Affirmed and Majority and Concurring Opinions filed July 11, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00180-CV

SUSETTE M. MCNEEL, Appellant

V.

CITATION OIL & GAS CORPORATION, Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 2014-00464

C O N C U R R I N G O P I N I O N

I concur in the court's judgment, but I respectfully disagree with the majority's reasoning. I write separately to make two points.

First, as to the sex-discrimination claim, this court can affirm the trial court's judgment but not for the reason the majority gives — that there is no evidence the defendant's reason for terminating the plaintiff's employment was a pretext for discrimination. We cannot affirm on this no-evidence ground unless the defendant presented summary-judgment evidence showing that the defendant had a

legitimate, nondiscriminatory reason for the termination. Because the defendant did not present any such evidence, this court may not properly affirm on this ground. Nonetheless, we may affirm the summary judgment as to this claim because the plaintiff did not raise a genuine fact issue as to whether the defendant treated the plaintiff less favorably than similarly situated male employees.

Second, as to the plaintiff's retaliation claim, the court is correct to affirm the trial court's summary judgment on the ground that there is no evidence that the plaintiff engaged in a protected activity, but the majority looks to the wrong thing in doing so — that the plaintiff did not quit her job. Whether the plaintiff quit is not relevant to the issue of whether a reasonable person could have believed that the workplace conduct described by the plaintiff created a hostile work environment. So, the court should not address this issue in its analysis.

For this court to affirm the summary judgment on the ground upon which the majority relies, the defendant must have produced summary-judgment evidence showing that the defendant had a legitimate, nondiscriminatory reason for terminating the plaintiff's employment.

This court may affirm the trial court's summary judgment based only on a ground expressly stated in the summary-judgment motion.[1] The majority affirms the summary judgment as to appellant Susette McNeel's sex-discrimination claim on a ground that appellee Citation Oil & Gas Corporation expressly presented in its motion — there is "no evidence that Citation's reason for terminating [McNeel] was pretextual."[2] Even presuming for argument's sake that Citation otherwise

[1] *See Henkel v. Norman*, 441 S.W.3d 249, 251 n.1 (Tex. 2014); *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993).

[2] Citation did not expressly present a traditional ground asserting that the Citation's summary-judgment evidence proved as a matter of law a legitimate, nondiscriminatory reason for Citation's termination of McNeel's employment. Thus, this court may not affirm on this ground. *See Henkel*, 441 S.W.3d at 251 n.1; *Stiles*, 867 S.W.2d at 26. In any event, even if Citation had presented this ground expressly, Citation still would have had the burden of producing summary-

properly could seek summary judgment based on this no-evidence ground, for Citation to assert this no-evidence ground, McNeel must have the burden of proving the challenged element at trial (that Citation's purported nondiscriminatory reason for terminating McNeel's employment was a pretext for discrimination).[3] But, McNeel did not have any burden to prove this challenged element unless and until Citation presented summary-judgment evidence of a legitimate, nondiscriminatory reason upon which Citation based its March 2012 termination of McNeel's employment.[4]

In its summary-judgment motion and in its appellate brief, Citation correctly acknowledged this burden. And, the majority appropriately notes that for the court to affirm on this ground, Citation must have presented evidence on this issue.[5] So, apparently, everyone (McNeel, Citation, and all the justices on this panel) agrees that, under applicable law, this court cannot affirm the trial court's summary

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judgment evidence showing Citation's reason for terminating McNeel's employment. *See Okpere v. National Oilwell Varco, L.P.*, 2017 WL 1086340, at *2, *7 (Tex. App.—Houston [14th Dist.] Mar. 20, 2017, pet. filed).

[3] *See* Tex. R. Civ. P. 166a(i) (stating that "[a]fter adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense *on which an adverse party would have the burden of proof at trial*") (emphasis added); *Brown v. Hearthwood II Owners Ass'n*, 201 S.W.3d 153, 157–58 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (stating that a movant could not obtain a no-evidence summary judgment on an issue because the nonmovant did not have the burden of proving that issue at trial).

[4] *See Okpere*, 2017 WL 1086340, at *2 (concluding that, if an employer moving for summary judgment proves as a matter of law a legitimate, nondiscriminatory reason for the adverse employment action, then the employee has the burden to raise a genuine fact issue as to whether the employer's reason was a pretext for discrimination); *Johnson v. City of Houston*, 203 S.W.3d 7, 12 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (determining whether the employer "produced evidence" of a legitimate, nondiscriminatory reason for the adverse employment action); *Gold v. Exxon Corp.*, 960 S.W.2d 378, 381 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (stating that, if the plaintiff-employee presents a prima facie case of discrimination, "the defendant-employer has the burden of producing evidence showing a legitimate, nondiscriminatory reason for the adverse employment actions") (internal quotations omitted).

[5] *See ante* at 11-12.

judgment on this no-evidence ground unless Citation presented summary-judgment evidence showing that Citation had a legitimate, nondiscriminatory reason for terminating McNeel's employment.[6] Citation did not do so.

Because the defendant failed to produce summary-judgment evidence showing a legitimate, nondiscriminatory reason for terminating the plaintiff's employment, this court should not affirm on the no-evidence-of-pretext ground.

In its summary-judgment motion, Citation characterizes its reason(s) for terminating McNeel in several ways:

- "When Citation learned of [McNeel's] business, [Citation] terminated [McNeel's] employment for multiple violations of company policy."
- "McNeel was not terminated because of her sex, age, or alleged prior complaints of discrimination."
- "[McNeel] was terminated because she violated her employer's Code of Conduct when she set up a business that was a conflict of interest with her current position, failed to disclose the potential conflict of interest or obtain approval, and misappropriated company work product and confidential information for use in her side business."
- "Citation concluded that McNeel had violated company policies in several respects. (*Id*. at 152, 155–58.) Accordingly, Citation terminated McNeel's employment in March 2012."

Though Citation cited the summary-judgment evidence for various propositions, including McNeel's alleged misconduct, when Citation mentioned its reason(s) for terminating McNeel's employment, Citation did not cite any evidence. Nor did Citation state in the motion that it had submitted evidence showing a legitimate, nondiscriminatory reason for terminating McNeel's employment. Though Citation submitted various exhibits in support of its summary-judgment motion, Citation did not present any summary-judgment evidence showing Citation's reason(s) for terminating McNeel's employment or

[6] *See Okpere*, 2017 WL 1086340, at *2; *Johnson*, 203 S.W.3d at 12; *Gold*, 960 S.W.2d at 378.

showing that any such reason was legitimate and nondiscriminatory. Citation submitted deposition testimony indicating that Citation sent a termination letter to McNeel, and Citation submitted affidavits to prove matters related to other summary-judgment issues, but Citation did not submit an affidavit from human-resources personnel or the individual who decided to discharge McNeel, stating Citation's reason(s) for terminating McNeel's employment.

In support of Citation's assertion that McNeel had "violated company policies in several respects," Citation cited to pages from the transcript of Tom Patrick's deposition. In these pages, Patrick, Citation's vice president of taxation, testified:

- At some point Patrick told Ms. Anglin that Patrick had decided to terminate McNeel "for conflict of interest."
- Patrick read the letter of termination before he signed it.
- In the letter, Patrick stated that McNeel owed Citation fiduciary duties.
- The statement in the termination letter — that McNeel breached her fiduciary duties by establishing a business that provides advice and services to companies that compete with Citation — is a true statement.

Patrick did not say anything else about the contents of the termination letter, which Citation did not submit in its summary-judgment evidence. Patrick's statement that he told Ms. Anglin he had decided to terminate McNeel "for conflict of interest" is not evidence that Patrick discharged McNeel for that reason. Though Patrick indicated that McNeel's termination letter refers to alleged breaches of fiduciary duty, Patrick did not testify that Citation terminated McNeel for these breaches or that the termination letter said so. In these deposition

excerpts, Patrick did not testify that the alleged misconduct to which he referred was the reason for McNeel's discharge.[7]

According to the majority, "[i]n its motion for summary judgment, Citation argued and attached evidence showing legitimate, nondiscriminatory reasons for its termination decision, i.e., that McNeel was terminated for 'multiple violations of company policy,' specifically including operating a business that conflicted with her position at Citation and misappropriating company work product and confidential information for use in the other business."[8] Though the majority concludes that Citation attached evidence to its motion proving these reasons for discharging McNeel, the record reflects that Citation attached no such evidence.[9] Likewise, though the majority concludes that Citation was required to submit evidence of its reasons for terminating McNeel's employment at the time Citation made the decision to do so, Citation did not submit any evidence on this point.[10] Nor did Citation present any evidence showing that any termination reason was legitimate and nondiscriminatory. Therefore, McNeel never had any burden to prove that Citation's purported nondiscriminatory reason for terminating McNeel's employment was a pretext for discrimination, and this court may not affirm the trial court's judgment on the ground that there was no evidence Citation's

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[7] Even if Patrick had testified to this effect, this reason would not be the same as the reasons recited by Citation in its summary-judgment motion.

[8] *Ante* at 11.

[9] The majority also refers to evidence McNeel submitted in her summary-judgment response, but Citation did not submit this evidence. *See ante* at 11–12, n.7.

[10] *See ante* at 11–12 & n.7. The majority reaches this conclusion in footnote 7 of the majority opinion, on an issue of apparent first impression in any Texas state court.

purported nondiscriminatory reason for discharging McNeel was a pretext for discrimination.[11]

This court may affirm the summary judgment as to the sex-discrimination claim because the plaintiff did not raise a genuine fact issue as to whether the defendant treated her less favorably than similarly situated male employees.

The summary-judgment record contains no direct evidence that Citation terminated McNeel's employment on the basis of her sex.[12] In the absence of direct evidence of discrimination, we are to apply the *McDonnell Douglas* framework.[13] For a claim of disparate treatment under the Texas Commission on Human Rights Act, which is McNeel's theory, she can meet her prima facie burden by showing that she: (1) is a member of a protected class, (2) was qualified for her position, (3) was subject to an adverse employment action, and (4) was treated less favorably than similarly situated persons not in the protected class.[14] There is no dispute that McNeel was qualified for her job and no dispute that, as a female, she is a member of a protected class. Likewise, there is no dispute that McNeel suffered an adverse employment decision when Citation terminated her employment. Citation moved for summary judgment on the ground that there is no evidence McNeel was treated less favorably than similarly situated men. Thus, this court should address whether the summary-judgment evidence raised a genuine fact issue on this element of McNeel's prima facie case.[15]

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[11] *See* Tex. R. Civ. P. 166a(i); *Okpere*, 2017 WL 1086340, at *2; *Johnson*, 203 S.W.3d at 12; *Brown*, 201 S.W.3d at 157-58; *Gold*, 960 S.W.2d at 378.

[12] *See Okpere*, 2017 WL 1086340, at *2.

[13] *See id.*

[14] *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

[15] McNeel was replaced by a woman and so this court should consider only Citation's treatment of McNeel's coworkers. *Accord, e.g.*, *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309 (5th

In her summary-judgment response, McNeel identified one male employee — a controller in the accounting department — whom McNeel alleged was situated similarly to her yet not terminated even though he engaged in the same prohibited conduct as McNeel.[16] The Supreme Court of Texas has concluded that "[e]mployees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct."[17] The United States Court of Appeals for the Fifth Circuit has articulated a similar standard, saying that employees are similarly situated if their circumstances are "nearly identical."[18] To establish that employees are "comparable in all material respects," a plaintiff must show "that there were no differentiating or mitigating circumstances as would distinguish the employer's treatment of them."[19] To show discrimination based on disparate discipline, the disciplined and undisciplined employees' misconduct must be of "comparable seriousness."[20]

McNeel states that the controller had a side business buying and selling oil and gas leases.[21] McNeel alleges that Patrick told her that the controller worked on

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Cir. 2004) (noting that a plaintiff can meet the fourth element by showing she was replaced with a similarly qualified person who was not a member of the protected class).

[16] In the trial court, McNeel also argued that another male employee was a similarly situated employee. McNeel since has abandoned her contention that he was similarly situated, focusing solely on the controller in her appellate brief.

[17] *Ysleta Indep. Sch. Dist. v. Monarrez,* 177 S.W.3d 915, 917 (Tex. 2005) (per curiam). *See Exxon Mobil Corp. v. Rincones*, —S.W.3d—, —, 2017 WL 2324710, at *7 (Tex. May 26, 2017); *Tooker v. Alief Indep. Sch. Dist*., —S.W.3d —,—, 2017 WL 61833, at *7 (Tex. App.—Houston [14th Dist.] Jan. 4, 2017, no pet.).

[18] *See Perez v. Tex. Dep't of Criminal Justice, Institutional Div*., 395 F.3d 206, 213 (5th Cir. 2004); *Exxon Mobil Corp*., —S.W.3d at —, 2017 WL 2324710, at *7.

[19] *Donaldson v. Texas Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 435 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (internal quotation omitted).

[20] *Ysleta Indep. Sch. Dist.*, 177 S.W.3d at 917.

[21] Citation responds that the controller merely made "passive investments" that did not compete with either the controller's employment or Citation's business; Citation included as part of its

this private business during working hours and that the controller would ask Patrick for Patrick's opinion on certain aspects of the leases. The controller did not receive positive performance reviews, and the controller resigned in 2011 because of, according to Citation, "performance related concerns."

McNeel contends that she and the controller both were subject to the same Code of Conduct and both allegedly had a "side business" that, given Citation's industry position, would constitute a conflict of interest. These circumstances, she argues, make the two employees similarly situated, and so Citation's treatment of the controller—"allow[ing]" him to resign instead of terminating him for a conflict of interest—raises a fact issue of disparate discipline.

Citation responds that the controller is not similarly situated to McNeel because he obtained approval from Citation before investing in oil and gas leases, the decision to approve the controller's investment activity was made by a different person than the decision-makers involved in McNeel's termination, and the controller reported to a different supervisor than McNeel's supervisor. Citation also argues that the controller is not a permissible comparator because the controller's conduct and McNeel's conduct were not of "comparable seriousness."

Under the applicable standard of review, the summary-judgment evidence does not raise a genuine fact issue as to whether the circumstances of McNeel and the controller were comparable in all material respects or as to whether McNeel's misconduct was of "comparable seriousness" to the controller's misconduct.[22] Because the summary-judgment evidence does not raise a genuine fact issue as to whether Citation treated McNeel less favorably than similarly situated male

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summary- judgment evidence an affidavit from the controller, who testified to that effect.

[22] *See Exxon Mobil Corp.*, —S.W.3d at —, 2017 WL 2324710, at *7–8; *Tooker*, —S.W.3d at —, 2017 WL 61833, at *7; *Coll. of the Mainland v. Glover*, 436 S.W.3d 384, 393–94 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

employees, this court should affirm the summary judgment as to the sex-discrimination claim on this basis.[23]

The majority should not rely upon the plaintiff's failure to quit as support for the court's conclusion that no reasonable person could have believed that a hostile work environment existed.

In affirming the trial court's summary judgment as to McNeel's retaliation claim on the ground that there is no evidence that she engaged in a protected activity, the majority correctly determines that no reasonable person could have believed that Patrick's conduct created a hostile work environment. But, the majority loses its way in reasoning that "[i]t is hard to reconcile McNeel's decision to remain in Citation's employ with her complaints of Patrick's conduct that occurred prior to March 2011."[24] Courts adjudicating hostile-work-environment claims recognize the reality that even in the face of a hostile work environment, quitting the job may not be a true option for the employee. Hence, as the cited cases show, courts refuse to recognize an employee's failure to quit as relevant to the hostile-work-environment inquiry.

A hostile work environment is one in which discriminatory conduct is sufficiently severe or pervasive to alter the conditions of the employee's employment and to create an abusive working environment.[25] For a hostile work environment to exist, the working conditions need not be so intolerable that a reasonable person would feel compelled to resign.[26] Thus, McNeel's failure to quit in the face of Patrick's alleged conduct is not relevant to the issue of whether that

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[23] *See Exxon Mobil Corp.*, —S.W.3d at —, 2017 WL 2324710, at *7–8; *Tooker*, —S.W.3d at —, 2017 WL 61833, at *7; *Coll. of the Mainland*, 436 S.W.3d at 393–94.

[24] *Ante* at 18.

[25] *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 805–06 (Tex. 2010).

[26] *Id*.

conduct created a hostile work environment.[27] An employee is not required to falter under the weight of a hostile work environment before the employee's discrimination claim becomes actionable.[28] If the evidence would allow a reasonable person to believe that Patrick's conduct created a hostile work environment, McNeel's perseverance in staying on the job would not contradict or undermine this evidence.[29] Thus, the majority should not point to or rely upon McNeel's failure to quit her job as support for the court's conclusion that no reasonable person could have believed that Patrick's conduct created a hostile work environment.[30] The former is not legally germane to the latter, and the law recognizes no connection between the two.

So, though I join the court's judgment, I respectfully decline to join the majority opinion.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Brown and Jewell (Jewell, J., majority).

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[27] *See id*.; *Perez-Cordero v. Wal-Mart Puerto Rico, Inc.*, 656 F.3d 19, 30 (1st Cir. 2011).

[28] *See Waffle House, Inc.*, 313 S.W.3d at 805–06; *Perez-Cordero*, 656 F.3d at 30; *Rivera v. Hospital Metropolitano Dr. Susoni, Inc.*, No. 10-1075, 2012 WL 3777003, at *12, n.7 (Feb. 27, 2012 D. P.R.).

[29] *See Waffle House, Inc.*, 313 S.W.3d at 805–06; *Perez-Cordero*, 656 F.3d at 30; *Rivera*, 2012 WL 3777003, at *12, n.7.

[30] *See Waffle House, Inc.*, 313 S.W.3d at 805–06; *Perez-Cordero*, 656 F.3d at 30; *Rivera*, 2012 WL 3777003, at *12, n.7.