Opinion issued May 5, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-14-00736-CV

DAVID DONALDSON, Appellant

V.

TEXAS DEPARTMENT OF AGING AND DISABILITY SERVICES, Appellee

On Appeal from the 335th District Court
Washington County, Texas
Trial Court Case No. 34895

CONCURRING AND DISSENTING OPINION

The majority opinion in this case creates and analyzes an unpleaded "reasonable accommodation" claim out of the second element of a disability discrimination claim (the element requiring that the plaintiff show he was qualified

to perform his job either (1) with or (2) without "reasonable accommodation"). And it decides that that element, as a separate cause of action, keeps alive for trial a three-year-old governmental employee disability discrimination claim against the Texas Department of Age and Disability Services (DADS) that it has already dismissed as without merit on other grounds. By creating this separate claim for "reasonable accommodation" in a discrimination suit it declares cannot be won, the majority throws the doors of the Texas state courts open to meritless disability discrimination claims that could never survive under the federal Americans with Disabilities Act on which the Texas disability discrimination act was modeled.

Furthermore, in requiring that DADS have addressed the unpleaded "reasonable accommodation" claim in its no-evidence motion for summary judgment, the majority imposes a far too stringent pleading burden on no-evidence motions for summary judgment that does not exist under Texas Rule of Civil Procedure 166a(i). The majority erroneously analyzes Donaldson's claim that DADS failed to provide him reasonable accommodation for his disability as distinct from his cause of action for disability discrimination and misapplies the standard of review for no-evidence summary judgments under Texas's discrimination laws to preserve Donaldson's "reasonable accommodation claim," even as it affirms the summary judgment on Donaldson's disability discrimination

claim on the ground that he cannot prove disability discrimination as a matter of law.

Therefore, I respectfully dissent. I disagree with the majority's conclusion that Donaldson has raised a fact issue sufficient to withstand summary judgment on a "reasonable accommodation" claim that is separate and distinct from his claim for disability discrimination under the Texas Commission on Human Rights Act ("TCHRA"), set out in Texas Labor Code Chapter 21. I concur in the majority's judgment insofar as it affirms the trial court's summary judgment on appellant David Donaldson's federal and state claims against the Texas Department of Aging and Disability Services ("DADS").

I would affirm the summary judgment against Donaldson on all of his claims. I would not remand this case to continue consuming state litigant and judicial resources even after it has been conclusively shown that all of Donaldson's claims have no merit.

Background

Donaldson's suit against DADS alleged race, age, and disability discrimination, retaliation, and hostile work environment in violation of the TCHRA;[1] race discrimination and retaliation under Title VII of the Civil Rights

[1] TEX. LAB. CODE ANN. §§ 21.001–.556 (Vernon 2015 & Supp. 2015).

Act of 1964;[2] and violations of the Americans with Disabilities Act of 1990 ("ADA") and its subsequent amendments ("ADAAA").[3] He also alleged a claim against DADS Commissioner Chris Traylor under Title 42, section 1983 of the United States Code.[4] Specifically, he alleged that DADS' conduct leading up to his termination:

> constitute[d] retaliation and discrimination in violation of the [TCHRA], Texas Labor Code, Sections 21.051, *et. seq.* (discrimination by employer, race, color, and disability), Sec. 21.055 (retaliation), Sec. 21.101 (Age Discrimination), Sec. 21.105 (Disability Discrimination), Sec. 21.122, Sec. 21.125 and Sec. 21.128. The stated reason for Donaldson's termination from the Defendants was false, and was mere pretext for unlawful retaliation and discriminatory treatment, in violation of Texas Labor Code, Sections 21.051, *et. seq.* (discrimination by employer, race, color, and disability), Sec. 21.055 (retaliation), Sec. 21.101 (Age Discrimination), Sec. 21.105 (Disability Discrimination), Sec. 21.122, Sec. 21.125 and Sec. 21.128.

Donaldson also asserted that he "was subjected to a hostile work environment" and that DADS' "conduct in harassing and discharging" him violated various provisions of the Labor Code, including sections 21.051 and 21.128.

The trial court granted DADS' plea to the jurisdiction on Donaldson's ADA, ADAAA, and section 1983 claims, and they are not before us. DADS then filed a no-evidence and traditional motion for summary judgment on Donaldson's

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[2] Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17.

[3] 42 U.S.C. §§ 12101–12213.

[4] 42 U.S.C. § 1983.

remaining claims, addressing Donaldson's "reasonable accommodation" claim within the framework of its arguments against his disability discrimination claim. Likewise, Donaldson's response to DADS' motion for summary judgment addressed "reasonable accommodation" in the context of his disability discrimination claim. He argued that he could "demonstrate that he was subjected to disability discrimination under the Texas Labor Code" because he "was denied a requested reasonable accommodation" and "can demonstrate that his disability was the sole reason for his termination." He further asserted that he could overcome the legitimate, non-discriminatory, non-retaliatory reasons for his termination.

The trial court granted DADS' motion for summary judgment. Donaldson appealed, arguing that the trial court erred in "dismissing [his] disability discrimination claim and race discrimination claim," in "dismissing [his] retaliation claim," and in dismissing his "hostile work environment claim." Donaldson's only mention of DADS' failure to provide reasonable accommodation for his disability was to call it an "important issue" in the context of his disability discrimination claim. He argued that his "summary judgment evidence revealed that [DADS] did not accommodate [him] and that Caucasian psychologists were given preferential treatment regarding help from assistants. This discriminatory treatment ha[d] broad implications" impacting his ultimate performance and demonstrated that DADS harassed him and discriminated against him in

terminating him for failure to complete the required reports. Thus, the only issues identified by Donaldson on appeal are the wrongful dismissal on summary judgment of his race, age, disability discrimination, retaliation, and hostile work environment claims under the TCHRA and his race discrimination and retaliation claims under Title VII. Nowhere in his pleadings, his response to the motion for summary judgment, or his brief on appeal does Donaldson assert a cause of action for "failure to reasonably accommodate" that is distinct from his disability discrimination claim.

The majority affirms the summary judgment in favor of DADS with the sole exception of Donaldson's "claim" for reasonable accommodation, as to which it reverses the trial court and remands the case, holding that Donaldson has raised a fact issue for trial. I disagree with the majority's conclusion that Donaldson asserted a reasonable accommodation claim independent of his disability discrimination claim. And even if he had, I disagree that the TCHRA provides a separate claim of failure to make a reasonable accommodation that is applicable to the facts of this case and reflected in the pleadings, and I disagree that Donaldson raised a fact issue on such a "claim." I believe the majority has incorrectly read the pleadings and motions in this case, has misapplied the no-evidence summary judgment standard of review for disability discrimination claims, and has reached an incorrect holding.

Standard of Review

A. Summary Judgment

DADS filed a hybrid traditional and no-evidence motion for summary judgment against Donaldson on all of his claims, including his disability discrimination claim. *See* TEX. R. CIV. P. 166a(c), (i).

Texas's no-evidence summary judgment rule provides that, after adequate time for discovery and without presenting evidence, a party may move for summary judgment on the ground that no evidence exists of one or more essential elements of a claim on which the adverse party bears the burden of proof at trial. TEX. R. CIV. P. 166a(i); *see Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.). "The motion must state the elements as to which there is no evidence." TEX. R. CIV. P. 166a(i). The Texas Supreme Court has construed this as a "fair notice" requirement. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 311 (Tex. 2009). To meet this requirement, the movant need only set forth the elements to define the issues for summary judgment and to allow the non-movant sufficient information to oppose the motion. *See id.* The burden then shifts to the non-movant to produce more than a scintilla of evidence on each of the challenged elements. *See id.* at 310. "The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact" on the challenged

evidence. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

B. Disability Discrimination Claim Under Texas Labor Code Chapter 21

Donaldson alleged that DADS violated the TCHRA. Section 21.051 of the TCHRA provides, in relevant part:

> An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer . . . fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment.

TEX. LAB. CODE ANN. § 21.051. Section 21.105 provides that an employer may be held liable only for discrimination that occurs "because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job." *Id.* § 21.105. Section 21.128 provides that it is "an unlawful employment practice" for an employer covered by the chapter "to fail or refuse to make a reasonable workplace accommodation to a known physical or mental limitation of an otherwise qualified individual with a disability who is an employee" unless the employer "demonstrates that the accommodation would impose an undue hardship on the operation of the business." *Id.* § 21.128.

Because one of the policies behind the adoption of the TCHRA was to further federal anti-discrimination policies embodied in Title VII of the Civil Rights Act of 1964 and Title I of the ADA and its amendments, the Texas courts

follow federal precedent in construing Labor Code Chapter 21. *See Hagood v. Cty. of El Paso*, 408 S.W.3d 515, 522–23 (Tex. App.—El Paso 2013, no pet.); *Davis v. City of Grapevine*, 188 S.W.3d 748, 756–57 (Tex. App.—Fort Worth 2006, pet. denied); *see also Haggar Apparel Co. v. Leal*, 154 S.W.3d 98, 100 (Tex. 2004) ("[O]ne purpose of chapter 21 . . . is to further the policies of Title I [of the ADA.] Accordingly, in construing and applying chapter 21, we are guided by federal law.").

To establish a disability discrimination claim, Donaldson, as the plaintiff, had the initial burden of presenting a *prima facie* case of discrimination. *See Hagood*, 408 S.W.3d at 523; *Davis*, 188 S.W.3d at 757. To establish a *prima facie* case of disability discrimination, the plaintiff must show that "(1) he has a 'disability'; (2) he is 'qualified' for the job; and (3) he suffered an adverse employment decision because of his disability." *Hagood*, 408 S.W.3d at 523. The plaintiff may satisfy the second element, that of showing that he is "qualified" for the job, "in one of two ways: (1) by proving that he can perform all essential job functions with or without modifications or accommodations; or (2) by showing that some reasonable accommodation by the employer would enable him to perform the job." *Id.* "[T]o maintain an action under either the ADA or the TCHRA, a plaintiff must demonstrate that [he] is a qualified individual with a disability." *Cornyn v. Speiser, Krause, Madole, Mendelsohn & Jackson*, 966 S.W.2d 645, 648–49 (Tex.

App.—San Antonio 1998, pet. denied). "If no reasonable accommodation would enable the plaintiff to perform the essential functions of his position, then he is not a 'qualified individual' with a disability." *Hagood*, 408 S.W.3d at 526.

Thus, to avoid a no-evidence summary judgment on a disability discrimination claim under the TCHRA in which the second element of the claim is challenged, a plaintiff must produce evidence that he is qualified for the job without modification or accommodation or that he is qualified with reasonable accommodation. Should he choose to prove that he is qualified to perform his job with reasonable accommodation, Texas courts have held that

> to establish a *prima facie* case of discrimination based on an employer's failure to provide a reasonable accommodation, the plaintiff must show: (1) that he is an individual who has a disability within the meaning of the ADA; (2) that an employer covered by the statute had notice of his disability; (3) that with reasonable accommodations he could perform the essential functions of the position; and (4) that the employer has refused to make such accommodations.

Davis, 188 S.W.3d at 758; *see Hagood*, 408 S.W.3d at 524.

"[I]f the plaintiff is successful [in showing a *prima facie* case of disability discrimination], the burden of production shifts to the defendant employer to show a legitimate and non-discriminatory basis for the adverse employment decision." *Davis*, 188 S.W.3d at 757 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)). If the employer carries its burden, the presumption of unlawful discrimination created by the plaintiff's *prima facie*

showing is eliminated, and the "ultimate burden" shifts back to the plaintiff to prove that, notwithstanding its explanation, the employer engaged in intentional discrimination. *Hagood*, 408 S.W.3d at 523–24. In other words, if the defendant employer demonstrates a non-discriminatory reason for its action, the plaintiff must show that the proffered reason is merely a pretext. *Davis*, 188 S.W.3d at 757–58 (citing *McDonnell Douglas*, 411 U.S. at 804, 93 S. Ct. at 1825). But "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 757 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981)). "[T]he intermediate burdens of production alternate between the plaintiff and the defendant and serve to eliminate claims at an earlier stage if no fact dispute exists that requires the court or jury to reach this ultimate question." *Id.* (citing *Burdine*, 450 U.S. at 253–55, 101 S. Ct. at 1093–95).

Summary Judgment Burden of Proof on Donaldson's TCHRA Claim

Here, Donaldson pled that he was qualified to perform his job as an Associate Psychologist III at DADS but that DADS refused to make reasonable accommodation for his disability—cancer—and terminated him because of his disability.

DADS expressly set out in its summary judgment motion the elements of a disability discrimination claim with and without reasonable accommodation and

challenged Donaldson to produce evidence on each of the elements of his claim. Among other things, it recited the passage quoted from *Davis* above regarding the plaintiff's burden to make a prima facie case of discrimination in order to proceed with its discrimination claim in a section entitled "a. Plaintiff was not denied any reasonable accommodation requested." It then stated:

> Thus, Plaintiff bears the burden of proving that he could reasonably perform, or was "otherwise qualified" for, his job. *Ketcher v. Wal-Mart Stores, Inc.*, 122 F. Supp. 2d 747, 755 (S.D. Tex. 2000). Plaintiff could demonstrate that he was otherwise qualified for his job by showing that: (1) he could perform all essential job functions without accommodations, or (2) with some reasonable accommodation by DADS, he could have performed the job. *Ketcher v. Wal-Mart Stores, Inc.*, 122 F. Supp. 2d 747, 755 (S.D. Tex. 2000); *see Davis*, 188 S.W.3d at 758 (holding that a plaintiff establishes her prima facie case based on her employer's failure to provide reasonable accommodation by proving that, with reasonable accommodations, she could perform the essential functions of her job and that the employer refused to make those accommodations). . . .

Therefore, to carry his no-evidence summary judgment *prima facie* burden of proof on his TCHRA disability discrimination claim, Donaldson had to produce more than a scintilla of evidence that (1) he had a disability—cancer—of which DADS had knowledge, (2) he was qualified for his job without accommodation or that he was qualified for his job with accommodation but DADS refused to make reasonable accommodations for his disability, and (3) DADS terminated him because of his disability. *See* TEX. R. CIV. P. 166a(i); *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824; *Hagood*, 408 S.W.3d at 523; *Davis*, 188 S.W.3d at

757. If he failed to produce evidence on any of these elements sufficient to carry his *prima facie* burden proof, the trial court was required to enter summary judgment against him and this Court is required to affirm the summary judgment. *See Burdine*, 450 U.S. at 254–55, 101 S. Ct. at 1094; *Davis*, 188 S.W.3d at 757–58; *see also* TEX. R. CIV. P. 166a(i) ("The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact [on the challenged elements].").

If Donaldson did produce evidence on each of the elements of his disability discrimination claim, carrying his no-evidence summary judgment burden of proof at the *prima facie* stage, the burden of production would then shift to DADS to show that it had a non-discriminatory reason for terminating him. *See Hagood*, 408 S.W.3d at 523–24. If DADS then carried its burden of production, the summary judgment should have been decided on traditional grounds against Donaldson "to eliminate [his] claim[] at an earlier stage [because] no fact dispute exists that requires the court or jury to reach [the] ultimate question" as to whether DADS intentionally discriminated against him. *See Davis*, 188 S.W.3d at 757–58 (citing *Burdine*, 450 U.S. at 253–55, 101 S. Ct. at 1093–95).

The majority correctly recites the law. However, it reaches no conclusion regarding whether Donaldson established his *prima facie* case of discrimination with respect to any of the elements, as required by the no-evidence summary

judgment rule and the case law construing the plaintiff's burden of proof in a disability discrimination case. Instead, it *assumes* that Donaldson carried his *prima facie* burden of proof. And it then moves on to *DADS'* burden to show that it had a non-discriminatory reason for terminating Donaldson.

The majority reasons that "DADS presented summary judgment evidence showing that Donaldson received much corrective action counseling, and was ultimately terminated for performance deficiencies and work rule violations." Slip Op. at 25. And it observes that Donaldson offered only conclusory denials and excuses of his documented poor performance and that "an employee's denials of bad performance and his subjective belief that his employer has given a false reason for its employment decision is not competent summary judgment evidence." Slip Op. at 26 (citing *Elgaghil v. Tarrant Cty. Junior Coll.*, 45 S.W.3d 133, 140–41 (Tex. App.—Fort Worth 2000, pet. denied)). Also, it "note[s] that Donaldson concedes that some of his reports he submitted were late, incomplete, or incorrect," and "he presents no evidence showing that any particular psychologist had a comparable number of delinquent reports or similar performance issues." Slip Op. at 27. Thus, it concludes, "We find little, if any, evidence in the record to show that DADS terminated Donaldson because of his disabilities. However, assuming without deciding that he established a prima facie case, we conclude that DADS

met its burden of production to articulate a legitimate non-discriminatory reason for its termination decision." Slip Op. at 25.

The majority thus assumes that Donaldson carried his *prima facie* burden of proof, which required him to produce evidence (1) that he had a disability, (2) that he was qualified for his job with or without reasonable accommodation *or* that, with reasonable accommodation which DADS refused to make, he could perform the essential functions of his job, and (3) that he was terminated. And it then moves on to affirm the summary judgment on Donaldson's disability discrimination claim on the ground that DADS showed that it had a non-discriminatory reason to terminate him—namely, that he was not qualified for his job.

In sum, the majority both applies the wrong standard of review to the no-evidence summary judgment entered against Donaldson and contradicts itself on the merits of his claim. Nevertheless, if the majority had stopped its analysis here, I would concur in its judgment. However, the majority compounds its errors by going back to the proof of the second element of Donaldson's disability discrimination claim and holding that he raised a material fact issue as to whether DADS provided reasonable accommodation for his disability. In spite of the fact that nothing in the record before the trial court raised a separate "reasonable accommodation" claim and the fact that Donaldson does not assert in his brief on

appeal that he had a distinct reasonable accommodation claim that was erroneously dismissed on summary judgment, the majority takes it upon itself to address "reasonable accommodation" as a separate claim from disability discrimination and remands for trial the discrimination issue it has already decided adversely to Donaldson as a matter of law. The majority should have treated Donaldson's arguments concerning DADS' failure to reasonably accommodate his disability—as the parties and the trial court did—as one of two alternative ways of proving the second prong of his disability discrimination claim—the only disability claim he pled—and it should have affirmed the judgment of the trial court on all claims.

I would not review the summary judgment the way the majority does. Nor would I conclude that any part of his disability discrimination claim under the TCHRA survives summary judgment and should be remanded for trial.

Donaldson's Failure to Meet His Prima Facie Burden of Proof

In both the no-evidence and traditional portions of its motion for summary judgment, DADS argued that the burden was on Donaldson to prove that he was qualified for the job he held at DADS and that he could not do so. *See Hagood*, 408 S.W.3d at 523 (qualification for job is essential element of discrimination claim). It provided evidence of the essential functions of Donaldson's position—an Associate Psychologist III—indicating that most of the work involved patient interaction, including interaction with clients who are violent, and included

extensive paper work to implement and document behavioral support plans. Specifically, DADS presented evidence that an Associate Psychologist III's essential job functions included:

- Conducting functional behavioral assessments and ensuring the development and approval of behavior support plans to meet clients' needs;
- Conducting or ensuring training for staff in applied behavior analysis, individual behavior support plans and other relevant topics to provide adequate staff training to facilitate optimal treatment and training;
- Monitoring and evaluating clients' behavior support plans to ensure their effective implementation; and
- Providing documentation (including data tables, graphs and progress notes) to reflect and evaluate clients' response to treatment.

DADS also presented summary judgment evidence that it was subject to compliance with a settlement agreement between the State of Texas and the United States Department of Justice requiring more extensive documentation of its compliance with generally-accepted professional standards.

The only evidence Donaldson produced in support of the second element of his disability discrimination claim was his own conclusory and self-serving affidavit denying DADS' assessment of his performance and, in some instances, asserting that other psychologists at the facility were also responsible for the delinquencies and failures. However, Donaldson's conclusory denials are not

competent summary judgment evidence. *See Nguyen v. Citibank N.A.*, 403 S.W.3d 927, 931 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (affidavits containing conclusory statements that fail to provide underlying facts to support their conclusions are not proper summary judgment evidence); *see also Ayeni v. State*, 440 S.W.3d 707, 712 (Tex. App.—Austin 2013, no pet.) ("[T]o be competent summary-judgment evidence, an affidavit must contain specific factual bases, admissible in evidence, upon which its conclusions are based."). Neither are his self-serving statements regarding his state of mind or subjective beliefs competent summary judgment evidence. *See Cornyn*, 966 S.W.2d at 651 (affidavits whose content is implied by very assertion of TCHRA or ADA claim are not competent summary judgment evidence, and "[s]elf-serving statements regarding a witness's state of mind or her subjective beliefs are no more than conclusions" and are not competent summary judgment evidence).

Donaldson also included in his affidavit a statement that DADS temporarily assigned a psychology assistant to help him with typing and clerical duties. He averred that she was promoted to another position after a week and DADS never assigned anyone else to assist him. However, this, again, is no evidence that Donaldson could perform the essential functions of his job—with or without the accommodation of an assistant to help with typing and filing—which included interacting with clients, conducting functional behavioral assessments and ensuring

the development of behavior support plans, conducting or ensuring training for staff in applied behavior analysis, and monitoring and evaluating clients' behavior support plans to ensure their effective implementation. And none of his evidence addressed the delinquencies and deficiencies in his performance that were noted prior to his disability (his cancer diagnosis).

Donaldson presented no evidence that he was able to perform the essential functions of an Associate Psychologist III at the Brenham State Supported Living Center ("BSSLC"), either with or without accommodation. *See Hagood*, 408 S.W.3d at 523 (providing that plaintiff bears burden of establishing prima facie case on all elements of disability discrimination claim, including element that plaintiff could perform all essential job functions with or without modifications or accommodations or that some reasonable accommodation by employer would enable him to perform job); *Davis*, 188 S.W.3d at 757 (stating same).

Although DADS acknowledged that Donaldson was qualified by his credentials at the time it initially hired him in December 2008, DADS presented extensive summary judgment evidence that it terminated Donaldson because he was not adequately performing the essential functions of an Associate Psychologist III at the BSSLC. The majority accurately outlines this evidence in its opinion. Slip Op. at 3–10, 25–27. Evidence of Donaldson's inability to perform the essential functions of his position date back to November 2009—prior to his cancer

diagnosis—when DADS instituted performance counseling for Donaldson because he fell asleep during a meeting and because he had failed to timely submit necessary reports. As the majority recites, Donaldson received numerous warnings, reminders, and performance counseling from his supervisors between November 2009 and April 2010, when he first informed DADS of his cancer diagnosis, for delinquent and inadequate reports. Following his diagnosis, Donaldson missed trainings for treatment, which DADS allowed him to make up at a later date. However, DADS presented evidence that Donaldson likewise failed to participate in the rescheduled trainings. Throughout 2010 until April 2011, when DADS terminated his employment, Donaldson continued to receive negative performance evaluations. DADS presented evidence that he failed to adhere to proper protocols, that his delinquent and incorrect reports resulted in his clients' not receiving necessary care, that he failed to adequately train staff for implementing a client's behavioral support plan, and that he failed to enter the required behavioral data or analysis for the residents in his unit.

I conclude that Donaldson failed to establish a *prima facie* disability discrimination case because he presented no evidence that he was qualified to perform the essential elements of his job as an Associate Psychologist III at the BSSLC, either with or without reasonable accommodation for his disability. Donaldson did not assert a separate cause of action seeking to remedy a failure to

reasonably accommodate his disability in the trial court, and he does not raise any argument on appeal that the trial court erroneously granted summary judgment on such a claim. Accordingly, I would not address "reasonable accommodation" as a separate claim at all. I would treat this issue, as the parties do, in the context of Donaldson's failure to meet his burden of proof on his disability discrimination claim under the TCHRA.

Conclusion

Because the majority does not apply the correct standard of proof of a disability discrimination claim under the TCHRA, contradicts itself by assuming both that Donaldson was qualified for his job with reasonable accommodation and that he was unqualified as a matter of law, and improperly creates a separate "reasonable accommodation claim" and remands it for trial, I concur in the majority's judgment only insofar as it affirms the summary judgment in favor of DADS on Donaldson's disability discrimination claim and his other claims. I dissent insofar as the majority concludes that Donaldson raised a material fact issue with respect to a putative "reasonable accommodation claim" and remands this case for trial.

I would affirm the trial court's summary judgment on all of Donaldson's claims.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Huddle, and Lloyd.

Keyes, J., concurring and dissenting.