IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10968
Summary Calendar

PAMELA SUE HOUSTON,

Plaintiff-Appellant,

versus

EBI Companies, ET AL.,

Defendants,

DR. KENNETH PEARCE, JENNY McNEIL, Individually, JENNY McNEIL, etc., ALL SAINTS HEALTH CARE, INC., d/b/a All Saints Episcopal Hospital,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
(4:93-CV-678-A)

(April 21, 1995)

Before DUHÉ, WIENER, STEWART, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant Pamela Sue Houston filed suit in state

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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." Pusuant to that Rule, the Court has determined that this opinion should not be published.

court against All Saints Episcopal Hospital (All Saints), Jenny McNeil (McNeil), and Dr. Kenneth Pearce (Dr. Pearce) (collectively, the Defendants-Appellees), alleging various common law torts as well as violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq.; 42 U.S.C. § 1981; the Texas Workers' Compensation Act; and the Texas Constitution. The Defendants-Appellees removed the case to the federal district court, which granted summary judgment in favor of the Defendants-Appellees and dismissed Houston's claim. Concluding in our plenary review that Houston has failed to show the existence of a genuine issue as to any material fact, we affirm the district court's dismissal.

I

FACTS AND PROCEEDINGS

Houston, an African-American registered nurse, was hired by All Saints in 1984. At that time, Dr. Pearce, a male Caucasian anesthesiologist, was performing anesthesia services at All Saints under a contract between the hospital and Anesthesia Care, Inc.[1] Houston worked with Dr. Pearce on occasion in her position as a nurse in the surgery department's Holding Room, where patients were taken prior to their surgeries.

McNeil was the supervisor of nurses in All Saints' surgery department. She completed Houston's evaluation forms based largely on information received from Ellen Baldwin, Houston's

[1]Dr. Pearce served as president of Anesthesia Care, Inc..

direct supervisor.

In July 1991, Houston complained to McNeil that Dr. Pearce had made a racially offensive comment to her. McNeil immediately reported Houston's complaint to the Director of Surgical Services at that time, Geraldine Petersen, who approved McNeil's proposed course of action - - to advise Dr. Pearce that racially offensive language would not be tolerated and that he must not make such remarks in the future. As soon as McNeil reprimanded Dr. Pearce, his conduct improved; he made no further racist comments to Houston.

In mid-August 1991, Houston injured her back while pushing a patient stretcher. She filed a worker's compensation claim and never returned to work at All Saints. On October 15, 1991, Houston filed a charge of employment discrimination against All Saints with the Equal Employment Opportunities Commission (EEOC) and the Fort Worth Human Relations Commission, the EEOC's local investigative agency, which responded by issuing Houston a "Notice of Right to Sue."

By letter dated June 18, 1992, All Saints advised Houston that her employment would be terminated under All Saints' leave of absence policy if she did not return to work by June 1, 1993, the anniversary of the June 1, 1992 date on which she had reached "maximum medical improvement" (MMI) according to the Texas Worker's Compensation Commission (TWCC). When June 1, 1993 came without Houston having reported to work, All Saints removed her from its active employment roster and sent her a letter informing

her of its actions.

Houston's state court suit was filed against All Saints, McNeil, and Dr. Pearce on August 20, 1993, alleging various federal and state claims.[2] As noted earlier, the Defendants-Appellees removed the case to district court where they moved for summary judgment. The district court granted their motion and dismissed Houston's action. On appeal, Houston challenges the district court's summary judgment dismissal of her hostile work environment, discrimination, and retaliatory discharge claims.

II

ANALYSIS

A. STANDARD OF REVIEW

In reviewing a grant of summary judgment, we apply the same standard as the district court.[3] Summary judgment must be granted if the record taken as a whole shows that there is no genuine issue as to any material fact that could lead a rational jury to find for the nonmoving party.[4] Our review of the facts in the record, however, draws all inferences most favorable to

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[2]Houston also sued EBI Companies, which was later dismissed from the suit by agreement of the parties.

[3]Waltman v. Int'l Paper Co., 875 F.2d 468, 474 (5th Cir. 1989).

[4]See Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969)(en banc).

the party opposing the motion.[5] Once a movant makes a properly supported motion for summary judgment, the burden shifts to the nonmovant to show that summary judgment should not be granted because a genuine issue for trial exists.[6] The party opposing the summary judgment motion may not rest on mere allegations in the pleadings, but must set forth specific facts supported by summary judgment evidence establishing the existence of a genuine issue as to any material fact.[7]

B. HOSTILE WORK ENVIRONMENT

1. Prompt Remedial Action

To establish a claim against an employer grounded in the existence of a hostile work environment, a plaintiff must show, inter alia, that the employer knew or should have known of the harassment in question and failed to take prompt remedial action "reasonably calculated" to end the harassment.[8] We have previously observed that the effectiveness of any initial remedial steps taken by the employer is an important factor in

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[5]Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

[6]See Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986).

[7]See Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2514 (1986); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992), cert. denied, 113 S.Ct. 82 (1992).

[8]See Garcia v. Elf Atochem North America, 28 F.3d 446, 451 (5th Cir. 1994); Jones v. Flagship Int'l, 793 F.2d 714, 720 (5th Cir. 1986), cert. denied, 107 S.Ct. 952 (1987).

assessing what constitutes appropriate remedial action.[9] After reviewing the summary judgment evidence, we conclude that All Saints took prompt remedial action in dealing with Houston's complaint about Dr. Pearce.

After Houston informed McNeil of Dr. Pearce's offensive behavior, McNeil assured Houston that she would address the matter and immediately reported the complaint to Petersen, the Director of Surgical Services, who told McNeil that her planned reprimand of Dr. Pearce was the appropriate course of action. McNeil wasted no time in meeting with Dr. Pearce, telling him that racially offensive language would not be tolerated, and counseling him to cease making racist comments to Houston. After the meeting, Houston was promptly informed by McNeil of just how she had dealt with Houston's complaint. Houston admitted in her deposition that after McNeil's meeting with Dr. Pearce, his behavior "toned down a lot" and that Dr. Pearce made no further racially offensive comments to her.

Houston argues nonetheless that McNeil's reprimand could not possibly qualify as prompt remedial action because McNeil was only a nurse supervisor who had no authority over Dr. Pearce. We disagree, particularly in light of the effectiveness of McNeil's reprimand. McNeil's talk with Dr. Pearce, which occurred shortly after McNeil received Houston's complaint, succeeded in putting

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[9]See Waltman v. Int'l Paper Co., 875 F.2d 468, 479 (5th Cir. 1989). See also Garcia, 28 F.3d at 451 (upholding grant of summary judgment for defendant, as he took prompt action against harasser and harassment actually ended).

an immediate and permanent stop to Dr. Pearce's offensive comments aimed at Houston.[10] McNeil's technical authority in relation to Dr. Pearce is, therefore, irrelevant; the district court was correct in granting summary judgment on this ground.[11]

2. Dr. Pearce's Liability

Houston also attempts to hold Dr. Pearce liable for his alleged discriminatory behavior towards Houston. As a Title VII suit may not be maintained against an individual, Dr. Pearce may only be held liable if he, in his employment capacity at All Saints, is deemed to be Houston's "employer" for Title VII purposes.[12] Title VII defines an "employer" as a person who has a certain number of employees and any agent of such person.[13]

We have previously held that the determination whether a

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[10]Although McNeil testified that Houston complained to McNeil only about Dr. Pearce's racist comments, we find in our analysis of Houston's hostile work environment claim that, as the alleged remarks contained both racial and sexual overtones, All Saints' prompt remedial action effectively put an end to both forms of harassment.

[11]As we agree with the district court's finding that All Saints took prompt remedial action in response to Houston's complaint, we need not, and therefore do not, address the preliminary issue whether All Saints is even subject to liability for Dr. Pearce's actions through any employer-employee or principal-agent relationship.

[12]See Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994), cert. denied, 115 S.Ct. 574 (1994).

[13]Title VII states that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b).

defendant is a Title VII employer is a two-step process: first, the defendant must meet the statutory definition and second, an employment relationship must exist between the defendant and the plaintiff.[14] The first step here is a given, as the parties agree that Dr. Pearce meets the Title VII statutory definition of employer by virtue of employing fifteen or more Certified Registered Nurse Anesthesists to assist him at the hospital. As to the second step, however, we conclude that the summary judgment evidence fails to show that an employment relationship existed between Houston and Dr. Pearce, thereby defeating Houston's efforts to have Dr. Pearce classified as her employer for Title VII purposes.

In determining whether an employment relationship exists, we apply the "hybrid economic realities/common law control test."[15] For the economic realities component of the test, we have focused on whether the putative employer paid the individual's salary, withheld taxes, provided benefits and set the terms and conditions of employment.[16] In examining the control component of the test, we have considered whether the putative employer has the right to hire and fire, to supervise the individual's work,

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[14]See Deal v. State Farm Co. Mut. Ins. Co. of Texas, 5 F.3d 117, 118 n.2 (5th Cir. 1993)(citing Fields v. Hallsville Indep. Sch. Dist., 906 F.2d 1017, 1019 (5th Cir. 1990)).

[15]See id. at 118-19.

[16]See id. at 119; Mares v. Marsh, 777 F.2d 1066, 1068 (5th Cir. 1985).

and to set the individual's work schedule.[17] The right to control and direct a putative employee's work is the most important aspect of the control component.[18]

Houston claims that her testimony to the effect that Dr. Pearce "took charge" of the surgery department, that the nurses obeyed his orders, and that she believed that Dr. Pearce could have her fired, is sufficient to present a genuine issue as to a material fact. We disagree with Houston's assertion. There is a total absence of any evidence in the record that Dr. Pearce had any input regarding Houston's employment conditions. The parties stipulated that Houston's direct supervisor was Ellen Baldwin, who reported to McNeil, and that Dr. Pearce did not set Houston's schedule, did not evaluate Houston's job performance, and did not have the authority to discharge any All Saints employee. The summary judgment evidence also reveals that Dr. Pearce did not provide Houston with any benefits or compensation.

Houston alternatively contends that, even if she had no employment relationship with Dr. Pearce, he functioned as an agent of her employer, All Saints, thereby subjecting him to Title VII liability. In refuting Houston's assertion that Dr. Pearce served as All Saints' agent, the Defendants-Appellees convincingly rely on our decision in Deal v. State Farm Co. Mut.

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[17]See Deal, 5 F.3d at 119; Fields v. Hallsville Indep. Sch. Dist., 906 F.2d at 1019-20 (5th Cir. 1990), cert. denied, 111 S.Ct. 676 (1991).

[18]See Fields, 906 F.2d 1017, 1019.

Ins. Co. of Texas.[19] In Deal, we held that an "agent," for Title VII purposes, must be an agent with respect to employment practices.[20] The record in the instant case does not indicate that All Saints delegated any employment decisions to Dr. Pearce. The only evidence that Houston presents in her favor is her self-serving, subjective testimony that she believed that Dr. Pearce could have her fired and that Dr. Pearce must have had some relationship with All Saints, as he was performing services at the hospital. Houston's mere speculation is insufficient to create a genuine issue for trial. The summary judgment evidence does not reflect the existence of a genuine issue of material fact as to whether Dr. Pearce was Houston's "employer" for Title VII purposes - - either through a common-law employment relationship with Houston or as All Saints' agent - - so the district court was correct in granting summary judgment in Dr. Pearce's favor.[21]

C. DISCRIMINATION

Houston alleged that All Saints and McNeil discriminated

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[19]5 F.3d 117 (5th Cir. 1993).

[20]See id. at 119 (citing York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982)).

[21]The Defendants-Appellees argue that Houston failed to exhaust her EEOC remedy by not mentioning Dr. Pearce in the EEOC charge and that she also failed to meet the Title VII jurisdictional prerequisites for her sex discrimination and harassment claims because her EEOC charge alleged only race, and not sex, discrimination. As we have found no genuine issue of material fact supporting the merits of Houston's claims, however, we need not, and do not, address these procedural issues.

against her by requiring her to push patient stretchers, which allegedly caused her to fall behind in completing patient charts before the patients went in to surgery and adversely affected her job performance evaluations. She asserted that pushing stretchers was not part of her job duties and that McNeil had targeted her to do the task because Houston was an African-American nurse. We conclude that the summary judgment evidence does not reveal that discrimination had anything to do with McNeil's actions in requesting Houston to push patient stretchers.

Once a plaintiff shows a prima facie case of discrimination, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the allegedly discriminatory action.[22] If the defendant meets this burden of production, the plaintiff must then prove by a preponderance of the evidence that the defendant's proffered reason was not true and that it merely served as a pretext for unlawful discrimination.[23] The plaintiff retains at all times the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.[24] If the plaintiff does not present sufficient evidence for a jury

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[22]McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817, 1824 (1973).

[23]See St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747 (1993); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

[24]See Texas Dep't of Community Affairs v. Burdine, 101 S.Ct. 1089, 1093 (1981).

to find that the protected status motivated the defendant's actions, or if the evidence the plaintiff offers is merely colorable or is not significantly probative, summary judgment for the defendant is appropriate.[25]

Houston did not produce any evidence showing that McNeil's motivation for ordering Houston to push the stretchers was discriminatory. On the contrary, the summary judgment evidence reveals that more efficient handling of patients was the reason McNeil asked Houston to help push stretchers. Defendant McNeil stated in her affidavit that orderlies at the hospital usually pushed patients on stretchers into the operating room, but first had to don head and shoe covers to preserve the sterile environment, thereby delaying the surgeries. As the surgical nurses were already prepared to enter the operating room, their assistance in pushing the stretchers sped up the process of moving patients, thereby expediting the surgical process.

Houston admitted in her deposition that the hospital wanted to move patients into the operating room faster, corroborating McNeil's statements. She also conceded that, from the outset of her employment with All Saints, she was always required to assist in pushing stretchers. McNeil testified that as a surgical nurse, Houston was a logical person from whom to seek assistance in pushing stretchers. Houston does not refute this testimony; neither does she present any evidence of discrimination, either

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[25]See Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986).

direct or circumstantial. Thus, we uphold the district court's conclusion that Houston has failed to show that McNeil harbored a discriminatory motive in requesting that she push stretchers.

D. RETALIATORY DISCHARGE

Houston also contends that All Saints terminated her employment in retaliation for her filing an EEOC charge of discrimination and a workers' compensation claim with the TWCC. A plaintiff alleging retaliatory discharge bears the initial burden of showing a prima facie case of the employer's retaliatory conduct, after which the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for discharging the employee.[26] As noted previously in our discussion of Houston's discrimination claim, once the employer meets this burden, the plaintiff has the burden of demonstrating that the employer's reason was merely a pretext for discrimination.[27]

Houston does not present any evidence of a causal nexus between her filings and her termination, an indispensable element of a prima facie case of retaliatory discharge.[28] She merely

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[26]See McDonnell, 93 S.Ct. at 1824; Burdine, 101 S.Ct. at 1094-95 (1981); Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1300 (5th Cir. 1994), cert. denied, 115 S.Ct. 1099 (1995).

[27]See McDonnell, 93 S.Ct. at 1825.

[28]See Anderson, 26 F.3d at 1300; Parham v. Carrier Corp., 9 F.3d 383, 389 (5th Cir. 1993); Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559, 562-63 (5th Cir. 1992); Jones v. Roadway Express, Inc., 931 F.2d 1086, 1090 (5th Cir. 1991).

states that All Saints must have known that she filed a workers' compensation claim and an EEOC charge, and that, therefore, her filings must have been the reason she was terminated. This is obviously an unavailing leap of logic: An employer's knowledge of a plaintiff's participation in a protected activity, without more, is insufficient to show a causal connection between the plaintiff's participation in the activity and the adverse employment action.[29]

In addition, a review of the summary judgment evidence indicates that Houston's employment was terminated for no other reason than a neutral and consistent application of All Saints' absence control policy, which mandates an employee's discharge after a one-year leave of absence. Houston does not allege that All Saints applied the absence policy in a disparate manner. In fact, All Saints submitted evidence that all employees who were placed on leave in 1992 and did not return to work were terminated in 1993 under the absence control policy, regardless of the reasons for their absences. And, Houston's conclusionary allegations to the contrary notwithstanding, no evidence in the record shows that All Saints harbored any hostility towards

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[29]See Parham, 9 F.3d at 387 (rejecting plaintiff's assertion that employer's knowledge that employee had filed workers' compensation claim, standing on its own, was sufficient evidence of retaliatory motive); see e.g., Paragon Hotel Corp. v. Ramirez, 783 S.W.2d 654, 658-60 (Tex.App.-El Paso 1989)(in reviewing sufficiency of evidence for retaliatory discharge verdict, court looked not only to employer's knowledge of compensation claim, but employer's expression of negative attitude toward worker's injury, failure to adhere to company policies, and disparate treatment of other employees who were similarly situated but not discharged).

Houston as a result of her having filed a workers' compensation claim and an EEOC charge. Contrary to Houston's contention, All Saints's facially neutral letter to Houston advising her that she had been placed on "non-active status" does not in itself imply any retaliation, as the evidence reveals that it was sent pursuant to the hospital's standard, automatic procedure for discharging employees who were absent for more than a year.

In a feckless effort to support her argument, Houston stresses that, contrary to All Saints' statement in its pre-termination letter to Houston, the TWCC did not rule that she had reached MMI on June 1, 1992. All Saints used the MMI date as the starting point for Houston's one-year leave of absence and stated in its deposition that Houston was terminated because she failed to report for work by June 1, 1993. But even if All Saints' adoption of the June 1, 1992 MMI date for calculating Houston's leave of absence was in error, that mistake is irrelevant to a determination whether a prima facie case of discrimination exists.[30] Indeed, we have previously held that an employer's incorrect but sincere and reasonable belief that it had a valid reason to discharge an employee negates a finding that the termination was due to the employee's participation in a protected activity, i.e., filing a workers' compensation claim or

[30]See Jeffries v. Harris Co. Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980)(employer's sincere belief in confidentiality of documents that employee copied and disseminated justified employee's termination, and correctness of employer's belief was irrelevant to discrimination question).

an EEOC charge.[31] As Houston has failed to produce any summary judgment evidence of a causal connection between her filings and her discharge, no genuine issue as to any material fact exists for her retaliatory discharge claim.

Houston also asserts on appeal that the district court should have remanded her retaliatory discharge claim to the state court, as one of the grounds of that claim is based on Texas workers' compensation laws.[32] Under 28 U.S.C. § 1445(c), a defendant may not remove a civil action arising under a state's workers' compensation laws.[33] If the Defendants-Appellees' removal of Houston's retaliatory discharge claim was thus defective, the defect was procedural, requiring Houston to move for remand within thirty days.[34] As Houston never objected to the removal, she waived any procedural defect in the removal process and therefore forfeited any right to a remand.

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[31]See Dickerson v. Metropolitan Dade Co., 659 F.2d 574, 581 (5th Cir. Unit B Oct. 19, 1981)(observing that even if employer was wrong in its evaluation of employee's absenteeism, it did not violate Title VII if it acted on reasonable belief); Corley v. Jackson Police Dep't, 639 F.2d 1296, 1298 (5th Cir. Unit A Mar. 19, 1981)(recognizing that mistaken but good-faith belief that employee violated employer's rules is sufficient to rebut McDonnell Douglas inference that employee's discharge was for impermissible reasons).

[32]See Jones v. Roadway Express, Inc., 931 F.2d 1086, 1091-92 (5th Cir. 1991)(holding that a claim based on Tex. Rev. Civ. Stat. Ann. art. 8307c, prohibiting retaliatory discharge, arises under workers' compensation laws of Texas).

[33]Section 1445(c) states, "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

[34]See Williams v. AC Spark Plugs Div. of General Motors Corp., 985 F.2d 783, 787-88 (5th Cir. 1993).

III

CONCLUSION

As we find that Houston has failed to show the existence of any genuine issue of material fact for her claims alleging unlawful employment practices, the district court's grant of summary judgment is

AFFIRMED.