

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1958
Summary Calendar

SHEILA LAMB,

Plaintiff-Appellee,

versus

CITY OF SWEETWATER HOUSING
AUTHORITY, SWEETWATER, TX,

Defendant-Appellant,

KATHLEEN LEWIS,

Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CA 1 91 91)

(August 19, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Sheila Lamb brought this action against the City of Sweetwater Housing Authority, Sweetwater, Texas, asserting violations under Title VII of the Civil Rights Act of 1964. The district court found in favor of Lamb and awarded her \$42,628.00

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, we have determined that this opinion should not be published.

in damages. The Housing Authority appeals from the district court's judgment in favor of Lamb. Finding no error, we affirm.

I. BACKGROUND

A. Facts

Sheila Lamb commenced employment as a temporary maintenance employee with the Housing Authority of the City of Sweetwater, Texas on April 2, 1984. She was then made a full-time employee and, through four promotions, reached the level of "Maintenance Mechanic A," the position just below "Maintenance Foreman." During Lamb's tenure with the Housing Authority, she was the only female employee in the maintenance department and the maintenance foreman position became available on at least two occasions--once in 1987 and again in 1990. Each time, male employees were hired and promoted the position. Asserting that she was acting on the recommendation of her physician, Lamb tendered her resignation effective September 21, 1990.

When she tendered her resignation, Lewis advised Lamb that, should prospective employers inquire about her, she would receive good recommendations from the Housing Authority. Lamb applied for various jobs but was not hired until May 1991, when she was hired to work in the housekeeping department at the Holiday Inn in Sweetwater, Texas. Lamb then left this position and applied for another at the Rolling Plains Memorial Hospital also located in Sweetwater, Texas. Rolling Plains advised Lamb that she given a poor recommendation by Lloyd Rasco, the director of the Housing Authority, and that he had accused her of stealing money during

her employment with the Housing Authority. Lamb denied this allegation and was hired by Rolling Plains. Subsequently, Lamb learned that various other prospective employers had been given poor recommendations by various employees of the Housing Authority, including Lewis and Rasco. She also learned that these Housing Authority employees had told prospective employers that she had stolen money while employed by the Housing Authority and had filed a claim with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission.

B. Proceedings

In September 1991, Lamb brought this action against the City of Sweetwater Housing Authority for alleged violations of Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e), et. seq. In her complaint, Lamb asserted that she had been sexually harassed by male employees while employed by the Housing Authority; that she had been constructively discharged due to the conditions under which she was forced to work; and that the Housing Authority had retaliated against her for filing a claim with the Equal Employment Opportunity Commission. The Housing Authority answered by filing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. The court denied that motion without conducting a hearing.

The Housing Authority then filed a motion for a judgment on the pleadings, asserting that Lamb's claim is barred by limitations; that the 1991 amendment to Title VII was not

retroactive and that the additional damage provisions contained therein are not applicable to this case; and that the amendment authorizing jury trials for Title VII complaints is not retroactive. The district court denied the Housing Authority's motion, and the case proceeded to trial.

At the commencement of the trial, Lamb waived her claims of sexual harassment and retaliation, but she proceed with her claim of failure to promote. She also continued to assert all the damages she allegedly suffered as a result of the failure of the Housing Authority to promote her, including constructive discharge. During the course of trial, Kathleen Lewis, Executive Director of the Housing Authority during Lamb's employment, admitted that Lamb had the skills necessary for the position of maintenance foreman and that she had recognized Lamb publicly as the best maintenance employee. Lewis also admitted telling Lamb and an African-American employee interested in the foreman position in 1987 that the men working in the Housing Authority weren't "ready for a woman or a black" to be foreman. It was established at trial that Lamb was the most senior employee being considered for the foreman position the two times it became available during her tenure at the Housing Authority, and that seniority had been a significant factor when filling the position in the past. Lamb also asserted that, beyond being the most senior candidate for the positions, she was the best qualified. The Housing Authority attempted to controvert this contention by asserting that Lamb's failure to be promoted was attributed to

her inability to get along with other employees, and that this behavior had resulted in her being categorized as a "trouble maker."

The district court entered a judgment in favor of Lamb and awarded her \$42,628.00, together with reasonable attorney's fees and expenses totalling \$10,377.58 and interest from the date of judgment until paid at the rate of 3.13 percent per annum. The Housing Authority then submitted a motion for amendment for findings of fact and conclusions of law, which was denied by the district court. However, by an order entered October 1992, the district court requested the parties to advise in writing whether Lewis was a defendant in this action in her individual capacity. Both Lamb and the Housing Authority responded that Lewis was not a defendant in her individual capacity, and a judgment nunc pro tunc was entered by the district court in November 1992 which effectively dismissed Lewis as an individual defendant. The Housing authority now appeals from the district court's judgment in favor of Lamb.

II. DISCUSSION

The Housing Authority raises the following issues on appeal:

- (a) whether the Housing authority meets the statutory definition of employer under Title VII;
- (b) whether the evidence is sufficient to support the district court's finding that the Housing Authority failed to promote Lamb because of her gender;
- (c) whether the district court's finding that Lamb was constructively discharged is clearly erroneous;
- (d) whether the

district court erred in awarding back pay from the date of Lamb's resignation; and (e) whether Lamb properly mitigated her damages.

A. Challenge to the Housing Authority's "Employer" Status Under Title VII

An "Employer" under Title VII is defined as "a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of such a person" 42 U.S.C. § 2000e(b) (emphasis added). According to the Housing Authority, it did not have more than twelve employees during the twenty calendar weeks the requisite number of employees to be considered an employer under section 2000e(b) and, therefore, the district court lacked subject matter jurisdiction in this case. Lamb asserts that the City of Sweetwater Housing Authority is simply a division of the City of Sweetwater and that the City of Sweetwater is subject to the provisions of Title VII.

This issue now before us--whether the Housing Authority is part of the City of Sweetwater--was raised below. The district court reached the factual determination that the Housing Authority is part of the City of Sweetwater and has fifteen or more employees, thereby making it subject to the provisions of Title VII. In considering the Housing Authority's challenge to this factual finding on appeal, we review the district court's determination for clear error pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or documentary

evidence, shall not be set aside unless clearly erroneous . . .
.")

When reaching its determination, the district court took judicial notice of TEX. LOCAL GOV'T CODE ANN. §§ 392.001, et seq. (Vernon 1988 & Supp. 1993), which creates housing authorities. These sections of the Texas Local Government Code establish that a housing authority is a division of the city which creates it and that the city creating it maintains control over it. For example, pursuant to section 392.031 of the Texas Local Government Code, for as long as a housing authority exists, the mayor of the city it serves is empowered to appoint the housing authority's commissioners. Under section 392.041(a), the mayors of Texas cities are also expressly empowered to remove the commissioners of housing authorities for inefficiency, neglect of duty, or misconduct in office. And section 392.041(f) of the Texas Local Government Code provides that, "[i]f a commissioner of a municipal housing authority is removed, a record of the proceedings with the charges and findings shall be filed in the office of the Clerk of the municipality." TEX. LOCAL GOV'T CODE ANN. §§ 392.041(f) (Vernon 1988).

Moreover, Texas courts have held that housing authorities are divisions of the municipalities they serve. For example, in Aetna Casualty and Surety Co. v. The Glidden Co., 283 S.W.2d 440 (Tex. Civ. App.--Eastland 1955, no writ), rev'd on other grounds, 291 S.W.2d 315 (Tex. 1956), the Texas Court of Civil Appeals expressly held that the housing authority "is a division of the

City of Borger and exists only with the consent of the City." Id. at 441, citing Miers v. Housing Authority of City of Dallas, 266 S.W.2d 487 (Tex. Civ. App.--Dallas 1954) (interpreting VERNON'S ANN. CIV. STAT. art. 1269k, the precursor to sections 392.001, et seq.), ques. cert.'d, 266 S.W.2d 842 (Tex. 1954); Housing Authority of City of Dallas v. Higginbotham, 143 S.W.2d 79 (Tex. 1940). Finally, in challenging the district court's determination that the City of Sweetwater Housing Authority is a division of the City of Sweetwater, the Housing Authority relies upon the testimony of Lewis. Although Lewis did testify that the Housing Authority is not a division of the City of Sweetwater, she acknowledged that Sweetwater appoints the members of the Board of Commissioners for the Housing Authority and that the Board of Commissioners has the authority to make decisions concerning the Housing Authority.

In sum, The Texas Local Government Code, Texas case law, and the evidence in the record before us support the district's determination that the City of Sweetwater Housing Authority is simply a division of the City of Sweetwater and subject to the provisions of Title VII is not clearly erroneous. Accordingly, we conclude that this finding is not erroneous.

B. Challenge to the Finding of Discrimination

To establish a claim under Title VII, a plaintiff must first establish a prima facia case of discrimination. To accomplish this, Lamb was required to show that:

- (1) she belongs to a group protected by Title VII, (2) she applied for and was qualified for a job for which

the employer was seeking applicants, (3) despite her qualifications she was rejected, and (4) after her rejection the position remained open and the employer continued to seek applicants among persons having plaintiff's qualifications.

Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563, 566-67 (5th Cir. 1979) (acknowledging, however, that the elements establishing a prima facie case of discrimination may differ, depending on the factual context), aff'd, _____. A defendant in a Title VII case may refute such a prima facie showing by articulating a legitimate, nondiscriminatory reason for rejecting the plaintiff. Id. at 567. Such nondiscriminatory reasons must be proven by a preponderance of the evidence. Id. If such a showing is made by the defendant, the burden then shifts back to the plaintiff to show that the nondiscriminatory reason for rejection was merely pretextual. See McDonnell Douglas v. Green, 411 U.S. 792, 804, 93 S. Ct. 1817, 1825 (1973).

Our standard of review for a district court's finding of discrimination in violation of Title VII is also addressed in Burdine. Specifically, as explained by this court,

[a]lthough discrimination is a question of fact, it is also the ultimate issue for resolution in a Title VII case. Therefore, we as an appellate court must independently determine the merits of plaintiff's allegations, but we are bound by findings of subsidiary facts (evidentiary facts) that are not clearly erroneous. We must also determine whether the ultimate finding is based on requisite subsidiary facts.

608 F.2d at 566 (internal citations omitted).

Lamb is protected under Title VII from discrimination based upon her sex, and we conclude that she has successfully established a claim under Title VII. Specifically, the record

supports Lamb's assertion that she was well-qualified for the position of foreman. Moreover, the record establishes that the Housing Authority rejected Lamb for the position and, after the position remained unfilled for several months, hired a male, Danny Cook, for the position. Accordingly, we conclude that Lamb successfully made a prima facie showing of discrimination under Title VII and that none of the district court's factual findings to this effect are clearly erroneous. Burdine, 608 F.2d at 566-67.

The Housing Authority attempted to rebut Lamb's showing of a claim of discrimination in violation of Title VII by asserting that Lamb was not promoted to the position of foreman because she did not get along with her co-workers in an acceptable manner. See Turner, 555 F.2d at 1255. Nevertheless, the court determined that this reason for denying Lamb the promotion to foreman was merely pretextual, and its determination is supported by the testimony of Lamb and two other witnesses that Lewis told Lamb that she could not be promoted to the position because of her sex. See McDonnell Douglas, 411 U.S. at 804, 93 S. Ct. at 1825. In fact, one of these two other witnesses was Lewis herself. Accordingly, we conclude that the district court's determination that the Housing Authority discriminated against Lamb in violation of Title VII is supported by the record.

C. Challenge to the Constructive Discharge Finding

The Housing Authority also challenges the district court's determination that Lamb was constructively discharged, asserting

that this claim was waived. In her original complaint, Lamb set forth causes of action for sexual discrimination, sexual harassment, constructive discharge, and retaliation pursuant to 42 U.S.C. §§ 2000e-2, 2000e-3(a), as well as claims of intentional and/or negligent infliction of emotional distress against both the Housing Authority and individual defendants. However, prior to the commencement of trial, Lamb waived her claims against the individual defendants, expressly stating that she waived "that part of the pleadings, except the allegations as to failure to promote, and the mental anguish, loss of wages, so forth, that go along with that." The pretrial order generally identifies the contested issues of law as whether the Housing Authority violated provisions of Title VII and whether Lamb is entitled to damages as a result of any such violation. During trial, Lamb confirmed that she retained her cause of action for "failure to promote and the mental anguish that goes with the failure to promote and what happened to her." She also presented evidence to establish that she was constructively discharged.

It is well established that "waiver is the voluntary or intentional relinquishment of a known right." Pitts v. American Sec. Life, 931 F.2d 351, 357 (5th Cir. 1991); see also Rogers v. General Elec. Co., 781 F.2d 452, 454 (5th Cir. 1986) ("A release waiving rights arising under Title VII must also be both knowing and voluntary."). Although the record establishes that Lamb did waive various claims and that she was ambiguous as to the claims she retained, but that she continued to assert that she was

constructively discharged. Accordingly, we cannot conclude that Lamb knowing and voluntarily waived her claim of constructive discharge.

The Housing Authority also asserts that, even if Lamb did not waive her constructive discharge claim, the district court erred in concluding that Lamb was subjected to a hostile work environment which resulted in her constructive discharge. This court set forth the standard for constructive discharge in Young v. Southwestern Savings and Loan Assoc., 509 F.2d 140, 144 (5th Cir. 1975), where we held:

The general rule is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.

We have also held that the a plaintiff asserting constructive discharge need not show that specific intent on the part of the employer. Boze v. Branstetter, 912 F.2d 801, 804 (5th Cir. 1990) ("Proof is not required that the employer imposed intolerable working conditions with the specific intent to force the employee to resign."); see also Jurgens v. EEOC, 903 F.2d 386, ___ (5th Cir. 1990).

Lamb testified that intolerable working conditions compelled her to resign from the Housing Authority.¹ In fact, she

¹ Lamb's assertions are summarized in her complaint, in which stated:

When Complainant performed jobs that required assistance, Rasco and Cook would not help her, and made

testified extensively about the physical symptoms arising from the stress that she was under due to her treatment at the Housing Authority (namely migraine headaches, insomnia, nausea, irritableness, and extreme nervousness), the fact that she sought the services of a physician due to those symptoms, and the fact that her physician advised her to resign from the Housing Authority. Based upon this evidentiary support for the court's determination, we find that the district court did not err in concluding that Lamb was constructively discharged.

D. Challenge to the Amount of the District Court's Award

The Housing Authority also challenges the amount of the district court's award in favor of Lamb, asserting that the district court erred in awarding her back pay. Title VII defines the relief available to an aggrieved party as follows:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate

such comments as "if she wants to do a man's job, let her." Rasco and Cook also told Complainant that upon the executive director, Kathleen Lewis, retiring, Complainant would probably be replaced by two woman, that the new executive director would ask Complainant why she was never promoted to foreman since she had worked there almost seven years, and various other comments. Complainant reported said harassment and mistreatment to Ms. Lewis, but no action was taken against Rasco and Cook and their harassment of Complainant continued.

42 U.S.C.A. § 2000e-5(g)(1). The Eleventh Circuit has expressly addressed the issue of an award of back pay under Title VII, stating that "Choices regarding the remedy to award an aggrieved party under Title VII are left to the discretion of the trial court." EEOC v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 529 (11th Cir. 1990). Similarly, the Sixth Circuit has stated that "Congress evidently intended that the award of back pay should rest within the sound discretion of the trial judge." Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 (6th Cir. 1973); see also Thornton v. East Texas Motor Freight, 497 F.2d 416, 421 (6th Cir. 1974) (referring to the court's holding in Head as having "established that whether back pay should be awarded at all is a matter of discretion"). This court has held that:

Because of the compensatory nature of a back pay award and because of the 'rightful place' theory, adopted by the courts, and of the strong congressional policy, embodied in Title VII, for remedying employment discrimination, the scope of a court's discretion to deny back pay is narrow. Once a court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, back pay should normally be awarded unless special circumstances are present.

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252-53 (5th Cir. 1974) (en banc), cert. denied, 439 U.S. 1115, 99 S. Ct. 1020 (1979); see also Marks v. Prattco, 607 F.2d 1153, 1155 (5th Cir. 1979).

We have already concluded that the district court did not err in reaching its determination that Lamb was constructively discharged. See supra Part II.C. The district court's award of damages is based upon this determination and fully supported by

the evidence Lamb presented at trial of the economic damages she actually suffered a result of the Housing Authorities' discriminatory actions. We conclude, therefore, that the district court's award of damages is in accordance with "the purpose of Title VII [which is] to make persons whole for injuries suffered on account of unlawful employment discrimination." Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362 (1975).

E. Challenge to the Finding that Lamb Properly Mitigated her Damages

This court has expressly held that successful Title VII claimants have a statutory duty to minimize their damages. Sellers v. Delgado College, 902 F.2d 1189, 1193 (5th Cir. 1990). Specifically, "the claimant must use reasonable diligence to obtain 'substantially equivalent' employment." Id. The Housing Authority asserts that Lamb failed to fulfill this obligation.

In Sellers, we held that "[t]he reasonableness of a Title VII claimant's diligence 'should be evaluated in light of the individual characteristics of the claimant and the job market.'" Id. at 1193. We clarified that:

"Substantially equivalent employment" is that "employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the Title VII claimant has been discriminatorily terminated."

Id.; see also EEOC v. Guardian Pools, Inc., 828 F.2d 1507, 1511 (11th Cir. 1987) ("Title VII requires reasonable diligence in locating employment and mitigating damages; it does not require

that a person remain employed despite dissatisfaction."). And we expressly stated that whether or not a claimant has met his or her statutory duty to minimize damages is a fact determination pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and, therefore, subject to the clearly erroneous standard of review. Sellers, 902 F.2d at 1193. Finally, we pointed out that, although the statutory duty to minimize damages is placed upon the Title VII plaintiff, the employer has the burden of proving a failure to mitigate. Id.

The record establishes that, upon being constructively discharged, Lamb immediately began seeking comparable employment through an unemployment office but was unable to do so. Specifically, she applied for employment with United States Gypsum and the Mental Health Mental Retardation facility in Sweetwater, Texas, but was not able to obtain employment from either. Accordingly, Lamb (1) worked for an individual remodeling a house; (2) provided day care for children in her home, for which she earned \$592.00 over the course of two months; (3) took a job with a motel as a maid earning \$4.25 per hour; (4) took a job at a convenience store as a clerk working the evening shift to earn \$4.25 per hour; and (5) took a job as a dietary aide at a hospital. The record also contains evidence that Lamb's efforts to find employment comparable to her employment at the Housing Authority were frustrated by the Housing Authority's accusations that she had stolen money during her employment there. Finally, in an effort to find employment at a salary

comparable to her salary at the Housing Authority, Lamb attended school from September 6, 1991 to August 14, 1992 in order to become a licensed vocational nurse.

In an effort to meet its burden to prove that Lamb failed to mitigate her damages, the Housing Authority asserts that Lamb failed to interview for a position at a pre-release detention center in Sweetwater, Texas and that this was a job equivalent to Lamb's job at the Housing Authority. Lamb testified at trial that she did not interview for the position because the working conditions were substantially different than those at the Housing Authority,² and the Housing Authority has presented no specific evidence to establish that the positions were substantially equivalent. Sellers, 902 F.2d at 1193 (establishing the defendant's burden). Accordingly, based upon the evidence in the record before us, we conclude that the district court's finding that Lamb properly mitigated her damages is not clearly erroneous. Id.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment in favor of Lamb.

² Sellers, 902 F.2d at 1193 (defining "equivalent employment").