

FILED

August 11, 2006

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

05-20998
Summary Calendar

VIVIAN MCKINNEY,

Plaintiff-Appellant,

v.

JB HUNT TRANSPORT INC.,
also known as JB Hunt Transport Services, Inc.,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas, Houston
4:03-CV-5545

Before DAVIS, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

This is an appeal from a summary judgment granted in favor of JB Hunt Transport, Inc., and against Vivian McKinney, who brought claims of gender and race discrimination under Texas Commission on Human Rights Act. Tex. Lab. Code Ann. § 21.051 (Vernon 1996). McKinney challenges the summary judgment, arguing that she raised a material fact issue with respect to her claims. We disagree.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

McKinney's principal argument is that she received disparate treatment compared to that received by another supervisor, James Welch, who was suspended for three days and not terminated for his violation of company policy. Her argument that she is similarly situated to her co-worker fails because the record reveals that Welch and McKinney were not similarly situated and certainly not "nearly identical" as required by our precedent. *Perez v. Tex. Dep't of Crim. Justice*, 395 F.2d 206, 213 (5th Cir. 2004) (citing *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991)). Indeed, McKinney had numerous complaints lodged against her and a number of instances of unprofessional conduct that were not common to her co-worker, who she contends was similarly situated.

Moreover, McKinney falls woefully short of providing evidence to show that the various legitimate reasons advanced for her termination were pretext for discrimination. Additionally, we note that McKinney did not advance a mixed-motive theory in the district court and none can be advanced for the first time here on appeal. In any event, she fails to raise a fact issue that discrimination for either race or gender was the cause or motivating factor for her termination. The judgment is affirmed essentially for the reasons given by the district court in its order signed August 10, 2005.

In conclusion, we have read the briefs and reviewed the record and find that her arguments have no merit. AFFIRMED.