IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50047

Summary Calendar

GLORIA RAMIREZ,

Plaintiff-Appellant,

v.

CITY OF ODESSA, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(M0-93-CV-93)

(October 14, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Gloria Ramirez ("Ramirez") appeals the district court's grant of summary judgment in favor of defendant City of Odessa, Texas ("City") in her suit alleging sexual discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Ramirez argues that the district court erred in granting summary judgment for City because there were

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

genuine issues of material fact concerning whether City's proffered justification for dismissing Ramirez was pretextual. Because our plenary review of the summary judgment evidence leads us to agree with the district court's grant of summary judgment, we affirm.

I. BACKGROUND

A. Factual Background.

Ramirez, an Hispanic female, began working for the City of Odessa on December 19, 1977. She received satisfactory evaluations and was ultimately promoted to the post of Sanitation Operations Supervisor. In September 1989, City adopted a stringent new alcohol and drug policy in order to comply with the Federal Drug Free Workplace Act. This policy required, *inter alia*, all city employees to report vehicular accidents within two hours, regardless of the amount of damage. The purpose of the reporting requirement was to enable City to conduct timely alcohol and drug tests on employees involved in accidents, as well as to minimize liability exposure and to preserve evidence of accidents. Failure to timely report any accident was grounds for suspension. By contrast, failure of the drug or alcohol test was grounds for dismissal.

In November 1989, Ramirez was suspended without pay for four days for failing to investigate an accident reported by a subordinate. Ramirez did not fill out an accident report as required by City's drug and alcohol policy, nor did she require

the subordinate to undergo a drug or alcohol test. The subordinate, a male truck driver, received a three-day suspension. Another male supervisor, who also failed to investigate the accident, received the same four-day suspension as Ramirez.

Because City's policy imposed severe consequences for failing a drug or alcohol test--termination of employment--but merely imposed suspension for failing to report an accident, the policy had the unintended effect of encouraging employees involved in accidents to keep mum. By remaining silent after an accident, the maximum penalty an employee faced was suspension. On the other hand, reporting an accident exposed the employee to a mandatory alcohol or drug test which, if failed, would result in dismissal. To remedy this perverse incentive, the Director of Administrative Services, Tom Cody ("Cody"), revised the policy to equalize the penalties for failure to report and failure of a drug or alcohol test, thereby making both violations grounds for termination.

After this change in policy became effective, Ramirez hit a mobile home "tie-down" while driving a city car through a vacant lot. Ramirez and two subordinates, who were passengers in the car, got out, inspected the vehicle, and successfully maneuvered the car away from the tie-down. Ramirez never reported the incident, believing it was not an "accident" because she could not discern any damage to the vehicle. Her fellow passengers, however, concluded that it was an accident and reported it.

Cody, Ramirez's supervisor, ordered the car inspected and determined that deep scratches on the underside of the car were caused by contact with the trailer tie-down. Following a pretermination hearing, Ramirez was dismissed for failure to report an accident in violation of the drug and alcohol policy. Ramirez filed a timely complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging her discharge was motivated discrimination based upon gender and national origin. The EEOC rejected both claims. Ramirez then sought injunctive and compensatory relief in the United States District Court, which granted summary judgment for City on grounds that Ramirez had failed to provide sufficient evidence of discriminatory animus for a rational trier of fact to permit recovery.

On appeal, Ramirez asserts that circumstances preceding her dismissal provide sufficient direct evidence of sexual discrimination to create a genuine issue of material fact as to discriminatory animus. Her national origin discrimination claim, also rejected by the district court, has not been appealed. We turn now to the facts put forth by Ramirez which she asserts create a triable issue as to discriminatory animus.

B. Evidence of Discriminatory Animus.

The evidence proffered by Ramirez to support her sexual discrimination claim is essentially of two types: (1) remarks by various officials of the City, and (2) less severe discipline imposed against male employees for workplace policy violations.

Specifically, Ramirez presented evidence that approximately one year prior to her termination, the Director of Public Works, Bobby Tucker ("Tucker"), told her that she "needed to be careful" because recent departmental consolidation had resulted in the dismissal of several female managers. Tucker also informed Ramirez that Bill Brown, the City Manager, "did not think highly of women [in] managerial positions." And finally, Tucker told Ramirez that Bob Derrington, Ramirez's supervisor at the time, had ordered Tucker to fire Ramirez, stating, "Just get rid of her. She is a woman, you need to get rid of her." Ramirez also asserts that several male sanitation department employees received more lenient discipline for allegedly analogous workplace policy violations.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo to determine whether the pleadings, discovery, and affidavits before the district court indicate that there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Brewer v. Wilkinson, 3 F.3d 816, 819 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994); Moore v. Eli Lilly & Co., 990 F.2d 812, 815 (5th Cir.), cert. denied, 114 S. Ct. 467 (1993); Hansen v. Continental Ins. Co., 940 F.2d 971, 975 (5th Cir. 1991). In so doing, we view all factual questions in the light most favorable to the non-movant.

Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994); Moore, 990 F.2d at 815; Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 189 (5th Cir. 1991). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In a non-jury case (such as this one), in which the district court is also the factfinder, the judge has somewhat greater leeway to grant summary judgment. Matter of Placid Oil Co., 932 F.2d 394, 398 (5th Cir. 1991). With these precepts in mind, we now turn to the case at hand.

III. ANALYSIS

The district court determined that Ramirez had established a prima facie case of sexual discrimination through indirect evidence. Ramirez contends, however, that her proof constituted *direct*, not indirect, evidence of discriminatory animus, and that she is therefore entitled to shift the burden of proof onto the City to prove that her discharge was motivated by legitimate, nondiscriminatory reasons.[1] In support of this argument, Ramirez

[1] In Title VII direct evidence cases, the framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) is inapplicable; thus, a direct evidence plaintiff may shift the burden of *proof* onto the defendant to prove that dismissal was *not* motivated by discrimination. Transworld Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); Moore v. Eli Lilly & Co., 990 F.2d 812, 815 (5th Cir. 1993), cert. denied, 114 S. Ct. 467 (1993). For indirect evidence cases, by contrast, the McDonnell Douglas-Burdine framework applies and the plaintiff must affirmatively prove discriminatory intent.

points to her claims that Tucker told her that she "needed to be careful," that the City Manager "did not think highly of women managerial positions," and that a former supervisor had ordered Tucker to "just get rid of her. She is a woman, you need to get rid of her."

The district court conducted a careful analysis of Ramirez's proof and determined that these remarks were insufficient to constitute direct evidence. We agree. Direct evidence is evidence which, if believed, proves discriminatory animus without inference or presumption. Brown v. East Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993). As the Supreme Court stated in Price Waterhouse, 490 U.S. 228 (1989) (plurality), "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision." Id. at 251; id. at 277 (O'Connor, J., concurring). While such stray remarks may be probative of discriminatory animus, id., they are not so egregious that, standing alone, they can suffice to shift the burden of proof to the defendant.

As Ramirez cannot offer direct evidence of sexual discrimination, the district court correctly analyzed her case as one requiring the three-step analytical framework outlined by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under this framework, a Title VII plaintiff must first establish a prima facie case that: (1) she was dismissed; (2) she was qualified for the position; (3) she was within a

protected class at the time of dismissal; and (4) that employees outside the protected class were treated more favorably. McDonnell Douglas, 411 U.S. at 802; Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993); Waggoner v. City of Garland, 987 F.2d 1160, 1163-64 (5th Cir. 1993); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638 n.4, 639 (5th Cir. 1985). The district court found that Ramirez had successfully established a prima facie case.

Once a prima facie case is established, the second step of the McDonnell Douglas-Burdine framework shifts the burden of *production* to the defendant to articulate a legitimate, nondiscriminatory reason for the dismissal. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978) (per curiam); McDonnell Douglas, 411 U.S. at 802; Bodenheimer, 5 F.3d at 957. In this case, City's proffered legitimate reason for terminating Ramirez was her failure to report an accident.[2] At this point, Ramirez's prima facie presumption of sexual

[2] Ramirez argues that she did *not* have an "accident" within the meaning of the City's drug and alcohol policy and that her actions cannot therefore constitute a "legitimate" reason for dismissal. This contention distorts the inquiry. The issue for the district court (and this court on appeal) is not whether Ramirez did, in fact, violate City policy, but whether the City used the alleged violation as a pretext for discrimination. If an employer, in good faith, believes an employee violated a policy and terminates the employee as a result, that is sufficient to satisfy the employer's burden of production. Even if the employer's reasonable belief turns out to be incorrect, it will not retrospectively alter the legitimacy of the discharge for Title VII purposes. Moore, 990 F.2d at 16; Waggoner, 987 F.2d at 1165. As Ramirez has presented no proof that City's determination that she had an "accident" was unreasonable or in bad faith, the district court appropriately considered the City's proffered justification to be legitimate.

discrimination "drop[ped] out of the picture," St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2749 (1993), and Ramirez bore the burden of proving that City's articulated reason was a pretext for intentional sexual discrimination. Id.; McDonnell Douglas, 411 U.S. at 253; Burdine, 450 U.S. at 256; Guthrie, 941 F.2d at 378.

Having found that City articulated a legitimate, nondiscriminatory reason for dismissing Ramirez, the district court then proceeded to address the ultimate question on City's motion for summary judgment: did Ramirez's evidence raise a genuine issue of material fact which would permit a reasonable factfinder to conclude that City dismissed her because of her gender? In answering this question "no," the district court determined that Ramirez's evidence of disparate enforcement of the alcohol and drug policy was not sufficiently analogous to permit a reasonable inference of discriminatory animus. In particular, the district court held that the male employees who were alleged to have been more leniently treated were not similarly situated to Ramirez because: (1) they had no previous violation of City policy; (2) they were determined not to have had an "accident" within the meaning of the City policy; (3) they were not in supervisory positions requiring a higher standard of conduct; or (4) they were disciplined by a different decisionmaker than the one who dismissed Ramirez. Furthermore, the district court implicitly found that any inference of discriminatory animus raised by this proof was negated by

evidence that: (1) three male employees were also dismissed for failure to report an accident, and (2) of eleven dismissals in the year preceding Ramirez's dismissal, only one was female. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (holding summary judgment is appropriate if moving party submits evidence which negates material element of opponent's claim).

Furthermore, the stray remarks made by Ramirez's co-workers are not sufficient to prove that her dismissal was pretextual. The remarks were not corroborated by any witness other than Ramirez, they occurred approximately one year prior to her dismissal, and they were made by individuals who did not have a direct role in her dismissal. This court has long held that "[c]omments which are vague and remote in time and administrative hierarchy . . . are no more than `stray remarks' which are insufficient to establish discrimination." Atkin v. Lincoln Property Co., 991 F.2d 268, 272 (5th Cir. 1993); Guthrie v. Tifco Indus., Inc., 941 F.2d 374, 379 (5th Cir. 1991), cert. denied, 112 S. Ct. 1267 (1992); Normand v. Research Inst. of Am., Inc., 927 F.2d 857, 864 n.3 (5th Cir. 1991); Young v. City of Houston, 906 F.2d 177, 182 (5th Cir. 1990). Ramirez has not offered any evidence that Cody, the decisionmaker in her dismissal, ever heard these comments, much less that these comments are causally linked to her dismissal.

In light of these facts, the district court concluded that Ramirez could not meet her burden of proving that the City fired her based upon her sex; hence, Ramirez failed to create a

reasonable factual question for the jury. We agree with the district court's analysis. To survive summary judgment, a Title VII plaintiff must offer some evidence that would create a reasonable factual inference of discriminatory animus. Evidence of stray remarks is insufficient. Likewise, evidence regarding the treatment accorded fellow employees with different positions, different work histories, different kinds of violations, or who were disciplined by different decisionmakers is not sufficiently analogous for a reasonable factfinder to draw an inference of discriminatory intent.

Because our review of the summary judgment evidence satisfies us that Ramirez failed to create a reasonable inference of discrimination based upon sex, we accordingly AFFIRM.