Opinion issued March 19, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00552-CV

ROBERT J. SYKES, SR., Appellant

V.

DRIFTWOOD HOSPITALITY MANAGEMENT, LLC D/B/A DOUBLETREE HOTEL, Appellee

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On Appeal from the 201st District Court
Travis County, Texas[1]
Trial Court Case No. D-1-GN-16-003004

MEMORANDUM OPINION

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[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 18–9083 (Tex. June 19, 2018); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases).

Appellant, Robert J. Sykes, Sr., challenges the trial court's rendition of summary judgment in favor of appellee, Driftwood Hospitality Management, LLC, doing business as Doubletree Hotel ("Driftwood"), in his suit against it for retaliation under the Texas Commission on Human Rights Act ("TCHRA").[2] In his sole issue, Sykes contends that the trial court erred in granting Driftwood summary judgment.

We affirm.

Background

In his first amended petition, Sykes alleged that on or about April 6, 2015, Driftwood hired him, a fifty-six-year-old Black man, as a maintenance technician. After suffering "multiple instances of harassment" by Diego Calel, "a [younger] Mexican-American employee," Sykes, on April 8, 2015, complained to Tim Lukachik, "his white [s]upervisor" and the chief engineer. On April 30, 2015, Sykes subsequently complained to Robert Garza, the "Mexican-American [h]uman [r]esources [m]anager" ("HR manager"), about Calel's harassment.

Sykes further alleged that "[a]bout [two] weeks later," Calel harassed him again in front of Charlie LNU ("Charlie"), "the white [c]orporate [d]irector," because Sykes was "not helping . . . with the unloading of an 18-wheeler" truck to Calel's "satisfaction." According to Sykes, "no corrective action was taken" by Charlie.

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[2] *See* TEX. LAB. CODE ANN. § 21.055.

On May 21, 2015, following a meeting between Sykes, Garza, and Lukachik, Driftwood terminated Sykes's employment. Sykes alleged that his employment was terminated because of "[t]he harassment by" Calel and Sykes's "grievance[s]." Sykes brought a claim against Driftwood for retaliation under the TCHRA.[3]

Driftwood answered, generally denying Sykes's allegations and asserting additional defenses. Driftwood then filed a combined no-evidence and matter-of-law summary-judgment motion, asserting that to establish a prima facie case of retaliation, Sykes was required to show: (1) he had engaged in a protected activity, (2) an adverse employment action had occurred, and (3) a causal link existed between the protected activity and the adverse action. And in the instant case, there was no evidence that Sykes had engaged in a protected activity or that his termination was caused by a protected activity. Driftwood also argued that Sykes's retaliation claim failed because Driftwood had terminated his employment for a legitimate, non-retaliatory reason. Driftwood attached to its summary-judgment motion, the sworn declaration of Tiffany Cahill, the human resources corporate director for Driftwood, Driftwood's Employee Handbook, Driftwood's maintenance-worker job description, a "statement" from Larry Grant, Driftwood's general manager at the time of Sykes's employment, a "statement" from

[3] *See id.* Although Sykes, in his first amended petition, also brought a claim for discrimination against Driftwood, on the record at a hearing, he agreed to dismiss all claims against Driftwood, except his retaliation claim.

Garza, Driftwood's controller and HR manager at the time of Sykes's employment, Sykes's supplemental interrogatory responses, and portions of Sykes's deposition testimony.

In his response to Driftwood's summary-judgment motion, Sykes asserted that he began working for Driftwood "in early April . . . 2015, as [a] [m]aintenance [t]echnician and as the only Black [employee] in [the] [m]aintenance" department. Shortly thereafter, Calel, "a young . . . Mex[ican]-Am[erican] employee[,] . . . started bothering" him. When Calel continued to harass Sykes, by calling him "lazy and incompetent," "oftentimes in front of their co-worker . . . Grant," an approximately fifty-year-old white man, Sykes, on April 30, 2015, reported Calel's harassment to Lukachik. Because Lukachik took no action, Sykes then complained to Garza, an approximately fifty-year old Mexican-American man.

Sykes further asserted that in May 2015, approximately two weeks later, "while unloading . . . [an] 18-wheeler[] [truck], Calel falsely reported Sykes to [the] on-site [c]orporate [d]irector Charlie . . . by saying, 'Look at him[,] Charlie; he ain't doing nothing.'" On May 21, 2015, Sykes had a meeting with Lukachik and Garza during which his employment with Driftwood was terminated. After that meeting, Lukachik told Sykes, "I tried to save your job; it came from corporate [implying Charlie]. I couldn't help you." (Alteration in original.) (Internal quotations

omitted.) According to Sykes, because he complained of Calel's harassment, he was "fired in retaliation (by either Calel or Charlie or both)." Sykes attached to his summary-judgment response, his "Charge of Discrimination," his official transcript from the Capital City Trade & Technical School, his sworn declaration, and portions of his deposition testimony.

The trial court, without specifying the grounds, granted Driftwood summary judgment on Sykes's retaliation claim. Sykes then filed a motion for new trial, which was overruled by operation of law.

Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215. If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

A party seeking summary judgment may combine in a single motion a request for summary judgment under the no-evidence standard with a request for summary

judgment as a matter of law. *Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004). When a party has sought summary judgment on both grounds and the trial court's order does not specify its reasons for granting summary judgment, we first review the propriety of the summary judgment under the no-evidence standard. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004); *see also* TEX. R. CIV. P. 166a(i). If we conclude that the trial court did not err in granting summary judgment under the no-evidence standard, we need not reach the issue of whether the trial court erred in granting summary judgment as a matter of law. *See Ford Motor Co.*, 135 S.W.3d at 600.

To prevail on a no-evidence summary-judgment motion, the movant must establish that there is no evidence to support an essential element of the non-movant's claim on which the non-movant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the non-movant to present evidence raising a genuine issue of material fact as to each of the elements challenged in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524. A no-evidence summary-judgment may not be granted if the non-movant brings forth more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements. *See Ford Motor Co.*, 135 S.W.3d at 600. More than a scintilla of evidence exists when the evidence

"rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (internal quotations omitted).

To prevail on a matter-of-law summary-judgment motion, the movant must establish that no genuine issue of material fact exists and the trial court should grant judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). When a defendant moves for a matter-of-law summary judgment, it must either: (1) disprove at least one essential element of the plaintiff's cause of action, or (2) plead and conclusively establish each essential element of an affirmative defense, thereby defeating the plaintiff's cause of action. *See Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). Once the movant meets its burden, the burden shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *See Siegler*, 899 S.W.2d at 197; *Transcon. Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The evidence raises a genuine issue of fact if reasonable and fair-minded fact finders could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Summary Judgment

In his sole issue, Sykes argues that the trial court erred in granting Driftwood summary judgment because he established a prima facie case for retaliation.

The TCHRA prohibits an employer from retaliating against an employee for engaging in certain protected activities. *See* TEX. LAB. CODE ANN. § 21.055; *see also Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 822 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Because one of the purposes of the TCHRA is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964," when analyzing a retaliation claim brought under the TCHRA, we look not only to state cases but also to analogous federal statutes and the cases interpreting those statutes. *See* TEX. LAB. CODE ANN. § 21.001(1); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 633–34 (Tex. 2012).

To prevail on a retaliation claim under the TCHRA, an employee must establish a prima facie case by showing: (1) he 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. *Chandler*, 376 S.W.3d at 822. 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. *See* TEX. LAB. CODE ANN.

§ 21.055; *Datar v. Nat'l Oilwell Varco, L.P.*, 518 S.W.3d 467, 477 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

Driftwood moved for summary-judgment, arguing, in part, that Sykes could not establish a prima facie case for retaliation because there was no evidence that he had engaged in a protected activity. In response, Sykes argued that he had engaged in a protected activity because he made two complaints about Calel's "harassment," i.e., one to Lukachik, his supervisor and the chief engineer, and one to Garza, the HR manager. Sykes asserted, in his summary-judgment response, that Calel's harassment was based on his race and age.

We note that in his briefing, Sykes only addresses the issue of whether he engaged in a protected activity in a single conclusory sentence, stating: "Appellant Sykes made a complaint of harassment (1st step) against Calel, first, to his supervisor Lukachi[k] and, then, to the HR manager Garza." (Emphasis omitted.) *See* TEX. R. APP. P. 38.1(i); *see also Martin Real Estate Partners, L.P. v. Vogt*, 313 S.W.3d 57, 75 (Tex. App.—San Antonio 2011, no pet.). He does not provide this Court with any authority to support his assertion that his complaints to Lukachik and Garza constituted protected activities. *See id.*

A "[p]rotected activity 'can range from [the] filing [of] formal charges to [the] voicing [of] informal complaints to superiors'" about discrimination that is covered by the TCHRA. *Guajardo v. Univ. of Tex. Med. Branch at Galveston*, No.

01-17-00288-CV, 2018 WL 2049334, at *8 (Tex. App.—Houston [1st Dist.] May 3, 2018, no pet.) (mem. op.) (quoting *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1228 (10th Cir. 2008)); *see also Spinks v. Trugreen Landcare, L.L.C.*, 322 F. Supp. 2d 784, 796–97 (S.D. Tex. 2004); *Warrick v. Motiva Enters., L.L.C.*, No. 14-13-00938-CV, 2014 WL 7405645, at *7 (Tex. App.—Houston [14th Dist.] Dec. 30, 2014, no pet.) (mem. op.) ("An employee complaining of discrimination *may* be engaged in a protected activity." (emphasis added)). However, a "vague charge of discrimination will not invoke protection under the statute." *Azubuike v. Fiesta Mart, Inc.*, 970 S.W.2d 60, 65 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *see also Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989); *Spinks*, 322 F. Supp. 2d at 797; *Guajardo*, 2018 WL 2049334, at *8.

Although an employee need not use "magic words" to oppose unlawful discrimination, his complaint must at least alert his employer of what discriminatory practice he reasonably believes has occurred. *Hous. Methodist San Jacinto Hosp. v. Ford*, 483 S.W.3d 588, 593 n.3 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (internal quotations omitted); *see also Guajardo*, 2018 WL 2049334, at *8. Notably, the employee's complaint "must indicate what alleged discriminatory conduct is at issue." *Ford*, 438 S.W.3d at 593 n.3; *see also Guajardo*, 2018 WL 2049334, at *8.

Here, the evidence presented to the trial court on summary judgment does not support Sykes's assertion that the complaints he made to Lukachik, his supervisor

and the chief engineer, and to Garza, the HR manager, about Calel's harassment constituted protected activities. In his sworn declaration, which he attached to his summary-judgment response, Sykes stated, in regard to Calel's harassment, that Calel had been harassing him "by saying that [he] did not know what [he] was doing, that [he] was lazy, and that [he] was incompetent." Further, Calel stated that he "did not believe" Sykes after Sykes told him that he had "work[ed] on Navy ships in Port Arthur." And Calel told Sykes that his "HVAC school transcript and [his] EPA certificate . . . were fake." Subsequently, on another occasion, while "unload[ing] an 18-wheeler [truck] at the loading zone," Calel saw Sykes and "yelled toward[] Charlie," the corporate director, "Look at [Sykes,] Charlie; he ain't doing nothing. Tell him to do something Charlie." (Internal quotations omitted.)

Similarly, in his deposition testimony, portions of which Driftwood attached to its summary-judgment motion and Sykes attached to his summary-judgment response, Sykes testified that Calel "had been bad-mouthing[] [and] talking down on [him] since [Sykes had] started" working for Driftwood. For instance, on Sykes's first day, Calel was "standing up watching" him work and Calel said, "You know what you doing?" (Internal quotations omitted.) And according to Sykes, Calel had "ragg[ed] on [him]" by saying that he "d[id not] know what [he was] doing." Calel also told Sykes, "[t]hat don't mean shit," when Sykes had shown him "a copy of [his] license . . . and [his] transcript." (Internal quotations omitted.)

Further, during another incident, while "unloading trucks one day," Calel said to Charlie, the corporate director, "Look, at [Sykes], Charlie. He ain't doing nothing. Tell him to do something." (Internal quotations omitted.)

Notably, when Sykes was asked, during his deposition, to explain the "specific statements" that Calel had made toward him "that [he] considered to be harassing," Sykes testified:

> Overseeing my work. That's not his job. We don't -- we work in the same department, but we're on different levels of work. I do repairs. [He] do[es] the other stuff, the more physical stuff.
>
> . . . .
>
> I mean, anything I did pretty much I felt like he was just -- just bugging, watching me.

Sykes also explained:

> We had to put some carts together, and he was kind of like -- I mean, demand -- you know, request that I do something that he [was] supposed to be doing. I mean, it's kind of like questioning my work orders or whatever. I mean just little stuff, and it just got built up to me. And I ain't got -- why you keep -- and my -- at some point, it sound like you feel like -- I'm getting harassed by you.

Moreover, Sykes specifically testified, during his deposition, that he *could not recall a time when Calel had ever said anything about his race or age*. And he stated that he believed that Calel had been harassing him because Calel was "pissed off" that Sykes had been hired for the position of "maintenance engineer," and as a result,

Calel "didn't get moved up to it." According to Sykes, that was the reason for Calel's "animosity" toward him.

Sykes also testified that Garza, Lukachik, and Charlie never made any race-related or age-related comments "of any kind" toward him. And although Sykes testified that Grant had told another employee, "Get off your fat ass, man, you old fart," Sykes stated that Grant never did "anything or sa[id] anything toward[]" him or "sa[id] [any]thing toward[] [him] that bothered [him] in any kind of way." (Internal quotations omitted.) Sykes further noted that Grant never referred to the other employee's race, and there is no evidence in the record that Sykes ever complained about Grant's behavior.

Further, in his supplemental interrogatory responses, Sykes stated that Calel had "harassed [him] twice, both verbally." In regard to the first incident, which occurred in the "maintenance office," Calel "asked Sykes in front of [another employee] if Sykes knew what he was doing and whether he was qualified to do the job." In response, Sykes told Calel that "yes, he knew what he was doing and [he] showed" Calel and the other employee "his license," which Calel then stated was not "real." (Internal quotations omitted.) In regard to the second incident, which occurred "in the loading zone," as an "18-wheeler trailer-truck was being unloaded, [Calel] arrived and . . . immediately told Charlie, 'Look at [Sykes,] Charlie; he ain't doing nothing.'"

In regard to the actual content of the two complaints that Sykes made to Lukachik and Garza, Sykes, in his sworn statement, stated that on April 30, 2015, "because [Calel] did not stop harassing [him]," he "complained" to Lukachik. And later that day, because Lukachik "did not do anything," Sykes "complained to HR."

Similarly, in his deposition testimony, Sykes testified that he first complained to Lukachik about Calel's harassment, by stating, "Tell [Calel] to keep his comments to himself. [And] [l]eave me alone." (Internal quotations omitted.) Sykes then "went right to [the HR manager] Garza's office and told him *the same thing*" that he had told Lukachik. (Emphasis added.) According to Sykes, he only complained of Calel's harassment twice, the first time he complained to Lukachik and the second time he complained to Garza. There is no evidence that Sykes ever complained or reported the purported harassment that occurred while Sykes and Calel were unloading the "18-wheeler" truck.

Although "magic words" are not required to invoke the TCHRA's anti-retaliation protection, generally complaining only of "harassment, a "hostile environment," "discrimination," or "bullying" is not enough. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 786–87 (Tex. 2018) (internal quotations omitted); *see also Univ. of Tex. Health Sci. Ctr. at Tyler v. Nawab*, 528 S.W.3d 631, 643 (Tex. App.—Texarkana 2017, pet. denied) ("Vague complaints of mistreatment, or of offensive and derogatory comments, which do not specifically import a

person's race . . . do not invoke protection under the TCHRA."). And for a complaint to constitute a protected activity, it must at least alert the employer of the employee's reasonable belief that unlawful discrimination is at issue. *Brown v. United Parcel Serv., Inc.*, 406 Fed. Appx. 837, 840 (5th Cir. 2010); *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 586 (Tex. 2017); *see also Harris-Childs v. Medco Health Sols., Inc.*, 169 Fed. Appx. 913, 916 (5th Cir. 2006) (simply complaining of "harassment" not enough); *Guajardo*, 2018 WL 2049334, at *8–10 (complaint must contain "sufficient description to . . . alert[] [employer] of what discriminatory practice [employee] believed had occurred"; complaints of "bullying, singling out, retaliation and discrimination" not enough where employee "d[oes] not state that she believe[s] the perceived discrimination [to be] based on her race" (internal quotations omitted)); *Nawab*, 528 S.W.3d at 643.

Here, there is no evidence that Sykes's two complaints to Lukachik and Garza about Calel's harassing behavior constituted complaints about race or age discrimination. *See Brown*, 406 Fed. Appx. at 840; *Harris-Childs*, 169 Fed. Appx. at 916 (employee produced no evidence that when she made her complaints to management she mentioned that she had felt she was being unfairly treated due to her race or sex); *Wiltz v. Christus Hosp. St. Mary*, No. 1:09-CV-925, 2011 WL 1576932, at *11 (E.D. Tex. Mar. 10, 2011) (holding internal complaint to management did not constitute protected activity where it did not include complaint

of race discrimination); *Guajardo*, 2018 WL 2049334, at *8–10; *Nawab*, 528 S.W.3d at 643; *Esparaz v. Univ. of Tex. at El Paso*, 471 S.W.3d 903, 914–15 (Tex. App.—El Paso 2015, no pet.) (employee never informed employer "she believed her treatment was improperly based on age, sex, or national origin"). In fact, Sykes testified that Calel *never* even harassed him about his race or age. *See Rincones*, 520 S.W.3d at 585–86 (holding employee did not engage in protected activity where he "admitted in his deposition [that] he did not complain about race or other discrimination to anyone . . . ."). Rather, according to Sykes, Calel harassed him by asking him if "he knew what he was doing and whether he was qualified to do the job" because Calel was "pissed off" that Sykes had been hired for the position of "maintenance engineer" instead of Calel. *See Gordan v. Acosta Sales & Mktg., Inc.*, 622 Fed. Appx. 426, 431 (5th Cir. 2015) ("[B]ecause [employee's] complaint about [supervisor's harassing behavior] was a personal grievance rather than a complaint resulting from illegal discrimination, his [retaliation] claim fail[ed]."); *see also Warrick*, 2014 WL 7405645, at *8–9 (explaining "[a]n employer cannot retaliate against an employee for voicing opposition to discriminatory practices if the employee has not actually voiced such opposition" and noting employee's email "d[id] not allege that . . . the . . . bullying against her w[as] based on a protected characteristic such as race"); *Martinez v. Wilson Cty.*, No. 04-09-00233-CV, 2010 WL 114407, at *3–4 (Tex. App.—San Antonio Jan. 13, 2010, no pet.) (mem. op.)

("Although [employee] may have found [other employee's] behavior rude or offensive, there [was] no indication that it implicated the TCHRA."). Thus, Sykes's two complaints to Lukachik and Garza could not qualify as protected activities.

Because there is no evidence that Sykes engaged in a protected activity, we conclude that he cannot establish his prima facie case for retaliation. *See Rincones*, 520 S.W.3d at 586 ("With no protected activity, there can be no retaliation."). Accordingly, we hold that the trial court did not err in granting Driftwood summary judgment.

We overrule Sykes's sole issue.

Due to our disposition of Sykes's sole issue, we need not address Sykes's complaint, about the "credibility" of the "statement[s]" from Grant, Driftwood's general manager at the time of Sykes's employment, and from Garza, Driftwood's controller and HR manager at the time of Sykes's employment, which Driftwood attached to its summary-judgment motion. *See* TEX. R. APP. P. 47.1.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Countiss.