a reasonable accommodation." In February 2012, Ferguson submitted a second accommodation request and attached medical evaluations from Michael Qunell, Dr. Michael Schultz, and registered nurse Linda Harris, who all recommended a "lateral transfer" or a "department change" due to Ferguson's medical condition, which worsened under Windham's supervision. Again, TXDOT denied Ferguson's request and stated that a change in supervisor was not a reasonable accommodation.

C. Ferguson's Performance

Ferguson's performance evaluations from her start date in 1996 to October 2009 indicated that she either "achieved" or "exceeded" her job expectations.

Although Ferguson's lead worker had changed to Windham, Haley completed the majority of her evaluations. Ferguson's performance evaluations were completed approximately every ten months. After regionalization, Cravotta completed Ferguson's evaluations.

In August 2010, Cravotta noted in her evaluation that Ferguson was placed on a year-long probation because she used TXDOT's internet for non-work-related purposes. Ferguson's subsequent evaluations, completed by Cravotta from June 2011 to April 2012, indicated that Ferguson's performance "[n]eed[ed] improvement." These evaluations indicated that Cravotta warned Ferguson that she had failed to follow policy by forwarding all leave time and comp time to the Lead Worker and the accounting manager. Cravota also noted that Ferguson failed "to collaborate and cooperate with her Lead Worker, Supervisor and Manager."

Due to Ferguson and Windham's relationship at work, human resources presented them with an "Agreement for a Commitment to an Effective Working Relationship" (Agreement) in March 2012. Ferguson refused to sign this Agreement until her attorney had had an opportunity to review the document. In August 2012, Ferguson received a written reprimand for her "insubordinate behavior." On this occasion, Ferguson submitted inaccurate information on the "Segment 04 Annual Review," a mistake that she admitted occurred because she overlooked a file, rejected help, and rushed through the report. In October 2012, TXDOT again placed Ferguson on a twelve-month probation because of her insubordinate behavior and her failure to abide by the Agreement.

D. Ferguson's Grievances

In May 2012, Ferguson filed a grievance against Mark Bradshaw, Cravotta, and Windham and alleged retaliation and nondiscriminatory reasons as the basis for her complaint. In her grievance, she asserted that Bradshaw intervened in the hiring

process for an open "Purchaser II" position to make sure that she did not get the position even though she claimed that she was qualified. She also claimed that Cravotta's negative evaluations of her were retaliatory. However, TXDOT's human resources department did not investigate the May 2012 grievance because it was not timely.

Ferguson then filed a second grievance in August 2012 against Windham, which concerned an incident that had occurred on June 4, 2012. Ferguson recalled that Windham had asked her to come into her office and then Windham had yelled and cursed at Ferguson. Ferguson said that, when she tried to leave the office, Windham yelled at her and blocked her path. TXDOT investigated this allegation and obtained witness testimonies from Brandy Halk and Delinda Skaggs. Halk stated that she overheard Windham talk to Ferguson in a loud, agitated voice and that she witnessed Windham exhibit very unprofessional behavior toward Ferguson. Similarly, Skaggs recalled that on June 4, she overheard loud voices and a door slam. Skaggs also stated that Windham treated Ferguson inappropriately in the workplace. With this information, the investigator dismissed Ferguson's grievance because the evidence did not support a pattern of unprofessional behavior by Windham and the evidence was inconclusive that Cravotta and TXDOT management supported Windham.

E. Ferguson's Termination

On November 30, 2012, TXDOT fired Ferguson. Cravotta, Bradshaw, Brian Ragland, Human Resources, and the Legal Team made the decision to fire her. TXDOT "terminated" Ferguson because she (1) failed to improve communications with her lead worker, supervisor, or manager; (2) failed to timely pay eight fuel invoices totaling more than $60,000 dollars, which caused undue hardship to TXDOT because of the suspension of fuel deliveries and unnecessary interest

payments; (3) failed to update the Damage Claim database when requested to do so; (4) installed a lock on her office door without permission; and (5) failed to follow TXDOT's chain of command. The termination letter also outlined how Ferguson had failed to comply with the terms of her twelve-month probation, which included a requirement for prior approval of work schedule changes, better communication with supervisors, improved accuracy on work assignments, proper retention or shredding of documents as required by TXDOT, and adherence to TXDOT policies including protection of sensitive and confidential information. TXDOT outlined that Ferguson had received previous warnings for these actions; TXDOT had sent Ferguson a written reprimand in August 2012, placed her on a twelve-month probation in October 2012, and warned her in early November 2012 that she needed to follow TXDOT's procedures when dealing with sensitive information.

III. *Issues Presented*

In her first, second, third, and fourth issues on appeal, Ferguson asserts that the trial court erred when it granted summary judgment in favor of TXDOT because she proved a prima facie case of failure to accommodate, disability discrimination, and retaliation and because TXDOT's stated reasons for her termination were false and pretextual. In her fifth issue, she contends that the trial court erred when it denied her motion to strike new evidence that TXDOT attached in its reply to Ferguson's summary judgment response. Finally in her sixth issue, she alleges that the trial court's judgment is void because the assigned trial judge could not properly preside over the case.

IV. *Summary Judgment Standard of Review*

A traditional motion for summary judgment involves a question of law and is reviewed de novo. *George v. Price*, 321 S.W.3d 164, 166 (Tex. App.—Eastland 2010, no pet.). We consider whether reasonable and fair-minded jurors could differ

in their conclusions in light of all the evidence presented to determine whether a fact question exists. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). Where, as here, the trial court does not specify the grounds on which it relied in granting summary judgment, we must affirm the summary judgment if any ground advanced by the movant is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000).

V. *Analysis*

We will first address part of Ferguson's first issue, which involves a jurisdictional issue. We will next address the remainder of her first issue, as well as her second and fourth issues, followed by her third issue. Afterward, we will address her fifth and sixth issues.

A. Issue One—Part One: Ferguson did not timely assert her failure-to-accommodate claim.

Ferguson asserts a failure-to-accommodate claim as part of her disability discrimination claim, and TXDOT asserts that the trial court lacked jurisdiction to adjudicate those accommodation and other workplace issues that occurred prior to November 30, 2012. TXDOT contends that a complaint of unlawful employment practices must be brought before the Equal Employment Opportunity Commission (EEOC) or the Texas Workforce Commission Civil Rights Division (Commission) within 180 days after the alleged unlawful act occurred. *See* TEX. LAB. CODE ANN. § 21.202(a) (West 2015).

Texas law requires that a plaintiff who alleges an unlawful employment practice must first exhaust her administrative remedies before proceeding to a Texas trial court. *See Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804–05 (Tex. 2010); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 487 (Tex. 1991), *overruled in part on other grounds by In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 310

(Tex. 2010); *see also* LAB. § 21.201. Under Section 21.202(a), a plaintiff must file her complaint with the Commission no later than the 180th day after the date of the alleged unlawful employment practice. LAB. § 21.202(a); *Wilsher v. City of Abilene*, No. 11-11-00355-CV, 2013 WL 6924004, at *4 (Tex. App.—Eastland Dec. 31, 2013, pet. denied) (mem. op.). A party who fails to file her complaint within the 180-day period fails to exhaust her administrative remedies and, consequently, deprives the trial court of subject-matter jurisdiction over her claim. *Wilsher*, 2013 WL 6924004, at *4; *Lueck v. State*, 325 S.W.3d 752, 761–62 (Tex. App.—Austin 2010, pet. denied).

Furthermore, "[e]ach discrete incident of discrimination—such as termination or failure to promote—and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice." *Harris Cty. Hosp. Dist. v. Parker*, 484 S.W.3d 182, 193 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Each discrete act starts the 180-day clock to file a claim for that act, and the claim becomes time-barred thereafter. *Id.*

Ferguson filed her claim with the Commission on May 3, 2013. In her complaint, she indicated that TXDOT's termination was retaliatory and discriminatory. On this form, Ferguson did not check the "continuing action" box, and she indicated November 30, 2012, as the date of the unlawful practice. At the time of Ferguson's filing, her complaint of the alleged discriminatory firing was timely; it was within the 180-day period. However, the trial court only had subject-matter jurisdiction for the acts that occurred within the 180-day period prior to the date of her complaint. *Lueck*, 325 S.W.3d at 761–62. The trial court did not have jurisdiction to adjudicate any matters that occurred prior to that time. *See City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008) (a plaintiff's noncompliance with the statute's requirements deprives courts of subject-matter jurisdiction).

TXDOT asserts that, because Ferguson filed her complaint on May 3, 2013, the trial court did not have jurisdiction to adjudicate any matters relating to (1) the failure to make accommodations in 2011 and 2012; (2) the purchasing-position decision in early 2012; and (3) the request that Ferguson participate in the "Agreement for a Commitment to an Effective Working Relationship" in March 2012. We agree that the trial court lacked jurisdiction to hear Ferguson's complaints about her two accommodation requests that she made in December 2011 and February 2012. We also agree that the trial court lacked jurisdiction to hear her claim about the purchaser position because TXDOT rejected Ferguson for the Purchaser II position sometime before March 2012. Ferguson waited over a year to file a claim with the Commission for these alleged acts. As a result, the trial court did not have jurisdiction to consider those discrete acts.

However, the Agreement arose out of an acrimonious and ongoing working relationship between Ferguson and Windham. TXDOT's human resources staff asked Ferguson to sign the Agreement in March 2012, but she refused to do so without her attorney's review. She continued to have problems working with Windham. Although the Agreement cannot be a basis for legal redress, the Agreement and the related ongoing dispute are part of the background of Ferguson's claims of disability discrimination and retaliation, and we may consider it on appeal to the extent it is relevant to a claim that is not time-barred. *Gonzalez v. Champion Techs., Inc.*, 384 S.W.3d 462, 471 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Soto v. El Paso Nat. Gas Co.*, 942 S.W.2d 671, 677 (Tex. App.—El Paso, 1997, writ denied)). We overrule Ferguson's first issue as it relates to her failure-to-accommodate claim and the other claims that predated November 30, 2012.

B. Issue One—Part Two, Issue Two, and Issue Four: Even if we assume that Ferguson presented a prima facie case of disability discrimination, she failed to establish that TXDOT's reasons given for her termination were a pretext.

In her first, second, and fourth issues on appeal, Ferguson asserts that the trial court erred when it granted TXDOT's summary judgment motion because she established a prima facie case for disability discrimination and because TXDOT's reasons for her termination were false and pretextual. To establish a prima facie case of disability discrimination, a plaintiff must show that (1) she has a disability, (2) she is qualified for the job in question, and (3) she suffered an adverse employment decision because of her disability. *Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 436 (Tex. App.—Houston [1st] 2016, pet. denied). Next, under the *McDonnell Douglas* burden shifting, TXDOT must then offer evidence of a legitimate, nondiscriminatory reason for her termination. *McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 279–80 (5th Cir. 2000); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–03 (1973). "Once the employer articulates such a reason, the burden then shifts back upon the plaintiff to establish by a preponderance of the evidence that the articulated reason was merely a pretext for the unlawful discrimination." *McInnis*, 207 F.3d at 280. If the plaintiff provides evidence that the reasons given are false or a pretext, then a jury may infer discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 740 (Tex. 2003). However, an at-will employer does not incur liability for carelessly forming its reasons for termination. *Canchola*, 121 S.W.3d at 740 (citing *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 609 (Tex. 2002); *Garcia v. Allen*, 28 S.W.3d 587, 591 (Tex. App.—Corpus Christi 2000, pet. denied)). As long as TXDOT's reasons were not illegal, it could have fired Ferguson, an at-will employee, for any

of the reasons listed in the termination letter or for no reason at all. *See Sears*, 84 S.W.3d at 608–09.

Even if we assume, without deciding, that Ferguson established a prima facie case of disability discrimination, TXDOT gave legitimate, nondiscriminatory reasons for her termination, which Ferguson failed to show were a pretext. TXDOT asserted that it fired Ferguson because she (1) failed to improve communications with her lead worker, supervisor, or manager; (2) failed to timely pay eight fuel invoices totaling more than $60,000 dollars, which caused undue hardship to TXDOT because of the suspension of fuel deliveries and unnecessary interest payments; (3) failed to update the Damage Claim database when requested to do so; (4) installed a lock on her office door without permission; and (5) failed to follow the company's chain of command. The termination letter also outlined how Ferguson had failed to comply with the terms of her twelve-month probation that included a requirement for prior approval of work schedule changes, better communication with supervisors, improved accuracy on work assignments, proper retention or shredding of documents as required by TXDOT, and adherence to TXDOT policies including protection of sensitive and confidential information. TXDOT further outlined that Ferguson had received previous warnings with a written reprimand in August 2012, had been placed on a twelve-month probation in October 2012, and had been warned in early November 2012 that she needed to follow TXDOT's procedures when dealing with sensitive information.

Cravotta, Bradshaw, Ragland, Human Resources, and the Legal Team made the decision to fire Ferguson. In affidavits produced by Cravotta and Bradshaw, they both indicated that Ferguson's disability did not play any role in her termination. Ferguson's termination letter did not mention her disability, and by Ferguson's own admission, TXDOT terminated her in part because she failed to

timely pay an invoice. We also note that, in October 2010, Cravotta noted in her evaluation that Ferguson was first placed on a year-long probation because she used TXDOT's internet for non-work-related purposes. Cravotta's evaluations from October 2011 to April 2012 indicated that Ferguson's performance "[n]eed[ed] improvement." Cravotta warned Ferguson that she needed to follow the chain of command when she encountered a problem. Cravotta also noted that Ferguson failed "to collaborate and cooperate with her lead worker, supervisor, and manager." Because of the poor working relationship between Ferguson and Windham, Human Resources presented them with an Agreement in March 2012, but Ferguson refused to sign it until her attorney reviewed it. A few months later in August 2012, Ferguson received a written reprimand for her "insubordinate behavior." Later, Ferguson submitted inaccurate information on the "Seg 04 Annual Review," which was a mistake that she admitted occurred when she overlooked a file, refused to take help, and rushed the work. Two months later, Cravotta placed her on a second, twelve-month probation because of insubordinate behavior.

Ferguson asserts that her prior positive evaluations from Haley, before the reorganization, are circumstantial evidence that she was fired because of her disability. However, Ferguson admitted that the failure to pay other fuel invoices was because she either "forgot" to do them or was "not sure" why they had not been paid. Ferguson acknowledged that she had communication issues with Windham, but she refused to sign the Agreement that sought to improve their communication and work relationship. She also installed a lock on her door without permission, and she failed to comply with instructions on how to reply to work e-mails and communicate with her chain of command. She also never explained why she failed to properly retain or shred documents, as required by TXDOT procedures, or why she failed to accurately update the Damage Claims database when asked to do so.

In addition, she did not explain how the allegation that she failed to abide by the terms of her probation was inaccurate or false. And, although Cravotta and others were aware of Ferguson's depression, the record does not reflect that her disability contributed to Cravotta's, Bradshaw's, Ragland's, and TXDOT's Legal Team's decision to fire her. Moreover, Ferguson admitted that the only person who knew of her hospitalization for depression was Ruth Snow, a person who did not participate in the decision to fire her. Because TXDOT presented summary judgment evidence of legitimate, nondiscriminatory reasons for Ferguson's termination and because Ferguson failed to adduce more than a scintilla of evidence that showed that TXDOT's reasons were a pretext, we overrule her first, second, and fourth issues on appeal.

C. Issue Three: Ferguson failed to establish a prima facie case of retaliation.

In her third issue, Ferguson asserts that the trial court erred when it granted TXDOT's summary judgment motion because she established a prima facie case for retaliation. To present a prima facie case of retaliation, a plaintiff must show (1) that she engaged in a protected activity listed in Section 21.055 of the Labor Code, (2) that an adverse employment action occurred, and (3) that a causal link existed between her participation in the protected activity and the adverse employment action. *Tex. Dep't of Family & Protective Servs. v. Whitman*, No. 11-15-00074-CV, 2016 WL 2854149, at *7 (Tex. App.—Eastland May 12, 2016, no pet.).

Even if we assume without deciding that Ferguson engaged in protected activity and suffered an adverse employment action, she failed to show a causal link between protected conduct and the adverse employment action taken by TXDOT. To meet this prong, a plaintiff must establish that the employer's adverse action would not have occurred "but for" his engagement in the protected activity.

Mitchell v. Tex. Dep't of Criminal Justice, No. 02-16-00100-CV, 2017 WL 632906, at *4 (Tex. App.—Fort Worth Feb. 16, 2017, no pet.) (mem. op.). Evidence sufficient to indicate a causal link between an adverse employment decision and the plaintiff's protected activities include:

> (1) the employer's failure to follow its usual policy and procedures . . . ;
>
> (2) discriminatory treatment when compared to similarly situated employees;
>
> (3) knowledge of the discrimination charge or suit by those making the adverse employment decision;
>
> (4) evidence that the stated reason for the adverse employment decision was false; and
>
> (5) the temporal proximity between the employee's conduct and discharge.

Datar v. Nat'l Oilwell Varco, L.P., 518 S.W.3d 467, 478 (Tex. App.—Houston [1st Dist.] 2017, pet. filed).

Ferguson asserts that a causal link existed between her protected conduct and TXDOT's actions because she was (1) terminated shortly after being hospitalized for her depression and (2) treated differently than her similarly situated coworker, John Finlay. Ferguson was hospitalized for a week in early November 2012 at the Acadia Medical Center in Abilene for her severe depression. Although the record reflects that TXDOT terminated Ferguson's employment two to three weeks after her hospitalization, there is no indication that Cravotta or Bradshaw—the individuals who made the decision to terminate—had knowledge of Ferguson's hospitalization. In fact, the record reflects that Cravotta was unaware of Ferguson's hospitalization. Ferguson also admitted that only Snow knew of her hospitalization and that Snow did not participate in the decision to fire Ferguson.

The record also does not reflect that TXDOT treated Ferguson, an Account Specialist II, differently than John Finlay, an Account Specialist I. Although Finlay and Ferguson had similar duties, Finlay was a recent hire and was not held to the same work standards as Ferguson. Additionally, during the time of Ferguson's alleged mistreatment from Windham, she was on probation for the second time, whereas Finlay had not had any disciplinary actions taken against him. Therefore, the record did not reflect different treatment of similarly situated workers. Ferguson failed to present more than a scintilla of summary judgment evidence that established a causal link between her termination and her protected conduct; therefore, she has failed to make a prima facie case for retaliation. We overrule her third issue on appeal.

D. Issue Five: The trial court did not err when it denied Ferguson's motion to strike new evidence filed by TXDOT.

In her fifth issue, Ferguson argues that TXDOT's reply to Ferguson's response alleged a new ground for summary judgment that her claims were time-barred and that the evidence attached to the reply was untimely and not before the court. We review the trial court's admission or exclusion of summary judgment evidence for an abuse of discretion. *Breaux v. W. Tex. Peterbilt (Lubbock), Inc.*, No. 11-13-00190-CV, 2015 WL 5190434, at *2 (Tex. App.—Eastland Aug. 13, 2015, pet. denied) (mem. op.); *see Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000) (A trial court's "inclusion and exclusion of evidence is committed to the trial court's sound discretion"). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012).

1. Summary Judgment Pleadings

TXDOT moved for summary judgment and attached evidence to its motion. TXDOT asserted that Ferguson had failed to establish a prima facie case of discrimination, that it had a legitimate nondiscriminatory reason for her termination that was not pretextual, and that Ferguson failed to raise a fact question on disparate treatment with respect to similarly situated employees. Ferguson replied with evidence that she had established a prima facie case for discrimination and retaliation, that TXDOT did not have a nondiscriminatory reason for her termination or that the reason was false and a pretext, and that she had shown disparate treatment—an allegation that was not raised in her discrimination complaint or her petition.

TXDOT responded to all of Ferguson's claims in its reply and attached the following evidence: (1) Ferguson's deposition and accompanying exhibits, (2) Haley's affidavit, (3) Ferguson's Job History Summary, and (4) Finlay's Job History Summary. Ferguson moved to strike this new evidence because she claimed that it was not filed with TXDOT's motion for summary judgment and was untimely under Rule 166a. TEX. R. CIV. P. 166a.

2. *Timeliness*

Rule 166a states that "[e]xcept on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing." TEX. R. CIV. P. 166a(c). If a movant's reply to a nonmovant's response raises additional grounds for summary judgment, it is also subject to the twenty-one day time constraint of Rule 166a(c). *Sams v. N.L. Indus., Inc.*, 735 S.W.2d 486, 487–88 (Tex. App—Houston [1st Dist.] 1987, no writ). A movant may not assert new grounds for summary judgment in its reply to the nonmovant's response. *Sanders v. Capitol Area Council*, 930 S.W.2d

905, 911 (Tex. App.—Austin 1996, no writ). But a movant may challenge the nonmovant's summary judgment evidence in a reply, which is not untimely even if filed on the day of the hearing and may be considered and ruled upon by the court. *Reynolds v. Murphy*, 188 S.W.3d 252, 259 (Tex. App.—Fort Worth 2006, pet. denied).

While a movant may file objections to a nonmovant's response up to the day of the hearing, the movant may not file late evidence without leave of court. *Id.* When a movant files late summary judgment evidence and there is nothing in the record to indicate the trial court granted leave to file a summary judgment response late, we presume that the trial court did not consider that response. *Benchmark v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996); *INA of Tex. v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985). But it is appropriate for the trial court to grant leave for the late filing of summary judgment proof when the summary judgment movant is attempting to counter arguments presented in the nonmovant's response. *Garcia v. Garza*, 311 S.W.3d 28, 36 (Tex. App.—San Antonio 2010, pet. denied).

Ferguson filed her response to TXDOT's summary judgment motion seven days prior to the hearing. TXDOT then filed its reply to Ferguson's response the morning before the hearing, but did not seek leave of court to file additional evidence. Ferguson objected to the evidence and moved to strike the new evidence attached to TXDOT's reply. At the outset of the summary judgment hearing, the trial court acknowledged TXDOT's newly filed reply and the "very short notice." The trial court remarked that it did not want to reschedule the hearing. Ferguson objected, and the trial court decided that it would grant more time at the end of the hearing—if deemed necessary. The trial court denied Ferguson's motion to strike the new evidence. At the end of the hearing, the trial court took the motion for

summary judgment under consideration and stated that it would rule on it by the end of the next week.

A trial court has the discretion to permit late filings of opposing proof any time before the signing of the summary judgment. *Diaz v. Rankin*, 777 S.W.2d 496, 500 (Tex. App.—Corpus Christi 1989, no pet.). Under Rule 166a(c) of the Texas Rules of Civil Procedure, a trial court clearly has discretion to allow late filings of opposing proof at any time before it signs the summary judgment order. *Campbell v. Auto. Ins. Co. of Hartford Conn.*, No. 07-06-0158-CV, 2007 WL 1390625, at * 3 (Tex. App.—Amarillo May 9, 2007, no pet.) (mem. op.); *see Stephens v. LNV Corp*., 488 S.W.3d 366, 375 (Tex. App.—El Paso 2015, no pet.) (holding that a trial court did not abuse its discretion by granting leave and considering a late-filed affidavit as part of the summary judgment record). "Permission to file a late response may be reflected in a 'separate order,' a recital in the summary judgment, or an oral ruling contained in the reporter's record of the summary judgment hearing." *Conte v. Ditta*, No. 14-02-00482-CV, 2003 WL 21191296, at *3 (Tex. App.—Houston [14th Dist.] May 22, 2003, no pet.) (mem. op.) (quoting *Neimes v. Ta*, 985 S.W.2d 132, 138 (Tex. App.—San Antonio 1998, pet. dism'd by agr.)). Where the record does not contain an affirmative indication that the trial court permitted the late filing, the response is a nullity. *Neimes*, 985 S.W.2d at 138; *see INA of Tex.*, 686 S.W.2d at 615 (noting that when nothing appears of record to indicate that late filing of summary judgment response was with leave of court, it is presumed that the trial court did not consider the response). While TXDOT did not formally request leave of court, we hold that the trial court's denial of Ferguson's motion to strike evidence overruled Ferguson's objections and indicated that the trial court implicitly granted leave to file late evidence and then considered that evidence. As such, we overrule Ferguson's fifth issue on appeal.

E. Issue Six: The assigned trial judge did not exceed his scope of authority under Section 74.055(b) of the Texas Government Code.

In her sixth issue, Ferguson asserts on appeal that Judge Griffin was disqualified under Section 74.054(a)(3) of the Texas Government Code because he had a speciality in criminal, family, and juvenile law but not civil and probate law. *See* TEX. GOV'T CODE ANN. §§ 74.054(a)(3), .055(b) (West 2013). We note that this case did not involve probate law but was a civil case and that the order of assignment provided:

> The judge is assigned in **Cause Number CV1401006, styled *Melissa K. Ferguson v. Texas Department of Transportation*** from this date until plenary power has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever first occurs. In addition, whenever the assigned judge is present in the county of assignment for a hearing in this cause, the judge is also assigned and empowered to hear at that time any other matters that are presented for hearing in other cases.

[1CR268] "Unlike disqualification of a judge based on a constitutional prohibition, which can be raised at any point in a proceeding, a statutory basis for recusal of a judge can be waived by failing to file a motion to recuse or by failing to assert the claimed error by a point on appeal." *Sweetwater Austin Properties, L.L.C. v. SOS All., Inc.*, 299 S.W.3d 879, 890 (Tex. App.—Austin 2009, pet. denied); *see Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982). When a judge is assigned, a party that objects to the assignment must file an objection or motion within seven days of receiving notice of the assignment. *See* GOV'T § 74.053(b), (c). Ferguson neither timely objected to Judge Griffin's assignment nor filed a motion to recuse him. Therefore, she waived her complaint. TEX. R. APP. P. 33.1; *see* GOV'T § 74.053(c); *see also Buckholts*, 632 S.W.2d at 148. But even if we are incorrect on waiver, absent any evidence to the contrary, we presume that the

assigned judge is qualified and note that Judge Griffin had specialities in both criminal and civil law and that Ferguson's case did not involve probate law. We overrule Ferguson's sixth issue on appeal.

VI. *Conclusion*

After a review of the record, we hold that Ferguson failed to exhaust her administrative remedies for any of her alleged failure-to-accommodate claims and other claims that predated November 30, 2012, and all of those claims are barred. We hold that Ferguson failed to rebut that TXDOT's reasons for her termination were a pretext. We also hold that Ferguson failed to produce more than a scintilla of evidence to support a prima facie claim for retaliation. We further hold that the trial court correctly denied Ferguson's motion to strike evidence and that she waived her complaint about the recusal of Judge Griffin.

VII. *This Court's Ruling*

We affirm the judgment of the trial court.

MIKE WILLSON
JUSTICE

August 31, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.