IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8307

SARAH M. PORTER,

Plaintiff-Appellant,

v.

GUADALUPE-BLANCO RIVER AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CV-45)

(November 8, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Sarah M. Porter brought claims against Guadalupe-Blanco River Authority (Guadalupe) for age and sex discrimination pursuant to 42 U.S.C. § 2000e et seq and 29 U.S.C. § 633a and for intentional infliction of emotional distress. The trial court granted summary judgment for Guadalupe. Porter appeals. We affirm.

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*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

In 1981, Porter was hired by Guadalupe as a plant operator for the Port Lavaca Water Treatment Plant. Porter alleges that during 1991 Guadalupe committed unlawful and discriminatory practices against her. In her complaint, Porter alleges that Guadalupe (1) issued an unwarranted written reprimand to her in February 1991; (2) assigned her to sack-up heavy materials; (3) denied her "special leave" when her grandchild needed surgery; (4) interrogated her concerning child rearing and her personal affairs; (5) subjected her to discriminatory statements made by her supervisors; (6) indefinitely suspended her from work without pay; (7) placed her on probation with the conditions that she receive psychiatric treatment, that her medical reports be given to defendant, that she give defendant the names of all medications that she was taking, and that she be under intensive supervision for one week; and (8) terminated her from employment.

Naturally, Guadalupe's story is a little different. Guadalupe asserts that for the first nine years of her employment Porter was a very effective employee. However, Guadalupe asserts that this began to change in the later part of 1990 when Porter began to take medication. Three of her medication bottles contained warning labels that the medication may cause drowsiness. Guadalupe further asserts that Porter's termination was the direct result of a series of incidents that occurred in February and March of 1991. According to Guadalupe, these

incidents caused it to lose faith in Porter's ability to safely accomplish her work.

These incidents related to the spilling of acid in a lab, failure to unplug a pump that was delivering an iron compound, and leaving a valve open which resulted in high levels of fluoride being released into the water supply. Also, Guadalupe asserts that her behavior became erratic and that one time she became so upset that she had to go home. Because of continued mishaps at the plant, Guadalupe told Porter that she would have to satisfy four conditions before she could continue in her employment. The conditions set down by Guadalupe were that Porter was to (1) receive professional counseling, (2) instruct her medical doctors to provide information to Guadalupe concerning her ability to perform physical tasks and to discuss with Guadalupe any medication that she was taking that could potentially cause safety problems on the job, (3) agree to cooperate with supervisors and display a professional and courteous attitude, and (4) meet all requirements of her job description. Porter informed Guadalupe that she refused to comply with these conditions, and she was then fired.

Porter then filed her complaint in federal district court. On August 28, 1992, Guadalupe filed a motion for summary judgment and a motion for leave to file depositions and its statement of material facts. Porter responded to Guadalupe's motion with no supporting documentary evidence. Porter also responded to

Guadalupe's motion to file depositions and its statement of material facts.

Because the trial court determined that the motion for summary judgment was not ripe for consideration without supporting evidence, the court granted Guadalupe's motion for leave to file depositions and ordered Guadalupe to file the deposition transcripts by December 21, 1992. On April 6, 1993, the trial court granted Guadalupe's motion for summary judgment for all claims that Porter had brought against Guadalupe. This appeal followed.

II.

Porter initially argues that the trial court improperly granted summary judgment sua sponte on her pendent state law claim of intentional infliction of emotional distress. Guadalupe contends that its motion for summary judgment sufficiently apprised Porter that failure to present evidence of her claim for intentional infliction of emotional distress would be grounds for summary judgment. Specifically, Guadalupe asserts that the following language contradicts Porter's claim of lack of notice:

> IV.
> Grounds For Summary Judgment
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> Defendant respectfully points out to the United States District Court that, beyond inadmissible speculation, there is no legally-competent proof that Defendant intentionally terminated the employment of Plaintiff because of her sex or because of her age or in retaliation for her having filed an EEOC complaint or in retaliation for any other proported conduct of Plaintiff.
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> V.
> Conclusion
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> . . . .
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> . . . that all claims asserted by Plaintiff against Defendant

be dismissed by way of summary judgment.

Although the majority of Guadalupe's motion deals with the age and sex discrimination claims, the quoted language from Guadalupe's motion for summary judgment was sufficient to place Porter on notice that her claim for intentional infliction of emotional distress was at risk of being adversely adjudicated. Therefore, we conclude that the district court did not grant summary judgment sua sponte as to Porter's claim for intentional infliction of emotional distress.

III.

Porter also contends that the district court erred in granting summary judgment for Guadalupe on her claims for age and sex discrimination. A court may grant summary judgment when "there is no issue of material fact, and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An appellate court reviews a trial court's grant of summary judgment de novo, and the facts are viewed in the light most favorable to the nonmovant. Frazier v. Garrison, I.S.D., 980 F.2d 1514, 1520 (5th Cir. 1993). In the case at bar, the question before us is whether the evidence in the summary judgment record establishes, as a matter of law, that Porter was

not the victim of discrimination by her employer. See Armstrong v. City of Dallas, 997 F.2d 62, 66 (5th Cir. 1993).

In Guadalupe's motion for summary judgment, Guadalupe asserted that Porter could not adduce any evidence that she was intentionally fired because of her age or sex. Furthermore, Guadalupe asserted that it had a valid non-discriminatory reason for firing Porter. The district court determined that Porter failed to establish that Guadalupe had intentionally discriminated against her. The district court also determined that the record established that the employer had articulated a legitimate non-discriminatory reason for its decision to terminate Porter. After reviewing the record, we affirm the district court's grant of summary judgment.

Porter points this court to three depositions that she contends establish that there is an issue of material fact which would preclude the granting of summary judgment. First is the deposition of Herbert J. Wittlief, manager for Guadalupe, which establishes that Guadalupe hired a younger woman without a state license to replace Porter. Porter also points us to her deposition and that of Frank Carrigan's, Porter's supervisor. Porter's testimony is to the effect that Frank Carrigan was always making remarks about the women who worked under him. Specifically, Porter testified that Frank Carrigan's remarks concerning the women were: "[t]hat we're older. We're afraid to be out there at night. The women are scared." Porter further testified that Carrigan was always criticizing the employees but

especially the ladies. Carrigan's testimony presents a very tenuous inference that other employees may not have been fired for committing one of the same acts that Porter did.[1] However, Porter's deficiencies exceeded the one act referred to in Carrigan's testimony. Furthermore, a mere scintilla of evidence will not defeat a motion for summary judgment; there must be sufficient evidence upon which a reasonable jury could return a verdict for the nonmoving party. Spiller v. Ella Smithers Geriatric Ctr., 919 F.2d 339, 343 (5th Cir. 1990). We conclude that the evidence which Porter states supports her claim is insufficient for a reasonable jury to return a verdict for her as a matter of law. Therefore, we uphold the district court's grant of summary judgment for Guadalupe on Porter's claims for age and sex discrimination.

IV.

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[1] Specifically, Carrigan's deposition is as follows:
Q. Okay. Of the two procedures that you just mentioned, do you know how many employees have ever been terminated at the plant for being involved in those type of procedures other than Sarah Porter?
A. There have been shortcomings and mistakes by employees from time to time, and there have -- may have been occasions where I orally reprimanded employees for failure to turn off a chemical feed pump.
Q. So is it your testimony that as far as you know there has not been any other terminations other than Sarah Porter for the procedures you've mentioned?
A. Sarah was not terminated. Sarah was reluctantly, and I emphasize that, reluctantly replaced. I fought for Sarah for years and years always wanting her to be recognized and to get more money. And she treated me in kind, that she supported me in all my endeavors.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment on Porter's claims of age and sex discrimination and intentional infliction of emotional distress.