



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00625-CV

Deborah H. **LUND**,
Appellant

v.

TEXAS HEALTH AND HUMAN SERVICES COMMISSION,
Appellee

From the 150th Judicial District Court, Bexar County, Texas
Trial Court No. 2016-CI-00468
Honorable Antonia Arteaga, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: March 6, 2019

AFFIRMED

This appeal concerns complaints of employment discrimination and retaliation by appellant Deborah H. Lund against appellee Texas Health and Human Services Commission (“THHSC”). The trial court granted THHSC’s plea to the jurisdiction based on sovereign immunity and dismissed Lund’s claims for lack of subject matter jurisdiction. We affirm.

Facts

Lund began her employment with THHSC in February 2006. At the time of the alleged discrimination and retaliation in 2015, she was employed as a Program Supervisor II in the Texas

Works Division, Region 8, within the Office of Access & Eligibility Services. In that position, Lund was responsible for supervising a unit of employees who determined client eligibility for TANF¹ and SNAP² benefits.

In February 2015, THHSC posted an opening for the position of Program Manager in the Customer Care Center (“CCC”), a division within Eligibility Field Operations. The work performed by CCC is highly specialized and is not performed by any other THHSC region or division. This job posting will be referred to as the “February Position.” Lund and numerous others applied for the position. Lund estimated the number of applicants to be in the hundreds.

Kelly Ford was the hiring authority for the February Position. Because of the large number of applicants, she decided to reduce the applicant pool by limiting it to those applicants who were currently employed within CCC. This was a consistent and routine practice because such applicants were already cross-trained in CCC units and would, therefore, be more qualified. Lund was not employed within CCC and, consequently, was screened out.

In April 2015, THHSC posted an opening for a Texas Works Program Manager in Region 8 within Access and Eligibility Services. This job posting will be referred to as the “April Position.” Lund applied for the position and, with ten other applicants, was determined to be qualified. Carla Morales screened these eleven applicants to determine who would receive an interview. She used the information provided by the job applications and established THHSC hiring protocols to assign each applicant a numerical score. The top six applicants, each of whom scored 20 or higher, were granted interviews. Lund scored 15, which placed her tenth of the eleven qualified applicants.

¹ TANF is an acronym for Temporary Assistance for Needy Families.

² SNAP is an acronym for the Supplemental Nutrition Assistance Program, also known as food stamp benefits.

Lynne Moore was the hiring authority for the April Position. Dee Ann Smith sat in on the interviews and signed off on the selections, but the hiring decision was Moore's. During the hiring process for the April Position, a second opening arose for the same job due to an employee's retirement. After conducting interviews, Moore determined that Susan Lozano and Hilda Rivera Delorme both received high scores of 41. Because there were now two positions open, both were hired.

On April 30, 2015, Lund filed an internal complaint alleging that she was not selected for the April Position as a result of disability discrimination and retaliation for previous complaints against THHSC.³ She identified the protected activity underlying her retaliation claim as an EEOC charge she filed in 2010. On June 26, 2015, Lund filed a similar charge of discrimination and retaliation with the EEOC, complaining of the failure to hire her for the February Position and the April Position. In this charge, she identified the protected activity underlying her retaliation claim as EEOC charges she filed in 2009 and 2010.

Lund alleged in her EEOC charge that THHSC management learned about her disability in March 2013. In its response, THHSC acknowledged that management was made aware in March 2013 that Lund had a medical condition when she provided medical documentation of "chronic malaise and fatigue due to [a] chronic medical condition resulting from stress." The documentation also stated that Lund was able to perform all of her job duties, had no job restrictions, and was "fully functional to perform her daily duties and tasks."

Meanwhile, on June 3, 2015, Lund's mother reported to THHSC her belief that Lund had improperly certified her own daughter, Norma Jean Morales, for Medicaid pregnancy benefits and

³ This internal complaint also referenced a failure to hire for a position she applied for on January 8, 2015. That complaint was determined to be untimely and was not investigated.

that Lund was improperly using a Lone Star Card⁴ issued to her nephew, James Andrew Villarreal. These allegations resulted in an internal investigation conducted by the Office of the Inspector General (“OIG”). This investigation revealed that Lund had accessed Morales’s TIERS⁵ records on December 31, 2013 and performed approximately 22 actions while logged into those records. It also confirmed that Lund used Villarreal’s Lone Star Card to make purchases at a store.

Lund learned of the OIG investigation on August 10, 2015, when the investigator called to ask her to meet with him to discuss the allegations. Lund told him that she could not meet at that time because she was at her doctor’s office. She also told him that she would be on medical leave and so could not meet with him at the office. She offered to meet him at her home or another location such as a restaurant or library, but soon afterward changed her mind. Rather than meeting with the investigator, Lund informed him that she had an attorney and that he could discuss the matter with him. Lund never did meet with the investigator or provide him with any information or explanation concerning the allegations against her.

On August 14, 2015, Lund submitted to THHSC a FMLA⁶ certification in which her doctor noted that Lund suffered from severe depression, bipolar depression, and anxiety. As a result of those conditions, she experienced panic attacks, crying spells, insomnia, fatigue, difficulty concentrating, and staying on task. The doctor also noted that Lund was considered a suicide risk until better control of her symptoms was obtained, and that she “may need assistance with instrumental activities of daily living.”

On September 25, 2015, Susan Lozano, Lund’s supervisor, sent Lund formal written notice of the allegations against her in the form of a “Notice of Possible Disciplinary Action.” In that

⁴ A Lone Star Card is the means of using SNAP benefits.

⁵ TIERS is an acronym for the Texas Integrated Eligibility Redesign System, a database containing information on persons applying for or receiving agency benefits.

⁶ FMLA is an acronym for the Family and Medical Leave Act.

notice, Lund was told to provide any information in defense or mitigation of the allegations by September 30, 2015. Lund testified that she did not provide a written response⁷ but that she spoke to Lozano by telephone instead. In that conversation, she denied committing any violations, asked for more specifics concerning the allegations against her, and asked what information THHSC needed. Lund did not reveal what, if anything, Lozano said in response.

On October 2, 2015, Regional Director Dee Ann Smith signed a letter terminating Lund's employment with THHSC, effective immediately. The stated reasons were violation of company policies by accessing Morales's case without a valid business reason and by using Villarreal's Lone Star Card without authority. Four days later, Lund filed an additional charge with the EEOC alleging disability discrimination and retaliation based on being "forced to disclose [her] disability and forced to complete paperwork for FMLA," as well as having her employment terminated for employee misconduct.⁸

The EEOC issued a Dismissal and Notice of Claim on each of Lund's charges, stating that it was unable to conclude, after investigation, that there was any statutory violation. Lund filed suit and THHSC filed a plea to the jurisdiction asserting sovereign immunity. The trial court granted the plea and dismissed Lund's claims. This appeal followed.

Discussion

Standard of review

When a plea to the jurisdiction challenges the existence of jurisdictional facts, the standard of review mirrors the standard applicable to a traditional summary judgment. *Alamo Heights Indep.*

⁷ The later termination letter states that Lund did respond in writing. Lund testified that this is not accurate. The record does not contain a written response by Lund to the Notice of Possible Disciplinary Action.

⁸ Lund also alleged that she was subjected to discrimination and retaliation because she complained of falsification of paperwork and illegal hiring practices. These allegations do not appear to be involved in this lawsuit. Neither party discusses them; neither will we.

Sch. Dist. v. Clark, 544 S.W.3d 755, 771 (Tex. 2018). “[I]f the plaintiffs’ factual allegations are challenged with supporting evidence necessary to consideration of the plea to the jurisdiction, to avoid dismissal plaintiffs must raise at least a genuine issue of material fact to overcome the challenge to the trial court’s subject matter jurisdiction.” *Id.* In determining whether a material fact issue exists, the reviewing court must “take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in the plaintiff’s favor.” *Id.* But the court cannot disregard evidence and inferences unfavorable to the plaintiff if reasonable jurors could not. *Id.*

Burden-shifting framework for jurisdictional analysis

It is undisputed that THSC is a governmental unit entitled to sovereign immunity. Governmental units are immune from suit unless that immunity has been waived. *Id.* at 770. The Texas Commission on Human Rights Act (“TCHRA”) waives that immunity, “but only when the plaintiff states a claim for conduct that actually violates the statute.” *Id.* If a plea to the jurisdiction challenges the existence of jurisdictional facts, then the court must consider the evidence, “even if that evidence implicates both subject-matter jurisdiction and the merits of a claim.” *Id.* at 770-71. “By intertwining the TCHRA’s immunity waiver with the merits of a statutory claim, the Legislature ensures public funds are not expended defending claims lacking sufficient evidence to allow reasonable jurors to find the governmental entity liable.” *Id.* at 763.

Texas courts recognize what is commonly referred to as the *McDonnell Douglas* burden-shifting framework⁹ to establish discrimination claims with circumstantial evidence. The Texas Supreme Court recently provided a concise explanation of that framework:

If the employee can establish a prima facie case of discrimination, a rebuttable presumption of discrimination arises, which can alone sustain a discrimination

⁹ This framework is derived from the opinion of the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

claim. But the employer can defeat this presumption merely by producing evidence of a legitimate, nondiscriminatory reason for the disputed employment action. Once rebutted, the presumption disappears, and an employee lacking direct evidence cannot prove a statutory violation without evidence that the employer's stated reason is false and a pretext for discrimination.

Id. at 782 (footnotes omitted). The court noted that this burden-shifting framework also applies to retaliation claims. *Id.*

Each of the *McDonnell Douglas* burden-shifting elements must be considered in determining whether the employee has raised a fact issue regarding waiver of immunity. *Id.* at 783. If there is jurisdictional evidence that rebuts the employee's prima facie case, then "sufficient evidence of pretext and causation must exist to survive the jurisdictional plea." *Id.* Further, while a prima facie case of causation may be made out merely by proving close timing between the protected activity and the adverse action, "if the employer provides evidence of a legitimate reason for the adverse action . . . the employee must prove the adverse action would not have occurred 'but for' the protected activity."¹⁰ *Id.* at 782.

Lund's claims of discrimination based on disability

Under the TCHRA, an employer commits an unlawful employment practice if it discriminates against an individual because of a disability. TEX. LABOR CODE ANN. § 21.051; *see Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003). "Disability" is statutorily defined as "a mental or physical impairment that substantially limits at least one major life activity of that individual, a record of such an impairment, or being regarded as having such an impairment." TEX. LABOR CODE ANN. § 21.002(6); *see City of Houston v. Proler*, 437 S.W.3d 529, 533 (Tex. 2014). Major life activities include, among others, learning, reading, concentrating, thinking, communicating, and working. *See* TEX. LABOR CODE ANN. § 21.002(11-a).

¹⁰ As in *Alamo Heights*, neither party in this case has advocated for a causation standard other than "but for" causation. *See* 544 S.W.3d at 783.

“To establish a prima facie case of disability discrimination, a plaintiff must show that (1) he has a ‘disability;’ (2) he is ‘qualified’ for the job; and (3) he suffered an adverse employment decision because of his disability.” *Tex. Dep’t of Aging & Disability Servs. v. Comer*, No. 04-17-00224-CV, 2018 WL 521627, at *3 (Tex. App.—San Antonio Jan. 24, 2018, no pet.) (mem. op.) (quoting *Donaldson v. Tex. Dep’t of Aging & Disability Servs.*, 495 S.W.3d 421, 436 (Tex. App.—Houston [1st Dist.] 2016, pet. denied)).

Lund contends that her own testimony (by affidavit and deposition) and her August 14, 2015 FMLA certification are sufficient to establish a prima facie case of disability discrimination. THHSC raises a variety of arguments to the contrary, particularly challenging whether Lund demonstrated that she has a disability at all. We need not determine whether Lund established a prima facie case. Even assuming that she did, the presumption of discrimination raised by that prima facie case was rebutted because, as demonstrated below, THHSC produced evidence of a legitimate, nondiscriminatory reason for the disputed employment actions. *See Alamo Heights*, 544 S.W.3d at 782.

Discrimination relating to the February Position

The first adverse employment action about which Lund complains is the failure to hire her for the February Position. As a practical matter, we focus on THHSC’s failure to give Lund an interview because that is the stage at which she was effectively denied the position.

The hiring authority for the February Position, Kelly Ford, decided to narrow the applicant pool because there was such a large number of applicants. She effected that reduction by limiting the pool to applicants who were employed in a CCC unit because those applicants were cross-trained in CCC units and would therefore be more qualified. Although Lund contends that this was an impermissible limitation because it was not included in the posted job requirements, Ford stated that it was a routine and consistent practice. In addition, the evidence shows that, according to

THHSC hiring protocol, it is the prerogative of the hiring authority to determine what method of selection to use and how many applicants to interview.

In any event, the need to reduce the applicant pool, coupled with the routine and consistent method employed to make that reduction, constitutes a legitimate, nondiscriminatory reason for not interviewing (and thus not hiring) Lund for the February Position. *See id.* Thus, the burden then shifted to Lund to produce evidence that this reason was “false, *and* that discrimination was the real reason.” *Canchola*, 121 S.W.3d at 740 (quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (emphasis in original)).

Lund produced no evidence that THHSC’s reason for not interviewing her was false. It is undisputed that only applicants employed in a CCC unit were given interviews and that Lund was not employed in a CCC unit. Lund also did not produce any evidence that limiting the applicant pool to CCC employees was a pretext for disability discrimination. In fact, according to Lund’s own testimony, hundreds of other applicants, none of whom were shown to have a disability, were also excluded from the interview process because they were not employed in a CCC unit.

Lund did not sustain her burden of producing evidence that THHSC’s reason for not hiring her for the February Position was false and a pretext for discrimination. *See Canchola*, 121 S.W.3d at 740. For this reason, immunity has not been waived as to Lund’s claim of disability discrimination relating to that position. The trial court properly granted THHSC’s plea to the jurisdiction and dismissed that claim for lack of subject matter jurisdiction.

Discrimination relating to the April Position

The second adverse employment action about which Lund complains is the failure to hire her for the April Position. We again focus on THHSC’s failure to give Lund an interview for the position.

Lynne Moore was the hiring authority for the April Position. Dee Ann Smith sat in on the interviews and signed off on Moore's selections, but was not the designated hiring authority. Carla Morales conducted an initial screening of the applicants and assigned a score to each based on the information on their application and established THHSC hiring protocols. Moore and Smith decided to interview only the top six applicants, each of whom received a score of 20 or above in the initial screening process. Lund received a score of 15 and was ranked tenth of the eleven qualified applicants. This screening process constitutes evidence of a legitimate, nondiscriminatory reason for not interviewing (and thus not hiring) Lund for the April Position. The burden again shifted back to Lund to produce evidence that this reason was false *and* that discrimination was the real reason. *See Canchola*, 121 S.W.3d at 740.

Lund did not produce any evidence that the stated reason for not interviewing her was false. It is undisputed that Lund did not receive a screening score of 20 or above and was not one of the top six candidates. The question, then, is whether that reason was a pretext for discrimination.

Lund contends on appeal that the criteria used for the initial screening were discriminatory because great weight was placed on having a college degree, which had a disparate impact on her because her disability made it difficult for her to obtain such a degree. However, Lund does not cite any evidence that either Moore, Smith, or Morales was aware that she suffered a disability that hampered her ability to obtain a college degree. On appeal, Lund cites her answers to interrogatories and a memorandum written in conjunction with her April 2015 internal complaint as demonstrating such knowledge. But neither of these sources even existed at the time Lund was screened for the April Position, neither indicates that THHSC had any knowledge *at that time* of Lund's contention that her disability limited her ability to obtain a college degree, and neither shows that Moore, Smith, or Morales *ever* had that knowledge.

In any event, the evidence does not support Lund's contention that the college preference criterion was unfairly weighted and so worked to her disadvantage. The screening sheet demonstrates that having a college degree was actually weighted less than job experience. For example, the one criterion stating a preference that the applicant have a degree from an accredited college was weighted "1."¹¹ But three criteria concerning an applicant's work experience were each weighted "2." Further, of the eleven qualified candidates, only six were shown to have any background at an accredited college and only one was shown to have obtained a college degree. Having a college degree was clearly not a determinative factor in the screening process.

Lund also complains that certain screening scores given to the two applicants who were ultimately hired for the April Position were unwarranted or inflated. Lund, however, does not cite to evidence demonstrating that those allegedly preferential scores were in any way related to her disability. In this regard, Lund is not assisted by her contention that Moore and Smith were aware of her disability. Neither Moore nor Smith conducted the initial screenings, so neither was responsible for the scores assigned to Lund or to the two applicants who were hired. Carla Morales conducted that scoring, and Lund identifies no evidence showing that Morales was aware of Lund's disability.

Finally, Lund complains that THHSC hired two persons for the April Position instead of one. But, again, she does not cite any evidence that this decision was in any way connected to her disability. These complaints simply have no bearing on our analysis. *See Canchola*, 121 S.W.3d at 740 (employee's burden is to show discrimination is real reason for adverse employment action; relevant inquiry is not just whether reason is pretext, but what reason is pretext for).

¹¹ A related criteria stated that 60 hours from an accredited college were required, but that relevant work experience could be substituted on a year-for-year basis. This criteria (which was also weighted "1") thus applies to both college education and work experience, rendering it neutral in our analysis.

Lund did not produce any evidence that either the initial screening process in general, or the college degree preference in particular, was a pretext for disability discrimination. For this reason, immunity has not been waived as to Lund's claim of disability discrimination relating to the April Position. The trial court properly granted THHSC's plea to the jurisdiction and dismissed that claim for lack of subject matter jurisdiction.

Lund's claims of retaliation

"[T]he TCHRA prohibits retaliation against an employee for engaging in certain protected activities." *Alamo Heights*, 544 S.W.3d at 781; see TEX. LABOR CODE ANN. § 21.055. "An employee engages in a protected activity by, among other things, filing an internal complaint, opposing a discriminatory practice, or making a charge of discrimination with the EEOC." *Alamo Heights*, 544 S.W.3d at 786. But an employee is not protected from discipline, or even termination, merely because she has engaged in a protected activity. *Id.* at 764. "Rather, a remedy exists only when the evidence establishes that a materially adverse employment action *resulted from* the employee's protected activities." *Id.* (emphasis added).

The elements of a retaliation claim are (1) the employee engaged in a protected activity; (2) the employer took an adverse employment action against the employee; and (3) the employer took the adverse action because the employee engaged in the protected activity. *Tex. State Office of Admin. Hearings v. Birch*, No. 04-12-00681-CV, 2013 WL 3874473, at *4 (Tex. App.—San Antonio July 24, 2013, pet. denied) (mem. op.); see *Comer*, 2018 WL 521627 at *8.

Lund contends that THHSC retaliated against her because she filed internal complaints and EEOC charges of discrimination. She contends that failing to hire her for the February or April Positions and terminating her employment were both retaliatory acts. The parties do not dispute that Lund engaged in protected activity or that THHSC took adverse employment actions. Once again, the only issue in dispute is the causal element. Because THHSC demonstrated legitimate

reasons for her termination, it was Lund's burden to produce evidence that these reasons were pretext and that she would not have been terminated but for her protected activity. *Alamo Heights*, 544 S.W.3d at 790. *Alamo Heights* is again instructive:

In evaluating but-for causation evidence in retaliation cases, we examine all of the circumstances, including temporal proximity between the protected activity and the adverse action, knowledge of the protected activity, expression of a negative attitude toward the employee's protected activity, failure to adhere to relevant established company policies, discriminatory treatment in comparison to similarly situated employees, and evidence the employer's stated reason is false.

Id.

Retaliation by failure to hire

We first address Lund's retaliation claim in the context of the failure to hire her for the February or April Positions.

Lund asserted her failure to hire retaliation claims in her April 2015 internal complaint and her June 2015 EEOC charge. In conjunction with the April 2015 internal complaint, Lund identified the protected activity underlying that complaint as an EEOC charge she filed in 2010. Similarly, in her June 2015 EEOC charge, she identified the protected activity underlying that charge as EEOC charges she filed in 2009 and 2010.

"Temporal proximity is relevant to causation when it is 'very close.'" *Id.* Charges filed five or six years before the adverse employment action are simply too remote to constitute any evidence of causation. *See id.* (eight-month gap "so long as to be of little, if any, probative value").

Concerning knowledge of Lund's protected activity, there is evidence that Moore, the decision-maker for the April Position, was aware in 2010 of Lund's 2009 and 2010 EEOC charges. There is no evidence that the others involved in the disputed hiring decisions (Ford, Smith, and Carla Morales) were aware of those charges.

We look next to evidence of expressions of a negative attitude toward the protected activity. Lund contends that she complained to Smith in early 2013 about being required to fill out FMLA paperwork. She alleges that Smith then told her that “[her] actions would inhibit [her] ability to get promoted.” However, the conversation, occurring two years before the February and April Position hiring decisions, is too remote in time to have probative value on the issue of causation. *See id.* And the subject of the negative expression was Lund’s verbal complaint about FMLA paperwork. Lund does not cite any authority indicating that such a complaint is protected activity.

Lund also relies on a negative statement made by Associate Commissioner Wayne Salter *after* the hiring decisions were made, in reference to the internal complaint Lund filed *about* those hiring decisions. This does not constitute any evidence that the hiring decisions were made in retaliation for EEOC charges filed in 2009 and 2010. In addition, Lund does not cite to anything in the record explaining who Salter is or what, if any, role he played in the decisions not to hire Lund for the February and April Positions.¹²

Neither Smith’s nor Salter’s statements demonstrates a causal link between the failure to hire Lund and her 2009 and 2010 EEOC charges. Lund does, however, cite evidence that Moore, the decision-maker on the April Position, made a negative statement in 2014 concerning Lund’s propensity for filing complaints and open records requests. Because Moore was aware of the 2009 and 2010 EEOC charges, this negative expression weighs in Lund’s favor on the issue of causation. The remaining factors, however, do not.¹³

Lund argues that hiring two persons for the April Position violated THHSC policy requiring that notice of all vacant positions be posted so that potential applicants have an equal

¹² In her brief, Lund cites to internet sources purporting to show Salter’s job position and then engages in speculation concerning how he might have affected the termination decision. We disregard these matters as being outside the record.

¹³ We need not discuss the treatment of similarly situated employees, as there were none.

opportunity to apply for them. The April Position was, however, posted, and Lund did apply for it. The fact that the position was offered to two applicants does not evidence any failure to follow THHSC policy. In addition, the decision to hire two persons instead of one did not affect Lund any differently than it did every other applicant (with the obvious exception of the second person who was hired). In other words, there is no evidence that offering the position to two applicants under one posting had any unique adverse impact on Lund that could be attributed to discrimination or retaliation against her.

Finally, as discussed at length above, there is no evidence that THHSC's stated reasons for not hiring Lund were false.

In summary, only Moore's expression of a negative attitude toward Lund's discrimination complaints and her knowledge of Lund's 2009 and 2010 EEOC charges tend to support a causal link between those charges and failure to hire Lund for the April Position. We cannot ignore the circumstances of Moore's involvement in the April Position hiring process. Moore conducted the applicant interviews and selected the hirees from those whom she interviewed. Lund was screened out of the applicant pool before the interview stage, and Moore was not involved in that initial screening. Because Moore was not the person who excluded Lund from the applicant pool, any knowledge or retaliatory animus she might have had was not the cause of Lund not being hired.

Lund did not produce evidence to raise a fact issue on the causation element of her claim of retaliation based on the failure to hire her for the February or April Positions. The trial court properly granted THHSC's plea to the jurisdiction and dismissed that claim for lack of subject matter jurisdiction.

Retaliation by termination of employment

We now address Lund's assertion that THHSC terminated her employment in retaliation for filing the April 2015 internal discrimination complaint and the June 2015 EEOC charge, each

of which asserted that THHSC discriminated against her based on disability by failing to hire her for the February and April Positions.

As noted above, “[t]emporal proximity is relevant to causation when it is ‘very close.’” *Alamo Heights*, 544 S.W.3d at 790. Lund’s employment was terminated approximately five months after she filed the April 2015 internal complaint and approximately three months after she filed the June 2015 EEOC charge. The temporal proximity factor here is neutral, at best. *See Comer*, 2018 WL 521627 at *8 (“[C]ourts have determined that, without other evidence, periods of six, five, four, and even three months between the activity and the adverse action are too long to support a causal link.”).

The record demonstrates that Dee Ann Smith, the THHSC decision-maker who terminated Lund’s employment, was aware of Lund’s April internal complaint and June EEOC charge prior to the termination. In fact, Smith was the named respondent in the internal complaint and was interviewed in July 2015 in connection with that complaint. Her knowledge, then, must be viewed in light of the entire circumstances to determine whether Lund raised a fact issue on causation. *See Alamo Heights*, 544 S.W.3d at 790.

We look next to evidence of expressions of a negative attitude toward the protected activity. Lund again relies on a statement made by Smith in 2013 concerning Lund’s complaint about FMLA paperwork, and a statement made by Wayne Salter after she filed her April internal complaint. Again, those statements lack probative value for the reasons stated above.

Concerning failure to adhere to company policies, Lund again argues that hiring two persons for the April Position violated THHSC policy. As discussed above, it did not. In addition, whether THHSC followed its policies concerning posting vacancies is immaterial to our analysis of retaliation by termination. The material question is whether THHSC followed its policies concerning termination of employment. Lund does not raise any argument or cite any evidence

that it did not. And we find it significant that the impetus for the investigation that resulted in Lund's termination came from outside THHSC. This was not a case of someone within THHSC inventing factual allegations to support the misuse of THHSC's termination policy. The "failure to adhere to company policy" factor does not aid Lund's argument.

We turn, finally, to the evidence concerning THHSC's stated reasons for termination—employee misconduct relating to Lund accessing Morales's TIERS records and using Villarreal's Lone Star card. We examine each allegation in turn.

Accessing Morales's TIERS records

Over the course of her employment with THHSC, Lund attended annual computer training, including information security training. She also signed numerous Computer Use Agreements acknowledging limitations on her authority to access confidential information. For example, she promised to use confidential information "only as needed to perform legitimate duties" and to only access confidential information for which she had "a need to know." Lund further agreed that she would not use Information Resources for personal reasons unless there were specific limited use exceptions permitted by the agency that employed her. She also agreed that she would not access cases that she was not authorized to work with in the performance of her job duties. Lund acknowledged that violating these agreements could lead to termination of her employment.

Lund testified that it would be a clear violation of agency policy for an employee to work on a case if the employee was a relative of the person applying for or receiving benefits. She does not contest THHSC's evidence that she accessed Morales's TIERS records and performed approximately 22 actions while logged into those records. She argues, though, that that access was not a violation because she did not "work on" her daughter's case, she merely checked to see if she had been approved for benefits. Yet Lund was permitted to access confidential information "only as needed to perform legitimate duties." Further, she identifies no "limited use exception"

authorizing her to access records for personal reasons. In short, if Lund accessed Morales's TIERS records for work purposes, she violated THHSC policy because she was not authorized to work on her daughter's case. If she accessed Morales's TIERS records for personal reasons, she violated THHSC policy because she was not authorized by a "limited use exception." The evidence thus demonstrates that Lund committed employee misconduct by accessing Morales's TIERS records.

Lund offered an explanation for her conduct after filing suit against THHSC, but did not present this explanation to THHSC prior to the decision to terminate her employment. Lund was given an opportunity to explain her conduct during the course of the OIG investigation but declined to do so.¹⁴ As a result, THHSC's decision to terminate her employment was founded on uncontroverted proof of employee misconduct. "The issue is whether the employer's perception of the problems—accurate or not—was the real reason for termination." *Alamo Heights*, 544 S.W.3d at 792. Because Lund did not produce any evidence that THHSC's reason for terminating her employment based on accessing Morales's TIERS records was false, she has failed to show that THHSC's decision was retaliatory.

Using Villarreal's Lone Star card

A Lone Star Card is used, in conjunction with the cardholder's PIN number, to purchase groceries under Texas's SNAP program. The primary cardholder is responsible for securing access to food stamp benefits using that card. Toward that end, primary cardholders are instructed not to share their PIN numbers with anyone else. A benefits recipient may, however, designate a

¹⁴ Lund argues, for the first time on appeal, that she was not afforded due process under the state and federal constitutions because the OIG investigation took place while she was on FMLA leave and because Lozano was both a witness and "the tribunal" against her. These arguments are waived. See *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex.1993) (constitutional error must be asserted in trial court to be raised on appeal); *Marin Real Estate Partners, L.P. v. Vogt*, 373 S.W.3d 57, 92 (Tex. App.—San Antonio 2011, no pet.) ("Even constitutional error can be waived if not raised in the trial court.").

representative to be the primary cardholder. But, because there can be only one primary cardholder, if the recipient designates someone else, then the recipient himself is not a primary cardholder.

Lund does not dispute that she used Villarreal's Lone Star Card. Rather, she contends that she was the primary cardholder because Villarreal had orally designated her as his representative during an interview to obtain SNAP benefits. Lund testified that Villarreal called her during the interview because he was being denied benefits. He wanted Lund to intervene for him, but the THHSC employee who was conducting the eligibility interview would not speak to Lund on the phone. Lund suggested to Villarreal that he tell the interviewer that he was designating her as his representative. Villarreal complied, and the interviewer then spoke with Lund.

Lund's explanation demonstrates that Villarreal designated her as his representative for a limited purpose—to discuss his eligibility on the telephone with the THHSC interviewer. It does not demonstrate, or even support an inference, that Villarreal designated her as the primary cardholder for his SNAP benefits. There is no mention of control or use of his Lone Star Card, or of any matter beyond helping to establish his eligibility. In addition, Lund did not produce any documentation showing that Villarreal appointed her as his representative for purposes of designating her the primary cardholder. On the contrary, Villarreal's written SNAP application states that he did not want to designate an authorized representative and indicates that he was to be the primary cardholder. Lund failed to demonstrate to OIG during the course of its investigation that she was the primary cardholder. Again, Lund was given the opportunity to explain her conduct but declined to do so.

There is some indication in the record that a "secondary cardholder" may be authorized to use a Lone Star Card. In the absence of any evidence that Lund was the primary cardholder, it was reasonable for OIG to consider whether Lund was a secondary cardholder. However, as a THHSC employee, Lund, who is responsible for certifying or issuing SNAP benefits, was required to obtain

written supervisory approval before becoming a secondary cardholder. It is undisputed that Lund did not have such written supervisory approval.

Again, even if Lund were to have proved her post-termination contention that she was the primary cardholder for Villarreal's Lone Star Card, that proof would not demonstrate that her termination was retaliatory. *See Alamo Heights*, 544 S.W.3d at 792 ("The issue is whether the employer's perception of the problems—accurate or not—was the real reason for termination.") Lund did not produce any evidence that THHSC's reason for terminating her employment based on using Villarreal's Lone Star Card was false.

Having considered each of the *Alamo Heights* causation factors, we conclude that the only factor militating in favor of a finding of retaliation is the fact that Dee Ann Smith, the THHSC decision-maker who terminated Lund's employment, was aware of Lund's April and June 2015 claims of discrimination. But that factor alone is insufficient. As the supreme court explained, "An employer is not forbidden from addressing performance issues involving employees who have engaged in protected activity, including following through on known pre-existing issues and addressing existing issues that come to light only during subsequent investigation." *Id.* at 791-92. As in *Alamo Heights*, the fact that Lund engaged in protected activity did not forbid THHSC from addressing the issues concerning her access to confidential computer records and her use of someone else's Lone Star card. And, while Lund denies any wrongdoing, "such denials are insufficient to create a fact issue as to causation." *Id.* at 792. The evidence shows that THHSC's perception of wrongdoing, unaddressed by Lund because of her decision to not participate in the OIG investigation, was the real reason for termination. Because "[t]he record bears no evidence the stated reasons were mere pretext," we conclude that no fact issue exists that Lund would not have been terminated but for her internal complaint and EEOC charge. *See id.* For this reason,

immunity has not been waived as to Lund's retaliation claim. The trial court properly granted THHSC's plea to the jurisdiction and dismissed that claim for lack of subject matter jurisdiction.

Conclusion

THHSC produced evidence of legitimate nondiscriminatory reasons for not hiring Lund for the February and April Positions, and for terminating her employment. Lund failed to sustain her burden of producing evidence beyond her own subjective belief that those stated reasons were false and were a pretext for discrimination or retaliation. *See Birch*, 2013 WL 3874473 at *4 (subjective beliefs about discrimination are insufficient to raise a fact issue on causation). The trial court's order granting THHSC's plea to the jurisdiction and dismissing Lund's claims for lack of subject matter jurisdiction is affirmed.

Rebeca C. Martinez, Justice