Opinion issued June 26, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00688-CV

ALDINE INDEPENDENT SCHOOL DISTRICT, Appellant

V.

ADDIE MASSEY, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2016-26124

MEMORANDUM OPINION

This is an interlocutory appeal from a denial of a school district's plea to the jurisdiction concerning its former employee's claims for disability discrimination and retaliation under the Texas Commission on Human Rights Act. *See* TEX. LAB. CODE §§ 21.051, 21.055; TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). The school

district contends that the trial court erred in denying its plea because the evidence does not raise a fact issue demonstrating that it violated the antidiscrimination law by (1) failing to provide its employee with reasonable accommodations, or (2) retaliating against the employee for engaging in protected activity by giving her an unfavorable reference. We reverse and remand.

BACKGROUND

Addie Massey worked for Aldine Independent School District as a paraprofessional in Stehlik Intermediate School, under the direct supervision of the school principal, Christi Van Wassenhove. Her primary duties consisted of monitoring students in the school's computer lab to ensure that they were performing assigned work. Massey's regular ancillary duties included assisting other faculty and staff with metal detector duty at the beginning of the school day. This task required standing while monitoring students and checking their belongings at the metal detector in the morning before they entered the building. She also had lunch duty, which entailed monitoring students' behavior during their lunch periods to maintain order. At times, Massey performed other ancillary duties, including supervising the in-school-suspension classroom.

On the second-to-last day of school in June 2014, Massey injured her hip when a student pushed her into a door as she attempted to open it. Massey sought medical attention and did not return to school for the last day. During the 2014 summer

recess, Massey was diagnosed with a fractured hip. In late August, a different treating physician opined that Massey was not ready to return to work. On September 15, the physician examined Massey again. This time, the physician released Massey for work, with the restriction that she perform seated light duty work with no lifting or carrying.

To accommodate Massey's physical restrictions, on September 23, the school principal gave Massey a written offer of modified duty. The offer consisted of metal detector duty, which was modified to require no lifting or carrying, and would be performed while Massey remained seated. Massey would perform this duty with at least one other employee, who could assist her, if needed. Massey also continued to monitor students during their lunch period. The school modified Massey's lunch monitor duties to allow her to sit near the stage instead of walking around the cafeteria like the other monitors. Massey accepted the restrictions and signed the offer of accommodation. She admitted that the principal offered her accommodations tailored to match her physical restrictions each time she provided updated work status reports from her physician.

On December 5, 2014, Massey's physician cleared Massey to return to work without any restrictions. The school nevertheless continued to allow Massey to sit during her morning duty at the metal detector, during lunch duty, and while monitoring in the computer lab.

In February 2015, Massey fell while walking to the computer lab. Massey was treated at a hospital and released the same day. She spent the next week recuperating at home. After that week, her physician released her to return to work with the following restrictions:

- up to two hours of standing;
- eight hours of sitting;
- no kneeling or squatting;
- no pushing or pulling;
- up to two hours of walking;
- no lifting heavier than five pounds; and
- up to eight hours of work.

The principal gave Massey an offer of modified duty to accommodate these restrictions, and Massey again accepted the offer.

Massey's physician evaluated her progress in late March 2015. The physician extended the duration of the restrictions for another month and increased some of them, prohibiting Massey from standing and walking and instructing that she sit and work only. The school provided a written offer of modified duty addressing these restrictions, and Massey again signed the offer, accepting the modified duty. The record does not show the specific changes made to Massey's duties that the school made to address these restrictions, but Massey has no complaints concerning them.

At a follow-up visit in mid-April, Massey's physician extended the restrictions until May 5, 2015. The school principal offered Massey the same modifications that Massey had accepted in March. This time, Massey did not return

a written acceptance. She conceded in her deposition that the proposed modifications tracked her work restrictions through mid-May 2015, and that the accommodations she received were the same ones that she had accepted in February.

In the meantime, in early May, the school district's human resources department contacted the school principal and told her that the physician's restrictions of no walking and no standing meant that Massey should be home recuperating. The principal called Massey to her office to discuss Massey's restrictions that prohibited standing and walking at work. She informed Massey about what the human resources department told her and proposed Massey take temporary leave to recuperate. Massey recounts that the principal informed her, "[a]ccording to HR, with your restrictions of zero walking and zero standing, you should be home recuperating. Bye." While on leave, Massey contacted the human resources department and asked whether a position was available for her to fill, but was told that no position that accommodated her restrictions was available. Massey conceded that no job at the school would have allowed her to completely avoid walking and standing.

Massey then contacted the payroll department to find out whether she could obtain the rest of her salary for the school year. She was told that she did not have immediate access to the remainder of her annual salary because she had opted to have her salary distributed in 24 installments over a 12-month period, an option that

the Internal Revenue Service calls "annualized compensation." The election form she signed cautioned her:

> Please understand, the IRS rules do not allow you to change your election once it has been made. If you elect annualized compensation, you will not be able to change to 20[-installment] pay or to be paid out for the summer. Further, if you elect to be paid over 20 paychecks, you will not be able to elect 24 paychecks at a later date.

Massey initialed and checked the box by the statement:

> I elect annual compensation. 1 understand that 1 will receive 24 paychecks throughout the year. I understand that I may not change my election until next school year. I also understand that my salary will be distributed evenly to me over the school year and the summer months when I am not at work.

According to Massey, the payroll department told Massey that she would have to resign if she wanted to immediately receive the balance of her salary.

Massey submitted her resignation on May 13, 2015. Two weeks later, Massey's physician gave her a complete release to work, with no restrictions. Massey did not attempt to rescind her resignation or reapply for her position.

In July 2015, Massey sent an email to the district superintendent detailing various incidents that, according to her, led to her "forced resignation." The email included: complaints about her on-the-job injuries in June 2014 and February 2015; having her pay docked while attending physical therapy; the lack of an available position that would accommodate her restrictions in May 2015; the school principal's decision to send her home on unpaid leave; and her resignation "to

prevent the rest of my wages from being docked by Human Resources/Payroll." Massey also reported that she had sought positions both inside and outside the district, and was "told I am not qualified after [the school district] is consulted."

During her summer employment search, Massey suspected that the school district was giving her an unfavorable reference. In August 2015, she enlisted a friend to pose as an employee of another school district. The friend called the school principal, representing that she was a principal at another school. She asked for a reference for Massey. The school principal responded, "No, I would not hire Ms. Massey because she's a troublemaker." Massey next filed a charge of discrimination with the Equal Employment Opportunity Commission and following that, this lawsuit.

DISCUSSION

I. Standard of Review

The Legislature has waived immunity from suit for employment discrimination and retaliation claims arising under the TCHRA. *See* TEX. LAB. CODE § 21.254; *Alamo Heights Indep. Sch. Dist. v. Clark*, 554 S.W.3d 755, 770 (Tex. 2018). This waiver of immunity applies when the alleged violation falls within the scope of the statute. *See Clark*, 554 S.W.3d at 770 (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012)).

The school district's plea challenges the existence of jurisdictional facts with supporting evidence. The standard of review that applies in this case mirrors that of a traditional summary judgment. *Id.* (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004)). Under this standard, if the governmental entity challenges the plaintiff's factual allegations with supporting evidence necessary to consider the plea, the plaintiff may avoid dismissal only by raising "at least a genuine issue of material fact to overcome the challenge to the trial court's subject matter jurisdiction." *Miranda*, 133 S.W.3d at 221. In determining whether a material fact issue exists, we take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in the plaintiff's favor. *Clark*, 554 S.W.3d at 771.

II. Failure to Provide Reasonable Accommodations

A. Applicable law

Massey's failure-to-accommodate claim concerns the school district's conduct in May 2015. The school district contends that Massey failed to raise a fact issue showing that it refused to provide her with reasonable accommodation on that occasion. To establish a prima facie case, a plaintiff must show that (1) she is an individual with a disability; (2) the school district had notice of her disability; (3) reasonable accommodations would permit her to perform the essential functions of her position; and (4) the school district refused to make such accommodations. *See*

Donaldson v. Tex. Dep't of Aging & Disability Servs., 495 S.W.3d 421, 439 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *see also Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 315 (5th Cir. 2007) ("The plaintiff bears the burden of proving that an available position exists that he was qualified for and could, with reasonable accommodations, perform.").

Once an employee identifies a disability and its attendant restrictions, "the employer and employee should engage in flexible, interactive discussions to determine the appropriate accommodation." *Hagood v. Cty. of El Paso*, 408 S.W.3d 515, 525 (Tex. App.—El Paso 2013, no pet.); *accord Jurach v. Safety Vision, LLC*, 72 F. Supp. 3d 698, 709 (S.D. Tex. 2014). The employee is responsible for initiating the discussion because she and her physician are best situated to know the accommodations that will assist the employee in performing a job. *Jurach*, 72 F. Supp. at 709. If the employer's unwillingness to engage in good-faith discussions leads to a failure to reasonably accommodate an employee, then the employer has not complied with its obligations. *See Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 112 (5th Cir. 2005). On the other hand, if the employee is responsible for a breakdown in the interactive discussions, no violation occurs. *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 481 (5th Cir. 2016).

Depending on the circumstances, time off from work, whether paid or unpaid, can be a reasonable accommodation. *Id.*

B. Analysis

Assuming, for the purposes of this appeal, that Massey has demonstrated that she is disabled within the meaning of Chapter 21, the evidence does not raise a fact issue showing that the district refused to provide her with a reasonable accommodation. Massey accepted the school district's offer of reasonable accommodations through April 2015. By May 2015, Massey could not perform any job requiring standing or walking. The school district put her on leave so that she could recuperate. Massey went on leave without protesting. She conceded that the school had no available job that would have allowed her to completely avoid walking and standing.

Massey disputes the necessity of her physician's restrictions, pointing out that she had been walking to and from the school building in the weeks after they were imposed. The district's human resources department, however, determined that Massey's accommodations did not comply with those restrictions and instructed the principal to have Massey take leave. If Massey did not agree with the school district's determination, she was responsible for providing the school district with a different medical opinion imposing less severe restrictions. The school district did not fail to accommodate Massey because its determination relied on the restrictions imposed by Massey's doctor, rather than those Massey believed she needed. Given that Massey's physician had completely prohibited her from standing and walking,

the school district's instruction that she take leave until her condition improved constitutes a reasonable accommodation. *See Delaval*, 824 F.3d at 481.

No evidence indicates that the school district would not have allowed Massey to return to work once her physicians allowed her to do some standing and walking, as it had in connection with earlier assessments. Accordingly, we hold that Massey has not raised a fact issue showing that the school district violated her rights under Chapter 21 by failing to provide reasonable accommodations. *See id.* The trial court thus erred in denying the school district's plea to the jurisdiction on this claim.

III. Retaliation

Massey's second claim alleges that the school district retaliated against her for making a claim of discrimination by providing an unfavorable employment reference. Chapter 21 prohibits employers from retaliating against a person who engages in an activity protected under the statute. TEX. LAB. CODE § 21.055. Protected activities include (1) opposing a discriminatory practice; (2) making or filing a charge; (3) filing a complaint; or (4) testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing. *Id.*; *Datar v. Nat'l Oilwell Varco, L.P.*, 518 S.W.3d 467, 477 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

To prevail in a retaliation case under Chapter 21, the employee bears the burden to make a prima facie case showing that: (1) she engaged in a protected

activity; (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse action. *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 137 (Tex. 2015); *Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 647 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *see also Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 823 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (explaining that plaintiff asserting retaliation claim must show that, absent plaintiff's protected activity, employer's prohibited conduct would not have occurred when it did).

Massey made a written complaint to the district superintendent about her dissatisfaction with the school's handling of her physical limitations. Massey claimed disability discrimination and later filed an EEOC charge based on these allegations; thus, the record supports that she engaged in protected activity.

Massey, however, has failed to adduce evidence that she was harmed by an adverse employment action in retaliation for filing a complaint. In *Montgomery County v. Park*, the Texas Supreme Court had to determine what qualifies as an "adverse" personnel action under the Texas Whistleblower Act, as the Act provides no definition. 246 S.W.3d 610, 612 (Tex. 2007). The Court noted that "[w]hile the Act defines a 'personnel action' as 'an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation,' it does not define 'adverse.'" *Id.* at 613. Recognizing that "[t]he anti-

retaliation provision of Title VII and the Whistleblower Act serve similar purposes," the Court adopted the "objective materiality standard" articulated by the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006), with appropriate modifications. *Park*, 246 S.W.3d at 614 (citing *White*, 548 U.S. at 68, 126 S. Ct. at 2415). In that case, the Texas Supreme Court held that an employee who alleged retaliation for filing a claim under the Whistleblower Act based in part on his diminished job duties and ability to assign himself "extra jobs" was not an adverse employment action where "he has not shown that the position allowed him to work more extra jobs than he would have without it." *Id.* at 615. Because he had not shown harm or diminished compensation from his reassigned job duties, the Court held that a similarly situated, reasonable employee would not be deterred from reporting a violation of the law. *Id.* at 615–16.

Like the employee in *Park*, Massey has failed to demonstrate harm from the school district's alleged retaliation. Relying on Title VII, Massey argues that a former employer's negative job reference to a prospective employer may constitute an adverse employment action under the TCHRA. *See generally Robinson v. Shell Oil Co.*, 519 U.S. 337, 343–46, 117 S. Ct. 843, 847–49 (1997) (holding that Title VII's use of term "employees" in antiretaliation provision includes former employees). But, "a remedy exists only when the evidence establishes that a

materially adverse employment action resulted from the employee's protected activities." *Alamo Heights*, 544 S.W.3d at 764. In this case, Massey has not adduced evidence that the school district gave a negative reference to a prospective employer. Massey points to the school principal's response to the phone call made by Massey's friend, in which the friend pretended to be seeking a reference for Massey. Massey argues that a factfinder could reasonably infer that the principal would have made a similar response in response to an actual inquiry for an employment reference. Massey, however, adduced no evidence to allow for that inference. The record contains no evidence of employment opportunities that Massey sought but was denied after reference inquiries were made, nor did she document any occasion in which a prospective employer contacted the school principal—or anyone at the school district—for a reference. Because she did not adduce any evidence that the school district gave an unfavorable employment recommendation that caused a materially adverse employment action (the decision not to hire Massey), we hold that Massey has failed to adduce evidence of a prima facie case of retaliation. Accordingly, the trial court erred in denying the school district's plea to the jurisdiction.

CONCLUSION

We reverse the order of the trial court and remand to the trial court with instructions to grant the plea and dismiss the case for lack of subject-matter jurisdiction.

Jane Bland
Justice

Panel consists of Justices Bland, Lloyd, and Caughey.