

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20031
Summary Calendar

KATHERINE HODGES,

Plaintiff-Appellee,

VERSUS

THE CITY OF HOUSTON, et al.,

Defendants

E. J. STRINGFELLOW, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1749)

(August 30, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Certain supervisory employees of the City of Houston ("City")
appeal from the district court's denial of their motion for summary

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

judgment on the issue of qualified immunity. Concluding that the district court erroneously denied the motion, we reverse and remand.

I.

Katherine Hodges, a black female, alleged race and sex discrimination in her employment as a uniformed marshal in the Houston City Marshal's Office, seeking monetary and injunctive relief under 28 U.S.C. §§ 1981, 1983, 1988, and 2000e. According to Hodges, the defendants¹ wrongfully restricted her employment duties by ordering her not to wear a City Marshal's uniform, not to drive a City Marshal's vehicle, and not to work extra jobs. The defendants respond that they were complying with Hodges's personal physician's recommendation that she be re-assigned to "inside office duties" and that the restrictions on her employment were consistent with Hodges's personal safety.

Although Hodges does not contest that her physician had recommended lighter duties, she alleges that the city treated her differently from other officers who were plagued by medical limitations or disabilities. Hodges alleges a handful of other incidents that she believes create a pattern of race- and sex-based discriminatory practices on the part of her supervisors.

Believing that they were entitled to qualified immunity, the individual defendants filed a motion for summary judgment on all

¹ The individual defendants are E.J. Stringfellow, R.D. Lynn, Jr., and Greg Hunstsman.

constitutional claims. The district court denied the motion, and this appeal follows pursuant to Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

II.

We review the denial of summary judgment de novo. Thomas v. Price, 975 F.2d 231, 235 (5th Cir. 1992). In order to avoid summary judgment, the nonmoving party must present affirmative evidence that creates a factual issue regarding the existence of each and all elements of the allegation for which that party would have the burden of proof at trial. "Unsubstantiated assertions of an actual dispute will not suffice." Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

Summary judgment claims involving qualified immunity are reviewed initially with respect to the substantive constitutional question))whether plaintiff has asserted a violation of a clearly established constitutional right. Duckett v. City of Cedar Park, 950 F.2d 272, 278 (5th Cir. 1992). Only after the court has determined that plaintiff has sufficiently stated a claim will the court address the qualified immunity issue))whether the right was clearly established at the time the violation occurred. Correa v. Fischer, 982 F.2d 931, 933 (5th Cir. 1993); see also Siegert v. Gilley, 500 U.S. 226, 231-32 (1991).

In determining whether a plaintiff has invoked a clearly-established right, the appropriate inquiry is whether "[t]he contours of the right [are] sufficiently clear that a reasonable

official would understand that what he is doing violates the right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). "Thus, even if a defendant's conduct actually violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity if the conduct was objectively reasonable." Pfannistiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990) (citation omitted). On appeal from an order denying summary judgment, "the plaintiff has the burden to produce summary judgment evidence sufficient to create a genuine issue as to whether the defendant's conduct was objectively unreasonable in light of clearly established law." Id.

Hodges has not produced sufficient evidence to create a genuine issue as to whether the City's conduct violated clearly established rights. Viewing the evidence most favorable to Hodges, we discern her only affirmative evidence to be the deposition testimony of Lynn, one of her supervisors.

Upon direct questioning by Hodges, Lynn averred that other marshals with medical handicaps who were of a different sex and/or race than Hodges enjoyed some of the employment privileges denied Hodges. The testimony does not, however, provide a basis for any inference that (1) the other marshals had medical or physical limitations similar to Hodges's; (2) the other marshals had direct orders from their physicians requesting inside office duties; (3) the city's actions were inconsistent with its proffered rationale of protecting the safety of Hodges and others around her; or (4) the city's actions were predicated on any racial or sex bias

against Hodges.

Hodges offers only the allegations in her first amended complaint to support her contentions of racial or sex animus or of the city's false pretenses for limiting her employment activities. We agree with Hodges that discriminating against her under the pretense that the city was following her physician's medical advice would provide her sufficient basis with which to defeat qualified immunity; absent any affirmative evidence to the contrary, however, we refuse to speculate about possible impermissible motives. FED. R. CIV. P. 56(c) does not permit Hodges to rely upon the mere pleadings to satisfy her summary judgment burden. Celotex, 477 U.S. at 324.

Hodges's citations to Johnston v. City of Houston, 14 F.3d 1056 (5th Cir. 1993), and Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303 (5th Cir. 1987), do not compel a different result. In Johnston we held that where both parties had submitted proper summary judgment evidence to corroborate each of their versions of the facts, a genuine issue of fact existed sufficient to deny summary judgment. Johnston, 14 F.3d at 1061. In this case, however, Hodges has rested on her pleadings, an insubstantial form of evidentiary material with which to oppose a summary judgment motion. Similarly, the right involved in Jefferson)the right of a child not to be shackled to a chair during the school day))was sufficiently protected under existing law; reasonable persons would not differ as to its interpretation. In contrast, we agree with the city that, absent proof that would create a genuine issue as to

racial or sex-based animus aimed at Hodges, reasonable persons could disagree as to whether following a physician's orders violates clearly established rights.

Concluding that Hodges has not satisfied her burden of creating a genuine issue as to the violation of a clearly established right, we REVERSE.