NUMBER 13-15-00561-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ORPHA HENRY, **Appellant,**

v.

DOCTOR'S HOSPITAL AT RENAISSANCE, LTD AND RGV MED, LLC, **Appellee.**

On appeal from the 275th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Justice Hinojosa

Orpha Henry appeals from a summary judgment granted in favor of Doctor's Hospital at Renaissance, LTD and RGV Med., L.L.C. (collectively hereinafter DHR). In two issues, which we treat as one, Henry contends the trial court erred in granting DHR's

no-evidence motion for summary judgment because she presented legally sufficient evidence of an adverse employment action. We affirm.

I. BACKGROUND[1]

Henry was and is employed as a nurse at DHR. According to Henry's original petition, she was assigned as a "Level III nurse tasked to work with the most critically ill babies." Henry's petition alleges three negative interactions with DHR personnel. First, Henry alleges that she was denied a request for re-assignment of a difficult patient she had nursed for several days. Second, Henry alleges that she was falsely accused of causing an IV burn to a patient. Third, DHR allegedly accused Henry of falsifying the patient's medical records in relation to the IV-burn incident. After the IV-burn incident, Henry was moved from "Level III" in the neonatal intensive care unit (NICU) to "Level II," also in the NICU.

Henry sued DHR, alleging claims of racial discrimination, retaliation, and intentional infliction of emotion distress (IIED). DHR moved for no-evidence summary judgment. In its motion, DHR contended that Henry had no evidence of an adverse employment decision and that Henry could not maintain a claim for IIED. Henry's summary-judgment response conceded that her IIED claim failed. However, Henry argued that fact issues existed as to her remaining claims. She referenced her deposition testimony and attached what appears to be a website printout from "The Women's Hospital at Renaissance." It provides in part:

With equipment designed for infants and a hospital staff that has

[1] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

> professional training in newborn care, the NICU at The Women's Hospital at Renaissance was created for sick newborns that need specialized treatment. Our NICU offers two levels of care: intensive care (Level III) and intermediate care (Level II), both designed to assist with your baby's healthcare treatment and development.

DHR replied that Henry's response failed to provide evidence that raised a fact issue.

The trial court granted summary judgment in DHR's favor. This appeal followed.

II. DISCUSSION

The gist of Henry's argument is that a "transfer" from Level III to Level II is actually a "demotion," which constitutes an adverse employment action.

A. DHR's Technical Arguments

Before addressing the merits of Henry's argument, we turn to technical arguments advanced by DHR. DHR complains that Henry's appellate brief fails to provide appropriate citations to the record in its statement of facts and argument sections. *See* TEX. R. APP. P. 38.1(g), (i). DHR also complains that, in the trial court, Henry filed deposition excerpts on the date that the no-evidence motion for summary judgment was set for submission, and those excerpts should be deemed untimely.[2] DHR further complains that a website printout should not have been considered on the ground that it was unauthenticated. Given our disposition on the merits of the issue raised, it is not necessary to further address DHR's technical arguments. *See* TEX. R. APP. P. 47.4.

B. Standard of Review

A no-evidence motion for summary judgment is essentially a pretrial motion for

[2] The record contains two orders setting DHR's no-evidence motion for summary judgment for consideration. The first sets the motion for *submission* on the briefs. The second sets the motion for *hearing* on a date approximately two months after the "submission date."

directed verdict, and we apply the same legal sufficiency standard of review. *Moreno v. Quintana*, 324 S.W.3d 124, 129 (Tex. App.—El Paso 2010, pet. denied). In our de novo review of a trial court's summary judgment, we consider all the evidence in the light most favorable to the non-movant, crediting evidence favorable to the non-movant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *City of Keller v. Wilson*, 168 S.W.3d 802, 825 (Tex. 2005). A no-evidence summary judgment is improperly granted if the nonmovant brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. *Mathis v. Restoration Builders, Inc*., 231 S.W.3d 47, 50 (Tex. App.—Houston [14th Dist.] 2007, no pet.). When an order granting summary judgment does not specify the grounds on which summary judgment was granted, we may uphold the summary judgment on any ground presented in the motion. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004).

C. Applicable Law

Henry's claims of racial discrimination and retaliation are based on Chapter 21 of the Texas Labor Code. Texas courts look to federal interpretation of analogous federal statutes for guidance because an express purpose of Chapter 21 is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments." TEX. LAB. CODE ANN. § 21.001(1) (West, Westlaw through 2015 R.S.); *see also NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999).

An adverse employment decision is an element for claims of racial discrimination and retaliation. *Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 899 (Tex. App.—Houston

[14th Dist.] 2013, no pet.);[3] *see also Brewer v. Coll. of the Mainland*, 441 S.W.3d 723, 729 (Tex. App.—Houston [1st Dist.] 2014, no pet.).[4]

Henry contends that she was "demoted" from Level III to Level II, and she points to a loss of prestige in support of her contention. DHR posits that Henry was "transferred," and it points to Henry's receipt of the same pay, benefits, and opportunities in support of its proposition. The U.S. Court of Appeals for the Fifth Circuit has provided some guidance for assessing whether legally sufficient evidence supports a determination that a transfer was actually a demotion.

To be equivalent to a demotion, a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement. *Alvarado v. Tex. Rangers*, 492 F.3d 605, 613 (5th Cir. 2007). A transfer, even without an accompanying cut in pay or other tangible benefits, may constitute an adverse employment action. *Serna v. City of San Antonio*, 244 F.3d 479, 483 (5th Cir. 2001). Whether the new position is worse is an *objective* inquiry. *Alvarado*, 492 F.3d at 613-14 (citing *Pegram v. Honeywell, Inc*., 361 F.3d 272, 283 (5th Cir. 2004)). A plaintiff's

[3] "A prima facie case of racial discrimination requires proof that the plaintiff (1) is a member of a protected class, (2) was qualified for the employment position at issue, (3) was subject to an adverse employment action, and (4) was treated less favorably than similarly situated members outside of the protected class." *Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 142–43 (2000); *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005) (per curiam)).

[4] "To establish a prima facie case under Title VII or the TCHRA, a plaintiff must show that (1) he participated in protected activity, (2) his employer took an adverse employment action against him, and (3) a causal connection existed between his protected activity and the adverse employment action." *Brewer v. Coll. of the Mainland*, 441 S.W.3d 723, 729 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing *Burger v. Cent. Apartment Mgmt., Inc*., 168 F.3d 875, 878 (5th Cir. 1999); *Dias v. Goodman Mfg. Co., L.P*., 214 S.W.3d 672, 676 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)).

subjective perception that a demotion has occurred is not enough. *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996). It is insufficient for a plaintiff to show merely that she has been transferred from a job she likes to one she considers less desirable. *Serna v. City of San Antonio*, 244 F.3d 479, 483 (5th Cir. 2001). Rather, a plaintiff must produce enough evidence to allow a reasonable factfinder to conclude that, when viewed objectively, the transfer caused her harm. *Id*.

D. Analysis

In response to DHR's motion for no-evidence summary judgment, Henry referenced deposition answers she provided to DHR. Henry's answers relating to the adverse employment action element are:

> Q. What is the difference between NICU level three and NICU level two? Are they all in ICU?
>
> A. Level two is upstairs. Level three is downstairs.
>
> Q. But they are both ICU units?
>
> A. Yeah, but level two is a stepdown.
>
> Q. Okay. But it is an ICU unit?
>
> A. Yeah.
>
> Q. Is there a level one ICU unit?
>
> A. No.
>
> . . . .
>
> Q. The last sentence says, "Although my pay was not affected, this non-voluntary removal has an affect [(sic)] on my career progression and evaluation." What do you mean by that? What is career progression? What does that mean?

A. That's going backwards. That was at level two, and now I am going back to level – I was at level three and going back to level two.

Q. Even though you are still in ICU, you view it as going backwards?

A. Yes, it's a stepdown. It's not the same. It's not the same care.

In the trial court, Henry also referred to a website printout. In this Court, Henry argues that she had been "removed from NICU Level III (intensive care), *one of the highest levels of care that can be administered at a community hospital*, to NICU Level II (intermediate care)." (Emphasis added). However, the emphasized portion is not supported by the website printout. The relevant portion of the website printout provides, "Our NICU offers two levels of care: intensive care (Level III) and intermediate care (Level II), both designed to assist with your baby's healthcare treatment and development."

We find guidance in two federal appellate cases dealing with law-enforcement employees where a court has held that an employee presented legally sufficient evidence to a jury to deem a transfer a demotion. In *Click v. Copeland*, 970 F.2d 106, 109 (5th Cir. 1992), the Fifth Circuit held that the transfers of two deputy sheriffs from the law enforcement division to positions as jail guards could be considered demotions, even though the transfers were not accompanied by reductions in salary, because there was evidence that: (1) the jail guard positions were less interesting and less prestigious than the law enforcement positions; (2) "everybody" viewed a transfer from detention to law enforcement as a promotion and such transfers were rarely appealed, unlike transfers from law enforcement to detention, which few people requested and which were often appealed; and (3) there was a general preference for law enforcement positions, as "all" jail guards would like to be doing law enforcement work. In *Forsyth*, 91 F.3d at 774, the

Fifth Circuit recognized as demotions the transfers of two police officers from the intelligence unit to night uniformed patrol positions, given that the patrol positions involved less prestige, less favorable working hours, and less interesting work, and officers had been transferred to patrol positions in the past as a form of discipline.

In contrast, a recent state court has found that an employee presented legally insufficient evidence to deem a transfer a demotion. In *Donaldson v. Texas Department of Aging and Disability Services*, 495 S.W.3d 421, 443 (Tex. App.—Houston [1st Dist.] 2016, pet. filed), a psychologist employed by the state contended that a transfer to a different unit constituted an adverse employment action by pointing to evidence that "the papers were everywhere in his new office when he arrived, the workload was backed up, and there was no psychology assistant assigned to the unit." In holding that there was no evidence the transfer constituted an adverse employment action, the First Court of Appeals noted that the employee failed to present any evidence showing how the backlog and lack of clerical assistance differed, if at all, from his previous assignment. *Id*.

The summary judgment record in this case is closer to *Donaldson* than *Click* and *Forsyth*. Henry provided the trial court with objective numbers—Level III and Level II—that are framed by her subjective opinion and conclusory statements. There is no evidence of how "everybody" viewed the transfer, *see Click*, 970 F.2d at 109, the prestige, working hours, and interest of the work performed in Level II as compared to Level III, *see Forsyth*, 91 F.3d at 774, and whether Level III was an "elite" unit. Instead, like the employee in *Donaldson*, Henry failed to present any evidence other than her subjective opinion of how her position as a nurse in Level II differed, if at all, from her previous

assignment. *See Donaldson*, 495 S.W.3d at 443. Henry failed to present legally sufficient evidence of her claims. *See Navy*, 407 S.W.3d at 899; *Brewer*, 441 S.W.3d at 729. Therefore, the trial court did not err in granting DHR's no-evidence motion for summary judgment.

Henry's sole issue, as reframed, is overruled.

III. CONCLUSION

The judgment of the trial court is affirmed.

LETICIA HINOJOSA
Justice

Delivered and filed the
27th day of April, 2017.