COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00100-CV

AMARYLIS MITCHELL — APPELLANT

V.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE — APPELLEE

FROM THE 30TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 180,032-A

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Amarylis Mitchell appeals the trial court's final order granting summary judgment for Appellee Texas Department of Criminal Justice (TDCJ) on Mitchell's state law discrimination and retaliation claims. *See* Tex. Labor Code Ann. §§ 21.051(1), 21.055 (West 2015). We will affirm.

[1]*See* Tex. R. App. P. 47.4.

II. RELEVANT BACKGROUND

Mitchell, an African-American female, worked at TDCJ's Allred Unit as a Correctional Officer from 1999 to October 2012. Over the course of her employment, she filed three Equal Employment Opportunity (EEO) complaints and was disciplined three times.

Regarding the EEO complaints,

- In March 2007, Mitchell complained that Sgt. Billy Hampton had sexually harassed her. The investigation concluded that the facts did not support Mitchell's allegation but that Sgt. Hampton may have committed a rule violation under TDCJ's PD-22, General Rules of Conduct and Disciplinary Guidelines for Employees. TDCJ reprimanded Sgt. Hampton.

- On January 5, 2011, Mitchell filed an EEO complaint against Officer Anthony Veretto, claiming that he had used profane and abusive language against her. The investigation concluded that the alleged behavior did not violate TDCJ's EEO policies but that there may have been a rule violation. TDCJ reprimanded Officer Veretto.

- On January 10, 2011, Mitchell filed an EEO complaint against Lt. Caryn Die, claiming that Lt. Die had harassed Mitchell by speaking to her in a hostile tone when Mitchell told Lt. Die that she was leaving sick. The investigation determined that there had been no EEO violation, and the matter was referred to the unit for action as deemed appropriate.

As for Mitchell's disciplinaries,

- On January 10, 2011, TDCJ reprimanded Mitchell for her participation in the verbal confrontation with Officer Veretto. Mitchell committed a Level 3, Rule 15a violation and received three months' probation.

- On March 14, 2012, TDCJ reprimanded Mitchell for substandard performance, a Level 4, Rule 7 violation. TDCJ placed Mitchell on three months' probation.

Mitchell's third disciplinary resulted from an incident that occurred on June 29, 2012, at the Allred Unit's 4 Building. Her job assignment that day was "utility

boss," which required her to "break" other officers, i.e., relieve them so that they could take a break, and to "feed chow." After Mitchell sent another officer on break, she became involved in a verbal altercation with Correctional Officer Krystal Goodin, who, as the "picket boss," was responsible for "rolling" (opening) doors. Mitchell had asked Officer Goodin to open an inmate's cell door, but Officer Goodin refused, and the two cursed at each other. Mitchell then went to the "desk boss," Officer West, and inquired if anything was wrong with Officer Goodin. According to Officer West's July 30, 2012 written statement, Mitchell told him that "she wasn't going to break [Officer Goodin] because she's a f---ing b---- and being rude." Officer West also received a phone call from Officer Goodin, who said that "she couldn't work like this because Officer Mitchell was yelling and cussing at her in front of inmates." Officer West notified Sgt. Jeffrey LaMel of the issue.

Sgt. LaMel arrived and interviewed both Mitchell and Officer Goodin. According to Sgt. LaMel's August 6, 2012 written statement, after he left the picket, he ordered Mitchell to break Officer Goodin, but Mitchell told him that she was not going to do so, said that he could "write her up," and left. Officer West told Sgt. LaMel that before Mitchell left, she told him that "she was not breaking that b---- and to find someone else." Although Mitchell acknowledged in her August 6, 2012 written statement that Sgt. LaMel had instructed her, "You will break [Officer Goodin] . . . if I tell you to[]," and that she had "refuse[d] to . . .

break [Officer Goodin]," Mitchell later testified at her deposition that Sgt. LaMel did not order her to break Officer Goodin and that she did not refuse his order.

Officer Goodin filed an EEO complaint against Mitchell regarding the June 29, 2012 incident. Shortly thereafter, on July 12, 2012, the human resources intake officer reported that there was no EEO issue and referred the matter back to Warden Richard Wathen to consider whether a PD-22 rule violation had occurred and to take any action by August 11, 2012. Assistant Warden Charles Vondra completed an investigation into the matter on August 7, 2012. In addition to other observations, he stated that Mitchell had "refused to relieve Officer Goodin and commented you can write me up." Warden Vondra recommended (1) that Officer Goodin and Mitchell each receive a "letter of instruction" to deter any more disagreements and (2) that Mitchell be reprimanded for failing to obey an order. On October 18, 2012, Warden Wathen reprimanded Mitchell for Failing to Obey a Proper Order from an Authority, a Level 2, Rule 13 violation, and because it was Mitchell's third violation within a two-year period, the PD-22's progressive disciplinary policy mandated that Mitchell be dismissed.[2] TDCJ officials subsequently approved Mitchell's dismissal. She was over fifty years old when TDCJ terminated her employment.

Mitchell filed a charge of discrimination and a lawsuit against TDCJ, alleging claims for disparate-treatment race discrimination and retaliation.

[2]TDCJ disciplined Mitchell on August 23, 2012, but it overturned the ruling and re-initiated the disciplinary process because Mitchell did not receive a copy of all of the relevant documents.

Although not pleaded, Mitchell also complains of age discrimination. TDCJ moved for summary judgment on each of Mitchell's claims, arguing that she was unable to establish a prima facie case of retaliation and race and age discrimination and that TDCJ had a legitimate, nondiscriminatory reason for terminating Mitchell's employment. The trial court granted TDCJ's motion.

III. STANDARD OF REVIEW

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). The issue on appeal is whether the movant met the summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). We take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort*, 289 S.W.3d at 848. A defendant who conclusively negates at least one essential

element of a cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence that raises a fact issue. *Van v. Peña*, 990 S.W.2d 751, 753 (Tex. 1999).

IV. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT

Mitchell argues in her only issue that the trial court erred by granting TDCJ summary judgment. She contends that she met her burden to establish a prima facie case of discrimination and retaliation, that TDCJ failed to offer any legitimate, nondiscriminatory reason for terminating her, and that even if TDCJ had done so, its reasons were merely pretextual.

A. Race and Age Discrimination

Labor code chapter 21 prohibits discrimination in employment based on "race, color, disability, religion, sex, national origin, or age." Tex. Labor Code Ann. § 21.051. The Texas legislature modeled chapter 21 after federal law for the express purpose of carrying out the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments. *See id.* § 21.001(1) (West 2015). Therefore, we may look not only to cases involving chapter 21 but also to cases interpreting analogous federal provisions. *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 505 (Tex. 2012).

An employee may establish discrimination by either direct evidence or circumstantial evidence. *Mission Consol. ISD v. Garcia*, 372 S.W.3d 629, 634 (Tex. 2012). Mitchell does not argue that she presented any direct evidence of discrimination. Therefore, the well-established *McDonnell Douglas* burden-shifting framework applies. *Id.* The employee bears the initial burden of proving a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). If the plaintiff is successful, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* at 802, 93 S. Ct. at 1824. The burden then shifts back to the plaintiff to show that the employer's reason was a pretext for discrimination. *Id.* at 804, 93 S. Ct. at 1825.

To establish a prima facie case of disparate-treatment discrimination, the employee must show that she was (1) a member of a protected class; (2) qualified for her position; (3) subject to an adverse employment action; and (4) treated less favorably because of her membership in that protected class than were other similarly situated employees who were not members of the protected class. *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009); *Harris Cty. Hosp. Dist. v. Parker*, 484 S.W.3d 182, 196 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Rosenberg v. KIPP, Inc.*, 458 S.W.3d 171, 175 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). TDCJ challenged only the fourth element in its motion for summary judgment. It argued, and met its summary-judgment burden to show, that Mitchell could not identify any appropriate

comparators—similarly situated employees who were outside of her protected class and treated more favorably.

Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct. *Ysleta ISD v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005); *Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 900 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The Fifth Circuit's "nearly identical" standard is similar—"[t]he employment actions being compared will be deemed to have been taken under nearly identical circumstances when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories." *Lee*, 574 F.3d at 260 (footnotes omitted).[3]

Mitchell argues that she "presented several non-African-American employees, Correctional Officers like [her], who were found to have committed far worse infractions," who were white and younger than her, and who were not terminated, but the only people that Mitchell specifically identifies are Officer Goodin and Sgt. Hampton. Regarding the June 29, 2012 incident, the summary-

[3]Mitchell contends that the Fifth Circuit has shied away from the "nearly identical" standard—a "heightened" burden of proof, she asserts, that applies only when the employee is responsible for demonstrating that the employer's reason for the adverse action is a pretext for discrimination. We disagree on both counts. *See, e.g.*, *Morris v. Town of Indep.*, 827 F.3d 396, 401 (5th Cir. 2016); *Paske v. Fitzgerald*, 785 F.3d 977, 985 (5th Cir.), *cert. denied*, 136 S. Ct. 536 (2015); *see also Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 435 (Tex. App.—Houston [1st Dist.] 2016, pet. filed); *Navy*, 407 S.W.3d at 900.

judgment evidence demonstrates that Warden Vondra recommended that *both* Officer Goodin and Mitchell receive a letter of instruction to deter any more disagreements between them. Warden Vondra also recommended that only Mitchell be reprimanded, but he did so because only Mitchell failed to obey a proper order from Sgt. LaMel. Thus, as TDCJ observes, not only was Mitchell *not* reprimanded for her verbal altercation with Goodin—she was instead disciplined for failing to obey Sgt. LaMel's order after the altercation—but Mitchell and Officer Goodin were treated the same for their involvement in the verbal altercation. To the extent that Mitchell opines that she was reprimanded for using foul language instead of for failing to obey an order, the documentary evidence, including her own written statement, belies her after-the-fact account.

As for Sgt. Hampton, notwithstanding that he was ranked higher than Mitchell, the evidence showed that he was reprimanded after Mitchell filed an EEO complaint against him in 2007. There is no evidence that unlike Mitchell, Sgt. Hampton received three rule violations within a two-year period but was not dismissed by TDCJ.

Mitchell identified several other individuals either in her summary-judgment response or in her deposition—Officer Jennifer Crumley, Sgt. LaMel, Officer Longacre, and Major Jim Webb—but none of them are appropriate comparators. Officer Crumley filed a complaint against Mitchell; not vice versa. Sgt. LaMel and Major Webb are not Correctional Officers like Mitchell. And Officer Longacre, like Mitchell, was terminated after committing three violations within the requisite time

periods under the PD-22. At her deposition, Mitchell was unable to identify any appropriate comparators for purposes of her age-discrimination claim. Mitchell's subjective beliefs of discrimination alone are insufficient to establish a prima facie case. *See Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 814 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

Mitchell failed to meet her burden to make a prima facie case of race and age discrimination because she presented no summary-judgment evidence that any employees outside of her protected class were similarly situated but treated more favorably than her.[4] *See Lee*, 574 F.3d at 259; *Parker*, 484 S.W.3d at 196. Accordingly, the trial court did not err by granting summary judgment in favor of TDCJ on Mitchell's chapter 21 discrimination claims. We overrule this part of her first issue.

B. Retaliation

Chapter 21 prohibits an employer from retaliating against an employee for engaging in certain protected activities, including making or filing a charge and filing a complaint. Tex. Labor Code Ann. § 21.055(2), (3). The *McDonnell-Douglass* burden-shifting framework applies to retaliation claims. *McCoy v. Tex. Instruments, Inc.*, 183 S.W.3d 548, 555 (Tex. App.—Dallas 2006, no pet.). To make a prima facie showing of retaliation, a plaintiff must show (1) that she engaged in a protected activity, (2) that an adverse employment action occurred,

[4]Nor did Mitchell attempt to establish a prima facie case under any other standard.

and (3) that a causal link existed between the protected activity and the adverse action. *Chandler*, 376 S.W.3d at 822; *see Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 487 (5th Cir. 2004). TDCJ challenged only the third element in its motion for summary judgment, arguing that Mitchell could not establish any causal connection between her filing three EEO complaints (protected activities) and her termination (adverse employment action) because (i) any temporal relationship between her protected activity and her termination was too remote and (ii) the reprimanding authority had no knowledge of Mitchell's prior EEO complaints.

A plaintiff asserting a retaliation claim must establish that in the absence of her protected activity, the employer's prohibited conduct would not have occurred when it did. *Herbert v. City of Forest Hill*, 189 S.W.3d 369, 377 (Tex. App.—Fort Worth 2006, no pet.). That is, the plaintiff must establish that she would not have suffered an adverse employment action "but for" engaging in the protected activity. *Id.*; *see Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528–34 (2013) (holding that traditional principles of but-for causation apply to Title VII retaliation claims). In evaluating the causal link element, we may consider the extent of the employee's disciplinary record, whether the employer followed its policies and procedures in dismissing the employee, and the temporal relationship between the protected action and the termination. *Bacon v. EDS*, 219 Fed. App'x 355, 357 (5th Cir. 2007) (citing *Nowlin v. Resolution Tr. Corp.*, 33 F.3d 507, 508 (5th Cir. 1994)). The decision maker's knowledge, or lack thereof,

about the plaintiff's protected activity may also be relevant to the causation inquiry. *See Gorman v. Verizon Wireless Tex., L.L.C.*, 753 F.3d 165, 171–72 (5th Cir. 2014).

TDCJ reprimanded Mitchell on January 10, 2011, March 14, 2012, and October 18, 2012. In light of both the nature of the rule violations and their temporal proximity to one another, the PD-22's progressive disciplinary policy mandated that Mitchell be dismissed. Indeed, Warden Wathen testified that he would not have recommended that Mitchell be dismissed had she not had two prior rule violations. Thus, TDCJ terminated Mitchell for disciplinary reasons, not for filing EEO complaints. *See, e.g.*, *Shirrell v. St. Francis Med. Ctr.*, 793 F.3d 881, 888 (8th Cir. 2015) (addressing Title VII retaliation claim and reasoning that "St. Francis terminated Shirrell pursuant to hospital policy for disciplinary reasons, rather than in response to Shirrell's complaints about Miller's remark").

Additionally, although Mitchell had filed three EEO complaints before October 2012, the first was filed over five years before her termination and the second and third were filed over a year and a half before her termination. The temporal relationship between the EEO complaints and her termination was thus highly attenuated, if not completely lacking, and Mitchell offered no explanation for why TDCJ would wait so long to retaliate against her for filing the EEO complaints. *See, e.g.*, *Dixon v. Gonzales*, 481 F.3d 324, 334 (6th Cir. 2007) ("[T]his Court has typically found the causal connection element satisfied only

where the adverse employment action occurred within a matter of months, or less, of the protected activity.").

Finally, when Warden Wathen signed Mitchell's October 18, 2012 reprimand form recommending dismissal, he did not know that Mitchell had previously filed any EEO complaints, and there is no evidence that he simply "rubber-stamped" Mitchell's reprimand on the recommendation of one of Mitchell's co-workers who did have knowledge of her EEO complaints. *See, e.g.*, *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 883 n.6 (5th Cir. 2003) ("If the decisionmakers were completely unaware of the plaintiff's protected activity, then it could not be said . . . that the decisionmakers might have been retaliating against the plaintiff for having engaged in that activity.").

We hold that Mitchell failed to come forward with any circumstantial summary-judgment evidence from which the trial court could have reasonably inferred that TDCJ retaliated against her because she had filed EEO complaints. Accordingly, the trial court did not err by granting TDCJ summary judgment on Mitchell's retaliation claim. We overrule the remainder of her only issue.

V. CONCLUSION

Having overruled Mitchell's only issue, we affirm the trial court's final order granting summary judgment in favor of TDCJ.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

DELIVERED: February 16, 2017