Opinion issued January 25, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00461-CV

JEFF VANDERHURST, Appellant

V.

STATOIL GULF SERVICES, LLC, Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Case No. 2014-41304

MEMORANDUM OPINION

This is an appeal from a summary judgment dismissing claims asserted under the Texas Commission on Human Rights Act.[1] Jeff Vanderhurst is a former employee of Statoil Gulf Services, LLC. While employed at Statoil, Vanderhurst

[1] *See* TEX. LAB. CODE §§ 21.001–.556.

had an extra-marital affair with a younger female co-worker. The affair ended, and Vanderhurst's co-worker, spurned, threatened him and his wife. Vanderhurst reported his co-worker to Statoil's human resources department. A few months later, he resigned without notice to take a higher-paying job with a competitor. He then sued Statoil for retaliation, constructive discharge, and hostile work environment. Vanderhurst alleged that Statoil removed him as the leader of a high-profile project in retaliation for reporting his co-worker's threats and that Statoil did nothing to prevent his co-worker from continuing to harass him, which made working conditions so intolerable that he was forced to resign.

We hold that Statoil conclusively negated the existence of a causal connection between Vanderhurst reporting the harassment and Statoil removing him from the project. We further hold that Vanderhurst's working conditions were not sufficiently intolerable to support his claims for hostile work environment and constructive discharge. Therefore, we affirm.

Background

Jeff Vanderhurst is a former geophysicist for Statoil. In the summer of 2012, when Vanderhurst was working at Statoil, he began an extra-marital affair with a younger co-worker, a geologist, Susie Irvine. At the time, Vanderhurst was 42 and Irvine was 28. Irvine was an expatriate from the UK, and Vanderhurst was supposed to be mentoring her. In company parlance, Vanderhurst was Irvine's

"Statoil buddy." The two had adjoining desks and worked on the same team on the tenth floor. The affair took place largely on Statoil premises during working hours and adversely affected their job performance. Vanderhurst admitted that at times he was not as focused on his work as he should have been.

The affair went on for six months. In mid-December 2012, Vanderhurst decided to end it. Irvine did not take it well. According to Vanderhurst, she threatened to physically harm him and his wife and to ruin his career by accusing him of sexual misconduct.[2] On December 19, Vanderhurst reported Irvine to HR.

After Vanderhurst's December 19 meeting with HR, he and Irvine were told that they should act professionally and stay away from each other. Irvine was moved to the other side of the floor about 200 feet away and placed on a different team. Irvine and Vanderhurst never worked with each other again, and Irvine never threatened, touched, or spoke to Vanderhurst again.[3] Irvine did, however, continue to walk by Vanderhurst's work station multiple times a day and stare at him during work meetings, which Vanderhurst perceived as continuing harassment and reported to HR.

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[2] Vanderhurst testified that although he is much larger than Irvine—he is 6'3" and weighs over 220 pounds and Irvine is 5'9" and "small"—he still considered her to be a physical threat.

[3] Irvine did send Vanderhurst an email and a corporate internal message that were both business-related and did not include any personal content. Vanderhurst reported both communications to HR. Besides those two business communications, Irvine never attempted to contact Vanderhurst.

Vanderhurst was later informed that Statoil had decided to pass him over for a promotion. The decision had been made that November—before Vanderhurst had reported Irvine to HR and before the Statoil leadership team knew about the affair.[4] Although Vanderhurst scored high on technical ability, the leadership team decided against promoting Vanderhurst because he had underperformed in three specific behavioral areas: (1) he had not shown the ability to function and collaborate on a team, (2) he had not demonstrated that he could coach and mentor junior employees, and (3) there were concerns that data and analysis conducted by him were not properly made available for others to use.

He was also removed as the leader of two projects. First, in late January, he was removed from the Game Look Back project. In early December, Vanderhurst's supervisor, Jez Averty, assigned Vanderhurst to lead the Game Look Back project—a high-profile project with a short deadline. But by the end of January, Averty was growing increasingly concerned because Vanderhurst had made very little progress and decided to remove him from the project. Second, in early February, Vanderhurst was removed as the leader of a post-well seminar. Averty decided to transfer the project to another employee because he had learned that

[4] On November 20, Vanderhurst's supervisor, Jez Averty, sent an email to his supervisor stating that Vanderhurst would "be a bit pissed off when we do not promote him to leading . . . ." Averty wrote that Vanderhurst "does not behave like leading yet even if he has made great strides."

Vanderhurst had interviewed with a competitor (Shell) and wanted to make sure the project continued in the event Vanderhurst left Statoil before its completion.

When Averty informed Vanderhurst of his decision to remove him from the post-well seminar, Vanderhurst had (unbeknownst to Averty) already accepted an offer of employment and signing bonus from Shell. But, as Vanderhurst later admitted, he had delayed his start date at Shell until March so he could collect a long-term incentive bonus from Statoil first.

In mid-February, Vanderhurst took his family on a vacation. When he returned to work, Statoil deposited the long-term incentive bonus into Vanderhurst's bank account, and Vanderhurst promptly resigned without providing any notice. Vanderhurst then sued Statoil for retaliation, hostile work environment, and constructive discharge. He alleged that Statoil passed him over for the promotion and removed him from the projects in retaliation for his complaint to HR and made his work environment intolerable by failing to prevent Irvine from continuing to harass him. Statoil moved for summary judgment, arguing that the evidence showed that there was no causal connection between Vanderhurst reporting Irvine to HR and Statoil's alleged retaliation and that Vanderhurst's working conditions were not sufficiently intolerable to support his claims for hostile working environment and constructive discharge.

The trial court granted summary judgment and dismissed Vanderhurst's claims. Vanderhurst appeals.

Summary Judgment

In three issues, Vanderhurst contends that the trial court erred in granting summary judgment on his claims for retaliation, hostile work environment, and constructive discharge. Vanderhurst contends that the evidence raises genuine issues of material fact concerning whether (1) there is causal connection between him reporting Irvine to HR and Statoil removing him as the leader of the Game Look Back project, (2) he continued to suffer from severe and pervasive harassment after first reporting Irvine to HR, and (3) working conditions were so intolerable that he was forced to resign.

A. Standard of review

We review a trial court's summary judgment de novo. *Brewer v. Coll. of the Mainland*, 441 S.W.3d 723, 728 (Tex. App.—Houston [1st Dist.] 2014, no pet.). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*

In a traditional summary judgment motion, the movant has the burden to show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Brewer*, 441 S.W.3d at 728.

A defendant moving for traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Brewer*, 441 S.W.3d at 728–29.

B. Retaliation

In his first issue, Vanderhurst argues that the trial court erred in granting summary judgment on his retaliation claim because the evidence raises a genuine issue of material fact concerning whether a causal link exists between the protected activity (his reporting Irvine's sexual harassment) and the adverse employment action (Averty's removing him as the leader of the Game Look Back project).[5]

An employer is prohibited from retaliating against employees for engaging in protected activities, including opposing a discriminatory practice, making a charge, or filing a complaint. *See* TEX. LAB. CODE § 21.055(1)–(3). To establish a prima facie case of retaliation, "a plaintiff must show that (1) he participated in a protected activity, (2) his employer took an adverse employment action against him, and (3) a causal connection existed between his protected activity and the adverse employment action." *Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 441 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

[5] On appeal, Vanderhurst does not contend that Statoil retaliated by either (1) declining to promote him or (2) transferring the post-well seminar assignment to another employee.

If the employee establishes a prima facie case of retaliation, the burden shifts to the employer to provide a legitimate, non-retaliatory reason for the adverse employment action. *See Datar v. Nat'l Oilwell Varco, L.P.*, 518 S.W.3d 467, 479 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). "The employer's burden is only one of production, not persuasion, and involves no credibility assessment." *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007).

If the employer meets its burden of production, "the burden shifts back to the employee to show that the proffered reason is pretextual." *Brewer*, 441 S.W.3d at 729. An employee's subjective belief that his employer retaliated against him is a mere conclusion that does not raise a fact issue precluding summary judgment for the employer. *Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 647 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

Vanderhurst presented evidence that he participated in a protected activity—reporting Irvine's alleged sexual harassment to HR. He presented evidence that Statoil took an adverse employment action against him—removing him as the leader of the Game Look Back project. And he presented evidence that the two were causally connected—his removal occurred shortly after he reported Irvine to HR. *See McCoy*, 492 F.3d at 562 ("Close timing between an employee's protected activity and an adverse action against him may provide the 'causal connection'

required to make out a *prima facie* case of retaliation." (quoting *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997))).

Thus, Vanderhurst made a prima facie case of retaliation by presenting evidence that he was removed as the leader of the Game Look Back project after reporting Irvine's sexual harassment to HR.

The burden then shifted to Statoil to articulate a non-retaliatory reason for removing Vanderhurst from the project. Statoil met its burden by presenting Averty's deposition testimony that he removed Vanderhurst due to lack of progress on the Game Look Back project. In early December, Averty appointed Vanderhurst to lead this project, which was high-profile with a short deadline. But by the end of January, Averty was growing "increasingly concerned" over the "little progress" Vanderhurst had made. So he decided to remove him and appoint a new leader, whom he instructed to "get cracking as soon as possible."

The burden then shifted back to Vanderhurst to present some evidence that Statoil's articulated reason was pretextual. Vanderhurst offered no such evidence; he made no attempt to rebut Statoil's stated reason for removing him from the project.

Because Statoil met its burden, to survive summary judgment, Vanderhurst was required to produce some evidence demonstrating that Statoil's articulated

reason for removing him from the project was pretextual. *See Brewer*, 441 S.W.3d at 729. He failed to do so. Therefore, we overrule Vanderhurst's first issue.

C. Hostile work environment

In his third issue, Vanderhurst contends that the trial court erred in granting summary judgment on his hostile-work-environment claim. Vanderhurst argues that the trial court erred because the evidence raises issues of whether (1) the alleged harassment was severe and pervasive and (2) Statoil failed to investigate and act upon his sexual harassment complaint.

"A hostile work environment claim 'entails ongoing harassment, based on the plaintiff's protected characteristic, so sufficiently severe or pervasive that it has altered the conditions of employment and created an abusive working environment.'" *Donaldson*, 495 S.W.3d at 445 (quoting *Bartosh v. Sam Houston State Univ.*, 259 S.W.3d 317, 324 (Tex. App.–Texarkana 2008, pet. denied)). "The elements of a prima facie case of hostile work environment are: '(1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based on the protected characteristic; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.'" *Donaldson*, 495 S.W.3d at 445 (quoting *Anderson*, 458 S.W.3d at 646).

"To satisfy the fourth element of a hostile environment claim, a plaintiff must show that the workplace was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to create a hostile or abusive working environment." *Donaldson*, 495 S.W.3d at 445. The plaintiff's "work environment must be both objectively and subjectively offensive . . . ." *Id.* That is, it must be "one that a reasonable person would find hostile or abusive and one that the victim perceived to be so." *Id.* When reviewing a hostile-work-environment claim, "we consider the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether the conduct was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with the employee's work performance." *Id.*

Considering the totality of the circumstances, we hold that there is no evidence that Vanderhurst's work environment was objectively offensive—one that a reasonable person would find hostile or abusive. *Id.* It is undisputed that after Vanderhurst made his sexual harassment complaint, Irvine was told to act professionally, moved to the other side of the floor, and placed on a different team. And it is undisputed that after Irvine was admonished, she never ridiculed, insulted, threatened, touched, or spoke to Vanderhurst again. Vanderhurst nevertheless contends that his work environment was objectively hostile and abusive because Irvine (1) continued to walk by his work station numerous times a

day and (2) stared at him from across the room during work meetings. We disagree.

As a matter of law, Irvine's alleged continuing harassment did not create an objectively offensive work environment. Irvine never threatened Vanderhurst, touched him, or got any closer to him than thirteen feet. And Vanderhurst conceded there may have been times when Irvine needed to be in her former workspace for meetings. As the trial court stated in its order, the conduct described by Vanderhurst may have been annoying, but it does not constitute an objectively offensive work environment sufficient to support a hostile-work-environment claim.

Vanderhurst's allegations and evidence do not show that his workplace was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to create a hostile or abusive working environment. We overrule Vanderhurst's third issue.[6]

D. Constructive discharge

In his second issue, Vanderhurst argues that the trial court erred in granting summary judgment on his constructive-discharge claim because the evidence raises

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[6] Because we hold that there is no genuine issue of material fact concerning whether Vanderhurst's work environment was objectively offensive, we need not address his argument that Statoil had a duty to investigate and act upon his sexual harassment complaint yet failed to adequately do so.

a genuine issue of material fact concerning whether his work environment was objectively intolerable.

A constructive discharge occurs when an employer makes working conditions so intolerable that a reasonable employee would feel compelled to resign. *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 134 (Tex. App.—Houston [1st Dist.] 1999, no pet.). In determining whether an employer's actions constitute a constructive discharge, courts consider whether there has been any (1) demotion, (2) reduction in salary, (3) reduction in job responsibilities, (4) reassignment to menial or degrading work, (5) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation, or (6) offers of early retirement that would make the employee worse off whether they were accepted or not. *Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 481 (5th Cir. 2008).

Viewing the summary judgment evidence in the light most favorable to Vanderhurst, we hold that a reasonable employee in his position would not have felt compelled to resign. Vanderhurst was not demoted. He suffered no reduction in salary. He was not reassigned to menial or degrading work. And he never received an offer of early retirement. Vanderhurst was relieved of certain job responsibilities, but Statoil stated legitimate reasons for doing so, which Vanderhurst made no attempt to rebut.

Vanderhurst does not allege that Irvine's alleged harassment or Statoil's alleged failure to do more were calculated to encourage his resignation. Nor were their actions severe enough to compel him to resign before receiving his bonus. Vanderhurst testified that Irvine's began harassing him in early December and that he accepted Shell's employment offer on January 26. Nonetheless, Vanderhurst waited to resign from Statoil until March 15—the day Statoil deposited his bonus into his bank account.

Moreover, to prevail on a constructive-discharge claim, a plaintiff must show "a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment." *Green*, 1 S.W.3d at 134. We have already held that Vanderhurst has failed to show harassment sufficiently severe or pervasive to prove to a hostile work environment. Because Vanderhurst's evidence does not support a finding of a hostile work environment, it does not support a finding of a constructive discharge either. *See id.* Accordingly, we overrule Vanderhurst's second issue.

Conclusion

We affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Justices Keyes, Brown, and Lloyd.