

Opinion issued October 27, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00941-CV

DEMETRIUS J. WRIGHT, Appellant

V.

CITY OF HOUSTON, Appellee

**On Appeal from the 269th District Court
Harris County County, Texas
Trial Court Case No. 2009-38972**

MEMORANDUM OPINION

Appellant, Demetrius J. Wright, appeals the trial court's grant of summary judgment in favor of appellee, the City of Houston, on his racial discrimination and retaliation claims. In three issues, Wright argues (1) there were material questions of fact preventing the trial court from granting summary judgment on his claims;

(2) the trial court misapplied the law in the motion for summary judgment and his motion for new trial; and (3) the trial court erred in striking his supplement to his motion for new trial.

We affirm.

Background

Wright filed charges of discrimination and retaliation with the Equal Employment Opportunity Commission and the Texas Workforce Commission, Civil Right Division. After receiving a right to sue letter from the Texas Workforce Commission, Wright filed suit in Texas state court. He asserted claims of racial discrimination based on disparate treatment and retaliation against the City of Houston.

The City of Houston moved for summary judgment on both claims. The trial court granted summary judgment in favor of the City of Houston. Wright filed a motion for new trial. Two weeks later, Wright filed a supplement to his motion for summary judgment, prepared and signed by him even though he was represented by counsel. The trial court granted the City of Houston's motion to strike the supplement to the motion for new trial and then denied Wright's motion for new trial. Wright appealed.

Analysis

An appellant must attack all independent grounds that fully support an adverse ruling; if he fails to do so, we must affirm the trial court's judgment. *Britton v. Texas Dep't of Criminal Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.). When the grant of summary judgment rests on several independent grounds, appellant must assign error to each independent ground on appeal or the summary judgment will stand on any omitted ground regardless of the merits of that ground. *Jack v. Holiday World of Houston*, 262 S.W.3d 42, 50 (Tex. App.—Houston [1st Dist.] 2008, no pet.). When the unchallenged independent ground fully supports the trial court's judgment, any error in the grounds challenged on appeal is harmless. *Britton*, 95 S.W.3d at 681.

Wright brought claims of racial discrimination based on disparate treatment and retaliation against the City of Houston. In its motion for summary judgment, the City of Houston sought summary judgment on the grounds that (1) Wright had failed to exhaust his administrative remedies for many of his alleged bases for discrimination and retaliation; (2) most of Wright's claims of adverse employment actions for his racial discrimination claim did not constitute adverse employment actions; (3) Wright could not show he was subject to disparate treatment for his racial discrimination claim; (4) it had provided a legitimate, non-discriminatory reason for its actions forming the basis of Wright's racial discrimination claim; (5)

Wright did not engage in a protected activity for his retaliation claim; and (6) Wright could not show a causal connection between any protected activity and an adverse employment action for his retaliation claim. The trial court granted summary judgment without specifying the grounds.

On appeal, Wright argues (1) most of the facts in the affidavits presented by the City of Houston were factually insufficient, without identifying which facts or how they were factually insufficient; (2) the City of Houston failed to show a legitimate, non-discriminatory reason for its actions; (3) the trial court erred by not applying the “cat paw” theory in his case; and (4) the trial court erred by striking his supplement to his motion for new trial. With the exception of whether the City of Houston established a legitimate, non-discriminatory reason for its actions forming the basis of Wright’s racial discrimination claim, Wright does not otherwise address in his brief the grounds upon which the City of Houston sought summary judgment.

The City of Houston’s third ground for summary judgment is an independent ground that would fully support the trial court’s grant of summary judgment on his racial discrimination claim. *See AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 594 (Tex. 2008) (holding employee claiming discrimination based on disparate treatment must show that the comparable treatments were “nearly identical”). Similarly, the City of Houston’s fifth and sixth grounds for summary judgment are

each independent grounds that would fully support the trial court's grant of summary judgment on his retaliation claim. *See Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.3d 672, 676 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding plaintiff in retaliation claim must make prima facie showing he engaged in a protected activity, an adverse employment action occurred, and a causal connection between the protected activity and the adverse employment action). Because these unchallenged grounds fully support the trial court's judgment, we must affirm the trial court's judgment and hold that any error in the grounds challenged on appeal is harmless. *See Britton*, 95 S.W.3d at 681.

While Wright does attempt to address these issues in his reply brief after they were addressed in the City of Houston's brief, this is insufficient. "It is well-settled that Rule 38.3 of the Texas Rules of Appellate Procedure does not allow an appellant to include in a reply brief a new issue in response to a matter pointed out in appellee's brief but not raised by the appellant's original brief." *In re TCW Global Project Fund II, Ltd.*, 274 S.W.3d 166, 171 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding); *see also* TEX. R. APP. P. 38.3.

We overrule all of appellant's issues on appeal.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Massengale.