UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50360
Summary Calendar

THERESA PINKSTON,

Plaintiff-Appellant,

VERSUS

SOUTHWEST RESEARCH INSTITUTE,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CV-384 c/w SA-93-CV-442)

(December 14, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

Plaintiff Theresa Pinkston appeals a summary judgment in favor of Defendant Southwest Research Institute (SwRI) denying relief on her claims of sex discrimination and disability discrimination. We affirm.

I. Background.

Plaintiff alleged sex and disability discrimination under the Texas Commission on Human Rights Act (TCHRA), Tex. Rev. Civ. Stat. Ann. art. 5221(k) (now Tex. Lab. Code Ann. §§ 21.00-21.306 (Vernon

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Supp. 1994)) and violations of the Americans With Disability Act (ADA), Title 42 U.S.C. § 12101-12213 (West Supp. 1994). Working in the capacity as a Senior Technician in the transducer manufacturing division of SwRI, Plaintiff took pregnancy leave which was later extended from April to August 1990 due to contraction of a disease. During her absence, a male, Darryl Wagar, became a Senior Technician assigned to transducer work. When Plaintiff returned to work, her own job duties changed; she was assigned the responsibility of creating file histories on the transducers produced in the fabrication laboratory. She received no cut in pay and her job title did not change. A short time following her return, she received a poor performance review.

In early November 1990, Plaintiff received notice that she was included in a reduction-in-force in her division and that her employment would terminate in 90 days if she could not locate an alternate position with the company. Before the 90 days elapsed, Plaintiff left SwRI on long-term disability. Upon returning to employment in December 1992, Plaintiff had 30 days remaining within which to locate alternative employment within the company. She was unable to find alternative employment and was terminated in January 1993. In this suit she alleges that SwRI improperly terminated her employment, selecting her for a reduction-in-force because of her sex and disability, and refused to give her another opportunity for employment due to her disability.

We review the district court's ruling on the motion for summary judgment de novo, applying the same standards as those that

govern the district court's determination. Waltman v. International Paper Co., 875 F.2d 468, 475 (5th Cir. 1989). Where a plaintiff has the burden of proving an essential element of her case and does not make a showing sufficient to establish the existence of that element, there is no genuine issue as to a material fact; "a complete failure of proof concerning an essential element of the [plaintiff]'s case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

II. TCHRA Sex Discrimination.

To establish a prima facie case of discriminatory termination, a plaintiff is required to show that (1) she is a member of a protected minority; (2) she was qualified for the job from which she was discharged; (3) she was discharged; and (4) after discharge, her employer filled the position with a non-minority. Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979); Vaughn v. Edel, 918 F.2d 517, 521 (5th Cir. 1990). Establishment of the prima facie case creates a presumption that the employer unlawfully discriminated against the plaintiff. St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747 (1993). If the defendant meets Plaintiff's prima facie case with a legitimate non-discriminatory reason for its action, then the defendant rebuts that presumption. Id. The plaintiff bears the ultimate burden of proving the employer intentionally discriminated against her because of her sex. Id.; see also Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992). In the summary judgment context, we

need not determine whether plaintiff actually proved intentional discrimination; rather, we assess whether she made a showing sufficient to establish the existence of that essential element of her case. See Celotex, 477 U.S. at 323.

Plaintiff's sex discrimination claim is based on a few arguably sexist remarks scattered over a seven-year period by a supervisor, Don Jolly, who was not involved in the decision to terminate Plaintiff. See Pl.'s dep. (Def.'s ex. A) at 120-35. These remarks cannot sufficiently establish sex discrimination. See Guthrie v. Tifco Indus., 941 F.2d 374, 379 (5th Cir. 1991) (holding, on summary judgment, that comments which are vague and remote in time and administrative hierarchy constitute no more than "stray remarks" insufficient to establish discrimination), cert. denied, 112 S.Ct. 1267 (1992). By Plaintiff's own testimony, the poor performance review by Jolly included no disciplinary action. Plaintiff's altered duties upon her return from leave involved no change in her title, wages, or benefits. The male employee whose title changed to Senior Technician when Plaintiff was on leave earned that title because of his own demonstration of proficiency and experience, independent of the fact that Plaintiff was on leave; an employer does not attain that title only when there is a "position to fill." Jolly dep. (Def.'s Ex. U) at 44-46; see also 1 R. 161. None of this evidence, viewed in a light most favorable to Plaintiff, would lead a jury to find discriminatory intent.

III. TCHRA Disability Discrimination.

Plaintiff's prima facie showing of disability discrimination under the TCHRA is that (1) she is handicapped; (2) she was discriminated against on the basis of her handicap; and (3) that adverse employment action occurred under circumstances giving rise to the inference that the action was based solely on her handicap. See Elstner v. Southwestern Bell Tel. Co., 659 F.Supp. 1328, 1345 (S.D. Tex. 1987), aff'd, 863 F.2d 881 (5th Cir. 1988). The district court found that Plaintiff could not establish that her selection for reduction in force occurred under circumstances implying her termination solely because of disability.

We agree. The uncontroverted facts indicate that, at the time the SwRI director recommended eliminating Plaintiff from her department, he had no idea that she had any disability. See Jackson aff. (Def.'s ex. O) at 2. Moreover, four nondisabled employees were similarly affected. Id. Plaintiff has failed to make a showing sufficient to establish that she was terminated under circumstances giving rise to an inference that the termination was based solely on her handicap.

IV. ADA Discrimination Claim.

Plaintiff's ADA claims are that Defendant improperly terminated her and did not give her another opportunity for employment due to her disability. Plaintiff was originally given 90 days' notice of her termination in November 1990 due to a reduction-in-force decision. Having taken long-term disability leave before the 90 days lapsed, she returned to active status in December 1992 and commenced running the remainder of the 90 days.

Accordingly, the original November 1990 termination decision did not take effect in until January 1993.

Plaintiff received notice of her termination in November 1990. The ADA became effective after she received such notice, and the ADA is not to be given retroactive effect. O'Bryant v. City of Midland, 9 F.3d 421, 422 (5th Cir. 1993); see also Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) (recognizing the proper focus as the time of the discriminatory act, not the time when the consequences of the act become most painful).

Additionally, Plaintiff has identified no other event surrounding her 1992 reinstatement and her January 1993 termination that could constitute disability discrimination. Although SwRI's personnel director William Crumlett allegedly expressed uncertainty about whether Plaintiff would be able to return to work, the context of his remark was the admitted uncertainty in Dr. Eastman's evaluation of the Plaintiff as "intermittently disabled."[2] He was

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[2] The district court considered the following unsworn tape-recorded conversation:

> **Crumlett**: Well, it doesn't sound to me like . . . you could--almost like you could return to any type of position. . . . I guess that's what we'll have to decide in consultation with Dr. Craig [SwRI's retained physician] . . . .
>
> Now, once we have kind of an idea of exactly what your situation would be or restrictions or limitations, then you'd probably be working with one of my recruiters . . . .
>
> **Pinkston**: . . . I thought this was [a letter to go back to work].
>
> **Crumlett**: . . . I guess I'm just not sure exactly what this means, okay? . . . [Y]ou gave me this [letter from your doctor saying "Symptoms wax and wane and she is intermittently disabled"] but this is not kind of an unconditional release. . . . How can I . . . tell a supervisor that an employee is going to be out maybe every other day . . . ? That's not what I would call a release to return to work. That's why I say I'm going to have to have it evaluated by Dr. Craig and see

advising her that he needed a consultation with a second doctor to understand more specifically Plaintiff's limitations and availability for work.[3] Viewed in context the conversation demonstrates Crumlett's willingness to obtain more information about Plaintiff's ability to return to work, not his rejection of her as a candidate for employment. Under these facts Plaintiff is entitled to no relief under the ADA.

V. Conclusion.

Summary judgment on behalf of SwRI was appropriate. The judgment of the district court is AFFIRMED.

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and I'll get back with you. . . .
1 R. 192, 193, 194, 198 (unauthenticated transcript).

[3] See transcript, supra n.2; see also Aff. Crumlett (Def. ex. E) at 2.