UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-50019

(Summary Calendar)

MICHELLE GREEN,

Plaintiff-Appellant,

versus

ALAMO COMMUNITY COLLEGE
DISTRICT and TERRY HOFFMAN,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA 93 CV 400)

(August 22, 1994)

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

PER CURIAM:*

Plaintiff Michelle Green sued her former employer, Alamo Community College District and her former supervisor, Terrie Hoffman, claiming that they illegally terminated her because of her race. The district court granted the defendant's motion for summary judgement and Green now appeals. We affirm.

I

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Green, a black female, worked for defendant Alamo Community College District as a clerk typist in the police security department located on the campus of St. Philip's College. Green resigned her employment under threat of termination after she admitted that she had stolen a pouch that had been turned in to the lost and found room at the security office. Green subsequently filed suit under Title VII of the Civil Rights Act 42 U.S.C. § 2000e (1988).[1] Green alleges that she was discriminated against because another employee, Eva Martinez, a Hispanic female, had committed similar acts without being asked to resign under threat of termination.

The district court granted summary judgment for the defendants, finding that no genuine issue of material fact existed because Green failed to produce any evidence suggesting that the defendants acted because of her race. On appeal, Green claims that the district court failed to consider evidence that indicated that Hoffman knew of possible stealing by another employee. Green alleges that this evidence raises an issue of material fact, thereby precluding summary judgement.

II

We review the district court decision to grant summary judgement *de novo*, applying the same standard as the district

[1] Green also asserted a claim for intentional infliction of emotional distress. The district court granted summary judgment for the defendants on this claim, and Green does not challenge that ruling.

court.[2] *Armstrong v. City of Dallas*, 997 F.2d 62, 65 (5th Cir. 1993). Title VII of the Civil Rights Act makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's race." 42 U.S.C. § 2000e-2. To establish a prima facie case of race discrimination, a plaintiff must demonstrate that (1) she is a member of a protected group; (2) she was qualified for the job that she held; (3) she was discharged; and (4) after her discharge, her employer filled the position with a person who is not a member of the protected group. *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990). If the plaintiff establishes a prima facie case, she raises a presumption of discrimination, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981), and the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). The defendant may meet this burden by presenting evidence

[2] A motion for summary judgement will be granted if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to judgement as a matter of law." Fed. R. Civ. P. 56. The party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 310, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the party seeking summary judgement carries its initial burden, the non-moving party must show that summary judgement should not be granted. *Id.* Although we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), the non-moving party cannot rest upon the mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986). Summary judgement will not be granted if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248, 106 S. Ct. at 2510.

that, "*if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks,* ___ U.S. ___, 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993). If the defendant meets its burden, the presumption raised by the plaintiff's prima facie case disappears. *Burdine,* 450 U.S. at 255 & n.10, 101 S. Ct. at 1095 & n.10. The plaintiff then has the opportunity to demonstrate, through presentation of her own case and through cross-examination of the defendant's witnesses, that the proffered reason was not the true reason for the employment decision and that race was. *St. Mary's*, 113 S. Ct. at 2747; *Bodenheimer*, 5 F.3d at 957.

Assuming *arguendo* that Green has established a prima facie case, the defendants were required to articulate a legitimate, non-discriminatory reason for asking Green to resign under threat of termination. Here, the defendants assert that they "terminated" Green because she stole an item from the security office. Thus, the defendants have offered a legitimate, non-discriminatory reason for asking Green to resign under threat of termination. To avoid summary judgement, Green must demonstrate that the reason given is pretextual. *See Atkin v. Lincoln Property Co.*, 991 F.2d 268 (5th Cir. 1993); *Moore v. Eli Lilly & Co.*, 990 F.2d 812 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 467, 126 L. Ed. 2d 419 (1993). Green admits that she was forced to resign for taking the pouch from the property room. She contends, however, that another employee, not of her race, also took items from the property room and was not asked to resign. *See Little v. Republic Refining Co.,*

Ltd., 924 F.2d 93, 97 (5th Cir. 1991)(noting that if an employer gives preferential treatment to employees not of plaintiff's race under "nearly identical" circumstances, a finding of discrimination will be upheld).

After carefully reviewing the record, we conclude that Green has not put forth any evidence tending to show that other employees, not of her race were given preferential treatment under "nearly identical" circumstances. Although Green asserts that her deposition testimony supports the conclusion that Hoffman knew that a Hispanic woman had taken property from the security office, we find her position to be without merit. A most liberal reading of Green's deposition testimony demonstrates only that Hoffman gave the employee permission to remove items from the security office.[3] That situation is quite different from the facts of this case as Green took property from the security office without seeking Hoffman's permission. Because Green has not introduced any evidence suggesting that the defendants' proffered explanation for their action was pretextual, the district court properly granted summary judgement for the defendants. *See Moore,* 990 F.2d 812.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[3] A more plausible reading of Green's testimony would be that Hoffman was unaware of any employee removing items from the security office.