Opinion issued April 28, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00090-CV

VICKY MCKENNA, Appellant

V.

BAYLOR COLLEGE OF MEDICINE, Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Case No. 2012-74884

MEMORANDUM OPINION

In this appeal, we consider whether the trial court erred in granting traditional summary judgment in favor of Baylor College of Medicine on Vicky McKenna's claims of age and race discrimination, libel, and breach of contract. We affirm.

BACKGROUND

McKenna worked as a nurse practitioner at the Ben Taub Emergency Center from 2006 to 2008. Baylor Medical Center became the provider of Emergency Services at Ben Taub in 2008, and at that time, McKenna became a Baylor employee. McKenna, a Caucasian, was 45 years old at the time she was hired. She continued in the same position with Baylor that she had before, and was considered a mid-level provider [MLP]. Patricia Harris, a 36-year-old African American, was the direct supervisor of the MLPs. Dr. Angela Fisher, a Caucasian female under the age of 40, was the Associate Chief of Operations for Baylor's Emergency Medical Services.

In July 2011, Baylor instituted new emergency medical standards, which instituted a goal for every MLP to treat an average of two patients per hour. MLPs who were consistently unable to meet that goal were coached and counseled. Baylor also implemented chart reviews as a quality assurance and performance improvement measure. Each month, the MLPs were to select 10 patient charts to review with their supervising physician. The physicians would then fill out a chart review form, which was then submitted to the emergency department administrator with a copy of the reviewed charts.

In December 2010, McKenna, along with other MLPs, received an email from her supervisor, Angela Fisher, that her charts were more than 30 days late.

In April 2011, McKenna received a second email that her charts were late. McKenna remained behind on her charts, and suggested to her supervising physician that they forget about the previous months' delinquent charts, but start over with the current month's chart review. Harris told McKenna that she had to bring all six months of her delinquent chart reviews current, and reminded her that it was her responsibility to find time to meet with her supervising physician after McKenna complained that she was having difficulty in doing so.

On June 21, 2011, Harris and Fisher met with McKenna to discuss her performance. At the meeting, Fisher informed McKenna that she was not meeting the productivity standard of two patients per hour. After the meeting, McKenna received a written warning, which stated that McKenna had persistently low productivity, was inefficient regarding patient care and throughput, exhibited a negative attitude at work, and failed to comply with non-clinical faculty requirements. McKenna was placed on probation pending improvement of her performance and was required to work an extra shift to make up the administrative time she missed by failing to complete the reviews and as a deterrent to future delinquencies.

On June 27, 2011, McKenna received a written warning for arriving 2 ½ hours late for work without communicating to her superiors that she would be late.

On October 7, 2011, McKenna presented Dr. Fisher what she categorized as "disorganized sign-out reports" for four patients in McKenna's care that day. A "sign-out" is a practice whereby a MLP transfers her patients to another provider at the end of her shift, and verbally explains each patient's chart, including labs, tests, or other necessary information.

After McKenna finished her sign-out, Dr. Fisher was made aware that McKenna had failed to sign-out a fifth patient, who had become angry and uncooperative after being left in the critical care area by herself. When Fisher confronted McKenna, McKenna became upset, spoke loudly, and used profanity in front of patients. She also carried a water bottle into the patient care area, which is a violation of both hospital policy and federal regulations.

After the October 7 incident and review of McKenna's prior disciplinary history, Baylor decided to terminate her. On October 31, 2011, McKenna's supervisors Fisher and Harris, and Employee Relations Department members Judy Garey and Letha Smith, met with McKenna to inform her that she would be placed on a 30-day administrative leave and then terminated effective December 1, 2011. She was informed that although being terminated from Emergency Services, she would remain eligible for another position at Baylor and would be allowed 30 days' paid leave in which to seek another position.

According to the witnesses present, McKenna became upset and aggressive and made comments while pointing her finger in Dr. Fisher's face. She then left the meeting abruptly, slammed the door to her office, and was then escorted from the premises by security. McKenna denies such an altercation took place.

Following the meeting, Garey met with the Vice President of Human Resources to discuss the meeting. Based on the conduct witnessed by Garey and Smith, Human Resources concluded that McKenna's conduct constituted misconduct and decided to re-categorize her termination from "performance" to "misconduct." As such, McKenna was no longer eligible for 30-days' paid administrative leave to find another position at Baylor because she was no longer eligible for rehire.

On the same day she was terminated, Garey sent an email to McKenna's MLP collegues and supervisors stating that: (1) McKenna no longer worked in the Emergency Medical Section; (2) everyone should "respect Ms. McKenna's privacy and allow her departure to remain confidential;" and (3) Human Resources agreed that McKenna would be terminated for misconduct—ineligible for rehire.

In November 2011, Baylor informed McKenna that her termination status had been changed to termination for misconduct, ineligible for rehire, and that she would not receive the 30 days' post-termination pay. Also in November, a fellow MLP who had received Garey's email, forwarded it to McKenna.

McKenna filed a discrimination charge with the United States Equal Employment Opportunity Commission [EEOC] alleging race and age discrimination. Baylor defended its discharge based on McKenna's poor performance, not her misconduct. The charge was subsequently dismissed by the EEOC.

McKenna then filed this lawsuit below, alleging race and age discrimination. In support of her petition, McKenna claimed that Dr. Fisher called her "old school" or "from . . . the old Ben Taub." McKenna's age claim is also based on the fact that she was the "oldest white female" of the MLPs and was replaced by Kaye-Ann Christie, a "25-year-old black female."

McKenna also alleged libel, based on the Garey email to her co-workers, which characterized her discharge as being based on misconduct.

Finally, McKenna alleged breach of contract, arguing that Baylor had promised to pay her 30 days' post-termination pay based on her promise to stay away from the hospital and not talk to her fellow MLPs. McKenna non-suited another breach of contract claim based on the extra shift she was required to work as punishment.

Baylor filed a traditional motion for summary judgment on all of McKenna's claims, which the trial court granted. This appeal followed.

PROPRIETY OF SUMMARY JUDGMENT

In three issues on appeal, McKenna contends the trial court erred in granting Baylor's motion for summary judgment on her race/age discrimination claims, libel claims, and breach of contract claims. We address each issue respectively.

Standard of Review

Baylor moved for summary judgment under rule 166a(c) of the Texas Rules of Civil Procedure. To prevail on a traditional motion for summary judgment under rule 166a, the party moving for summary judgment carries the burden of establishing that no material fact issue exists on the challenged elements and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a; *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). And, when a trial court's order granting summary judgment does not specify the grounds on which it relied, as is the case here, we must affirm summary judgment if any of the summary judgment grounds are meritorious. *FM Prop. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000).

Discrimination Claim

An employer commits an unlawful employment practice if, because of an employee's race or age, the employer "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. LABOR CODE ANN. § 21.051(1) (Vernon 2006). The Texas Legislature patterned the Texas Commission on Human Resources Act after federal law "for the express purpose of carrying out the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments." *Elgaghil v. Tarrant Cnty. Junior Coll.*, 45 S.W.3d 133, 139 (Tex. App.—Fort Worth 2000, pet. denied); *see also Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 474 (Tex. 2001) (stating same). Thus, when analyzing a claim brought under the TCHRA, we look not only to state cases, but also to the analogous federal statutes and the cases interpreting those statutes. *Toennies*, 47 S.W.3d at 476.

To establish a prima facie case of race discrimination, the plaintiff must show that: (1) she was a member of a protected class, (2) she suffered an adverse employment action, and (3) non-protected class employees were not treated similarly. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973); *McCoy v. Tex. Instruments, Inc.*, 183 S.W.3d 548, 554 (Tex. App.—Dallas 2006, no pet.). A prima facie case of age discrimination requires proof that the plaintiff (1) is a member of a protected class; (2) was discharged; (3) was qualified for the position from which she was discharged; and (4) was either replaced by someone outside the protected class, replaced by someone younger, or

was otherwise discharged because of her age. *See Baker v. Gregg Cty.*, 33 S.W.3d 72, 80 (Tex. App.—Texarkana 2000, pet. dism'd).

Once the plaintiff establishes a prima facie case, the burden of production shifts to the defendant-employer to articulate legitimate, non-discriminatory reasons for any allegedly unequal treatment. *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824; *Greathouse v. Alvin Indep. Sch. Dist.*, 17 S.W.3d 419, 423 (Tex. App.—Houston [1st Dist.] 2000, no pet.). After the employer articulates a non-discriminatory reason, the burden then shifts back to the plaintiff to prove that the articulated reason is a mere pretext for unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 804, 93 S. Ct. at 1825; *Greathouse*, 17 S.W.3d at 423. Although the burden of production shifts between the parties, the burden of persuasion "remains continuously with the plaintiff." *Greathouse*, 17 S.W.3d at 423.

To raise a fact issue on the pretext element of a race-discrimination claim, the nonmovant must present evidence "indicating that the non-discriminatory reason given by the employer is false or not credible, and that the real reason for the employment action was unlawful discrimination." *Elgaghil*, 45 S.W.3d at 140. A plaintiff can avoid summary judgment if the evidence, taken as a whole, creates a fact issue "as to whether *each* of the employer's stated reasons was not what actually motivated the employer and creates a reasonable inference that [race or

age] was a determinative factor in the actions the plaintiff is now complaining about." *Id.* (emphasis in original); *see also Little v. Tex. Dep't of Criminal Justice*, 177 S.W.3d 624, 632 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("[T]he United States Supreme Court has made it clear that it is not sufficient merely to show that the employer's reasons are false or not credible; the plaintiff must prove that the employer discriminated intentionally.") (*citing Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 146–47, 120 S.Ct. 2097, 2108 (2000)). An employee's subjective belief that his employer has given a false reason for the employment decision is not competent summary judgment evidence. *Elgaghil*, 45 S.W.3d at 141; *see also Greathouse*, 17 S.W.3d at 425 ("Summary judgment for the defendant is proper when a plaintiff claiming race discrimination presents only conclusory allegations, improbable inferences, unsupportable speculation, or subjective beliefs and feelings.").

Baylor "assumed for purposes of its motion below [and on appeal] that McKenna was able to make a prima facie claim for her race and age discrimination claims[.]" Instead, Baylor argues that it established a legitimate, non-discriminatory reason for its discharge decision, thus shifting the burden to McKenna to show that those reasons were pretextual, which Baylor contends she failed to do.

McKenna does not argue that Baylor did not show legitimate, non-discriminatory reasons for her discharge. Indeed, Baylor showed that McKenna was late with her chart reviews for several months, even after receiving warnings, that she failed to meet the hospital's productivity requirements, that she was late to work without calling her superiors, that she failed to properly transfer patients at the end of her shift, that she used profane language in front of patients when confronted about not properly transferring patients, and that she violated hospital policy and federal law by bringing a water bottle into the patient care areas.

McKenna does, however, argue that the reasons given by Baylor for her discharge were pretextual because she was "treated differently from other similarly situated employees." Thus, we must decide whether the evidence, taken as a whole, creates a fact issue "as to whether each of the employer's stated reasons was not what actually motivated the employer and creates a reasonable inference that [race or age] was a determinative factor in the actions the plaintiff is now complaining about." *Elgaghil*, 45 S.W.3d at 140.

Pretext—Comparator Evidence

In support of her claim of pretext, McKenna argues that she "was treated differently than other similarly situated employees." Baylor contends that McKenna "failed to raise a fact issue on her claim that she was treated differently."

Thus, the issue presented is whether any of the non-Caucasian, younger employees identified by McKenna were similarly situated to her.

The Texas Supreme Court has held that "[e]mployees are similarly situated if their circumstances are comparable in all material respects[.]" *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005) (per curiam). An employee who proffers a fellow employee as a comparator must demonstrate that the employment actions at issue were taken "under nearly identical circumstances." *Little v. Republic Ref. Co.*, Ltd., 924 F.2d 93, 97 (5th Cir. 1991) (internal quotation marks omitted). Further, to establish that employees are "comparable in all material respects," a plaintiff must also show "that there were no differentiating or mitigating circumstances as would distinguish . . . the employer's treatment of them." *Ineichen v. Ameritech*, 410 F.3d 956, 960–61 (7th Cir. 2005).

In a disparate discipline case, "the disciplined and undisciplined employees' misconduct must be of 'comparable seriousness.'" *Monarrez*, 177 S.W.3d at 917. The *Monarrez* court noted that although the United States Supreme Court had previously held that "precise equivalence in culpability between employees is not the ultimate question," the Fifth Circuit had held that "the plaintiff must usually show 'that the misconduct for which [the employee] was discharged was nearly identical to that engaged in by a[n] employee whom [the company] retained.'" *Id.* at 917–18 (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283

n.11, 96 S. Ct. 2574, 2580 n.11 (1976) and *Smith v. Wal–Mart Stores, Inc.*, 891 F.2d 1177, 1180 (5th Cir. 1990)). "Employees with different responsibilities, supervisors, capabilities, work rule violations, ***or disciplinary records*** are not considered to be 'nearly identical.'" *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 594 (Tex. 2008) (emphasis added); *see also Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009*)* (noting employment actions being compared will be deemed to have been taken under nearly identical circumstances when employees being compared held same job or responsibilities, shared same supervisor or had employment status determined by same person, and have essentially comparable violation histories); *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001) (holding employment actions being compared will be deemed to have been taken under nearly identical circumstances when the employees being compared have essentially comparable violation histories); *see, e.g.*, *Bouie v. Equistar Chems. LP*, 188 Fed. Appx. 233, 237 (5th Cir. 2006) (unpublished) (per curiam) (plaintiff discharged for violating two safety protocols could not use comparator who only violated one safety protocol). "If the 'difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer,' the employees are not similarly situated." *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009)

(quoting *Wallace v. Methodist Hosp. Sys., Inc.*, 271 F.3d 212, 221–22 (5th Cir. 2001)).

We find the case of *Texas State Office of Administrative Hearings v. Birch*, No. 04-12-00681-CV, 2013 WL 3874473 (Tex. App.—San Antonio, pets. denied) (mem. op.), to be instructive in deciding whether McKenna is "similarly situated" to the comparators she offers. In *Birch*, an administrative law judge ["ALJ"], Wood, filed a wrongful termination action against the State Office of Administrative hearing, alleging discrimination based on age and gender. *Id*. at *14. She alleged that, even though she was purportedly fired for turning in late proposals for decisions ["PFDs"], other younger, male ALJ's were not fired even though they too had turned in late PFDs. *Id.* at *15. The court, nevertheless, concluded that the proposed comparator ALJs were not "similarly situated" to Wood because she was terminated for other reasons, in addition to turning in late PFDs. *Id.* at *16. In so holding, the court of appeals stated:

> We accept as true Wood's claim that the comparators had untimely PFDs and were not disciplined. However, therein lies the problem. Even if these comparators held the same job or responsibilities (all ALJs), shared the same supervisor or had their employment status determined by the same person (Chief ALJ Parsley), and had essentially comparable violation histories (untimely PFDs), we hold there is no evidence their conduct was "nearly identical" to that for which Wood was terminated. *See Lee*, 574 F.3d at 260. As noted above, the most critical factor in evaluating comparator evidence is that the plaintiff's conduct that drew the adverse employment action be "nearly identical to that of the proffered comparator who allegedly drew" a dissimilar response. *Id.*

> (emphasis added). Taking Wood's evidence as true, we agree all of the proffered comparators had late PFDs—many of them had several late PFDs. However, Wood was not terminated solely because she filed the Envirosol PFD in an untimely matter. Rather, the evidence, which is undisputed, establishes Wood's termination was based, in part, on her prior demotion and probation, which was also for time mismanagement, and because she misrepresented the closing date in the Envirosol PFD. In addition, she failed to comply with the SOAH policy that required her to contact her supervisor if she believed a PFD would not be timely completed. Wood presented no evidence the other comparators had prior disciplinary actions for late PFDs and improper time mismanagement, and were demoted and placed on probation for that conduct. Nor did she present any evidence the comparators misrepresented closing dates in their PFDs, or that they failed to advise supervisors when PFDs could not be completed on time. We therefore hold the conduct for which Wood was terminated differed from those she claims were treated differently due to gender and age.

Id.

The same is true here. Even accepting McKenna's representation that "all MLPs failed to meet the standard [requirement of seeing two patients per hour]," and that "no other MLP was terminated for that reason," we nevertheless conclude that McKenna has not raised a fact issue regarding whether they are similarly situated. McKenna's termination was not based solely on her failure to see two patients per hour. The undisputed evidence shows that she also received a written reprimand for being delinquent in her chart reviews, and McKenna presented no evidence that other MLPs who also received emails about delinquent chart reviews remained delinquent after being repeatedly warned by Harris that their chart reviews were late. In contrast, McKenna received email reminders in December

2010 and April 2011 about her delinquent charts, and she remained delinquent until her written reprimand in June 2011. While McKenna claims that two other MLPs were delinquent in their chart reviews and were not written up, there is no evidence that they were delinquent in their chart reviews for as long as McKenna. Also, McKenna met with her supervisor in June 2011, after which she received a written warning about not only her productivity, but also that she exhibited a negative attitude at work. She was placed on probation pending improvement and was told that failure to improve would result in further disciplinary action. There is no evidence that any other MLPs were reprimanded for a negative attitude.[1] McKenna was also given a written warning in June 2011 about arriving for work more than two hours late and not communicating that fact to her supervisors. Again, there is no evidence that other MLPs were reprimanded for failing to let their supervisors know when they would be late for work. Finally, there was evidence that in October 2011, McKenna had a confrontation with Dr. Fisher about disorganized sign-out sheets at the end of her shift for four patients in her care. When Dr. Fisher learned that a fifth patient had not been signed out and had become angry and uncooperative after being left alone, Fisher approached

[1] McKenna denies having a negative attitude, but does not deny that such was given as a reason for her June 2011 reprimand. *See Chandler*, 376 S.W.3d at 820 ("The question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive."); *id* at 820 (stating employee's "own conclusory allegation that he did not behave inappropriately is irrelevant").

McKenna to discuss the patient. When confronted, McKenna became upset and used profane language in front of other patients. It was after this event that Baylor decided to terminate McKenna.[2] There is no evidence that any other MLP had a similar situation involving a failure to sign-out patients appropriately or behaving inappropriately in front of patients.

Because the undisputed evidence shows that McKenna was terminated based on a series of events—not just her lack of productivity—her claim that she is similarly situated to other MLPs who also did not meet productivity requirements necessarily fails. Thus, we conclude that the comparator evidence offered by McKenna does not present a scintilla of evidence that she was treated differently from other MLPs who were similarly situated.

Pretext—Younger Replacement

McKenna also claims that she raised an issue of pretext because she was replaced by Christi, a 25-year-old African American. The fact that she was replaced by a younger worker is relevant to whether McKenna established a prima facie case of discrimination, but is not relevant in determining pretext. *See Hennis*

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[2] McKenna denies that this event occurred, but she does not deny that it was given by Baylor as a justification for her termination, which was initially classified as based on performance, but was changed the next day to misconduct. Similarly, McKenna denies any allegation that she was unprofessional, but does not deny that her disciplinary records show that she was reprimanded for a "bad attitude." *See Chandler*, 376 S.W.3d at 819 (stating "employee's own conclusions allegation that he did not behave appropriately is irrelevant").

v. Alter Trading Corp., 341 Fed. Appx. 991, 994 n.1 (5th Cir. 2009) (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309 (5th Cir. 2004)).

Pretext—Stray Remarks

McKenna also notes in brief that she was referred to as "old school." Such an isolated remark is insufficient evidence to raise a fact issue. *See Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1166 (5th Cir. 1993) ("a mere 'stray remark' is insufficient to establish age discrimination").

Therefore, we conclude that McKenna has failed to raise a fact issue regarding whether Baylor's stated non-discriminatory reasons for firing her were a mere pretext for discrimination or whether her race or age was a motivating factor in Baylor's decision. As such, that the trial court correctly rendered summary judgment in favor of Baylor on McKenna's claim that Baylor discriminated against her.

Libel Claim

In issue two, McKenna contends the trial court erred in denying her libel claim based on limitations. The statute of limitations applicable to a libel claim is one year. TEX. CIV. PRAC. & REM. CODE ANN. § 16.002(a) (Vernon 2002). McKenna contends that this cause of action arose at the time of her termination on October 31, 2011. McKenna filed her amended petition containing the libel claim on May 19, 2014, but argues that it "relates back" to her original petition, which

was filed December 20, 2012. Baylor contends that the libel claim would have been time-barred even if had been filed on December 20, 2012, the date of McKenna's Original Petition. We agree with Baylor.

Under the relation-back doctrine, an amended pleading is not subject to a statute of limitations defense and "relates back" to the date of the original filing if the amended pleading adds a cause of action that is based on the same transaction or occurrence that also forms the basis of the claim made in the original pleading. *See Lexington Ins. Co. v. Daybreak Exp., Inc.*, 393 S.W.3d 242, 244 (Tex. 2013); *Bratcher v. Boeke*, 207 S.W.3d 431, 434 (Tex. App.—Dallas 2006, no pet.).

Further, if the statute of limitations would have barred a cause of action when the original pleading was filed, it will still bar that cause of action when it is first asserted by amended pleading, even though the original pleading asserted other theories that were timely. *Almazan v. United Servs. Auto Ass'n, Inc.*, 840 S.W.2d 776, 778–79 (Tex. App.—San Antonio 1992, writ denied); *see Bado Equip. Co. v. Bethlehem Steel Corp.*, 814 S.W.2d 464, 469 (Tex. App.—Houston [14th Dist.] 1991, no writ); *Sullivan v. Hoover*, 782 S.W.2d 305, 306–07 (Tex. App.—San Antonio 1989, no writ); *Khalaf v. Williams*, 763 S.W.2d 868, 870 (Tex. App.—Houston [1st Dist.] 1988), *rev'd on other grounds*, 802 S.W.2d 651 (Tex. 1990); *Bell v. Bell*, 434 S.W.2d 699, 701 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.). Similarly, one court has held that "a cause of action barred by

limitation cannot be revived by filing a pleading stating an invalid cause of action and thereafter amending to include the barred cause of action." *Church v. Ortho Diagnostic Sys., Inc.*, 694 S.W.2d 552, 556 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

Here, McKenna's original petition was filed on December 20, 2012—more than a year after she contends the libel cause of action arose on October 31, 2011. Even if the amended petition "relates back" to the date of the original petition, it will not save the libel claim, which was already time-barred at the time the original petition was filed. As such, the trial court correctly granted summary judgment on McKenna's libel cause of action.

We overrule issue two.

Breach of Contract Claim

In her third issue on appeal, McKenna contends the trial court erred in granting summary judgment on her breach of contract claim, which was based on her allegation that Baylor offered her one month of post-termination pay in exchange for her promise to not return to the hospital or contact her former co-workers. Baylor moved for summary judgment, claiming there was no consideration for its promise to pay her post-termination leave. McKenna, however, claims that she raised a fact question on the issue, and points to her own affidavit, in which she states as follows:

> I was also told during the meeting that although I was terminated, I would be paid an additional salary to allow [me] the opportunity to determine if another department in Baylor would have interest in hiring [me] as an employee but that in consideration, for continued payment of salary that I would have to agree not to come on the premises or speak with [my] fellow mid-level providers. I advised Harris and Dr. Fisher that I would abide by this requirement. In fact I did not come on premises again or make contact with any mid-level providers at the work place.

At the most fundamental level, a contract must be based on consideration. *See Tex. Gas Utilities Co. v. Barrett*, 460 S.W.2d 409, 412 (Tex. 1970). Consideration may consist of some right, interest, profit, or benefit that accrues to one party; or, alternatively, of some forbearance, loss, or responsibility that is undertaken or incurred by the other party. *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 224 (Tex. App.—Fort Worth 2009, pet. denied). McKenna's position is that her forbearance from coming on the hospital premises and making contact from other MLPs at the workplace constituted her consideration for the post-termination pay.

However, the record shows that, based on McKenna's reaction at the termination meeting, she was escorted from the building and her termination was reclassified from one based on performance to one based on misconduct. Because her termination was reclassified as one for misconduct, McKenna no longer had the right to return to her workplace, thus her forbearance from doing so cannot be consideration for any agreement to pay post-termination pay.

Also, by reclassifying McKenna's termination as one based on misconduct, Baylor, in effect, revoked any offer that it may have made regarding payment of post-termination pay, and McKenna's forbearance from returning and discussing her termination with employees at the workplace could not have been an acceptance.

We overrule point of error three.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.