

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60448
Summary Calendar

SANDRA HINOJOSA,

Plaintiff-Appellant,

versus

JOSE LUIS MARTINEZ, PETER VARGAS, and
CITY OF LAREDO,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
(L-93-9)

(April 25, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

I

Sandra Hinojosa, the plaintiff and appellant, was hired by the Laredo, Texas Police Department. After successfully completing the police academy, she entered the Field Training Officer Program--a second program in which the cadet gains street experience by

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

working with senior officers. Hinojosa argues in her five-page brief that she "successfully completed" the sixteen-week Field Officer Training Program, but points to no evidence supporting this contention--and in fact it does not appear to be true.

The Chief of Police, Jose Luis Martinez, stated in his deposition that he ordered Hinojosa to undergo two weeks of remedial training after she completed the initial sixteen-week program because of his concerns of her "neglect of safety, failure to know the patrol district, problems with report writing, problems with not showing up for calls, and poor attitude." During this remedial training, Chief Martinez required Hinojosa to accompany an on-duty patrol officer for further observation and evaluation. Chief Martinez assigned Hinojosa to Mary Villarreal, a female patrol officer, after she encountered problems with the males to whom she was previously assigned. Following this remedial training program, Officer Villarreal stated in her final performance evaluation that Hinojosa continued to have the same problems that caused Chief Martinez to assign her to remedial training--most importantly, her neglect to officer safety. On this basis, Chief Martinez terminated Hinojosa's employment.

On December 28, 1992, Hinojosa filed a petition in Texas state court against the City of Laredo, Chief Martinez, and Peter Vargas, alleging various state and federal causes of action, including a claim of gender discrimination under 42 U.S.C. § 1983 in violation of the Equal Protection Clause of the Fourteenth Amendment of the

United States Constitution. The defendants timely removed the action to the United States District Court for the Southern District of Texas. On January 14, 1994, the district court granted the defendants' unopposed motion for summary judgment on all claims, except for the gender discrimination claim. In spite of Hinojosa's failure to ever present an argument on the gender discrimination claim, the court allowed the plaintiff additional time to demonstrate what evidence, if any, supported this claim. Hinojosa responded with affidavits and deposition excerpts, but nevertheless again made no argument in support of her claim. On March 9, the court granted the defendants' unopposed final motion for summary judgment on the only remaining claim before the court--gender discrimination in violation of the Equal Protection Clause--and dismissed Hinojosa's complaint. The court found "little in the record to support the Plaintiff's conclusory claim that she was terminated because she was female," considerable evidence of the defendant's legitimate, non-discriminatory grounds for discharging Hinojosa, and concluded that no genuine issue existed for trial. On March 21, Hinojosa filed a Motion for a New Trial under Rule 59 of the Federal Rules of Civil Procedure on her gender discrimination claim and included for the first time a three-page argument in support of this claim. On May 17, the district court denied Hinojosa's new trial motion for essentially the same reasons as given for granting summary judgment in favor of the defendants. On June 16, Hinojosa appealed the district court's final judgment

dismissing her complaint and later order denying her motion for new trial.

On appeal, Hinojosa argues only one issue: that she presented sufficient evidence to the district court of gender discrimination in violation of the Equal Protection Clause. She thus concludes that the district court erred in granting the defendants' motion for summary judgment and dismissing her case.

II

A

Because this is a case on appeal from the denial of a motion for summary judgment, we review the record de novo. Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1412 (5th Cir. 1993). Under Rule 56(c) of the Federal Rules of Civil Procedure, we examine evidence presented to determine that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994), cert. denied, 115 S.Ct. 639 (1994). We must review "the facts drawing all inferences most favorable to the party opposing the motion." Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994).

B

Section 1983 provides that "any person who, under color of state law, deprives another of 'any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured.'" Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1573-74 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990). Because section 1983 provides a remedy only for the rights it designates, an underlying constitutional violation is a predicate to liability under section 1983. Johnston, 869 F.2d at 1574. Hinojosa alleges that the defendants violated her rights under the Equal Protection Clause by terminating her because of her gender. To establish gender discrimination violative of the Equal Protection Clause in this case, Hinojosa must prove that she, as a female, was treated differently from other similarly situated male individuals. See Samaad v. City of Dallas, 940 F.2d 925, 940-41 (5th Cir. 1991)(finding that challenged government action does not deny equal protection if it does not distinguish between two or more relevant groups). Furthermore, Hinojosa must prove purposeful and intentional acts of discrimination based on her membership in a particular class, not just on an individual basis. See Personnel Admin. of Massachusetts v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (discriminatory purpose implies "a particular course of action [chosen] at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

In opposition to the defendants' motion for summary judgment on her gender discrimination claim, Hinojosa presented the following evidence, which she argued in her new trial motion created a genuine issue of material fact, defeating the defendants' summary judgment motion. Chief Martinez repeatedly referred to her as "la muchachita" meaning "little girl." Furthermore, only five of two hundred thirty-two officers in the Laredo Police Department are female. Additionally, Hinojosa was the only officer graduating from the Field Training Officer Program, later assigned to remedial training. During her remedial training, Chief Martinez reassigned Hinojosa to a female officer, admittedly after she experienced problems training under male officers. Officer Carlos Garcia, one of Hinojosa's field training officers, stated that this was the first female he had trained and that she had the attitude that she was going to be placed "like in a secretarial position." The officers observing Hinojosa in the Field Training Officer Program gave her acceptable evaluations and stated that she was doing well in the program. The officer observing her in the last phase of the regular program stated that Hinojosa did nothing to make him believe she could not adequately function as a police officer. Chief Martinez attempted to persuade Steven Perez, one of the Field Training Officer Program co-ordinators, to lower her evaluations from acceptable to unacceptable. Although Chief Martinez contends that he terminated her because of poor job performance on the

recommendation of Mary Villarreal, Villarreal denied making any such recommendation, stating rather that Hinojosa could overcome any shortcomings in her performance.

Our review of the record indicates, however, that Hinojosa unsuccessfully attempts to create a genuine issue of material fact by taking the statements of her observing officers, Chief Martinez, and the program co-ordinators out of the context in which they were made. The evidence showed, for example, that Chief Martinez referred to the male field training officers as "muchachito" and the females, as Hinojosa points out, as "muchachita." The evidence also showed that although some of Hinojosa's evaluations were acceptable, Hinojosa's performance was substandard. Furthermore, several of the officers supervising Hinojosa during her initial training period made complaints about her conduct as threatening to officer safety. Hinojosa repeatedly received low scores and several unacceptable notations on her evaluations from various supervising officers. Furthermore, Perez explained without contradiction that Chief Martinez's comments of altering Hinojosa's evaluation were made because of the inconsistency of one field training officer's review of Hinojosa--giving her low scores in individual categories, yet ranking her performance overall as acceptable. Chief Martinez observed in a Field Training Officer Program meeting that this evaluation should be altered in order to make the overall evaluation consistent with its subparts. Perez responded that because Hinojosa had signed the evaluation it could

not be altered, but that a supplemental report could be filed by the reporting officer making this change. In short, Perez testified that Hinojosa performed unacceptably in her initial training causing her to require remedial training, which effected no change in her inadequate performance. Additionally, Villarreal testified that she gave Hinojosa several unsatisfactory evaluations during the two-week time she observed Hinojosa as the remedial phase field training officer. Although Villarreal stated that she believed with more training Hinojosa could satisfactorily perform as an officer, she unequivocally stated that she felt Hinojosa was a serious threat to officer safety.

Viewing this evidence in the light most favorable to Hinojosa, as we must, we find that Hinojosa has failed to create a genuine issue of material fact concerning whether the defendants intentionally discriminated against her because of her gender in violation of the Equal Protection Clause. Although minor inconsistencies exist between the statements of her observing officers, Chief Martinez, and the program coordinators concerning her qualifications, these inconsistencies do not support her claim that she was intentionally terminated because she was a female in violation of the Equal Protection Clause. Most tellingly, she fails to adduce any evidence that similarly situated males were treated in a different manner from her. In sum, the evidence presented does not show any genuine issue of material fact concerning Hinojosa's discharge as a violation of the Equal

Protection Clause; in fact, except for Hinojosa's self serving and conclusionary averments, the evidence shows that even after receiving sixteen weeks of initial training and two weeks of remedial training, Hinojosa nevertheless was not qualified to act as a police officer at the time of her termination. Accordingly, the district court's judgment granting summary judgment in favor of the defendants and dismissing Hinojosa's complaint is¹

A F F I R M E D.

¹Furthermore, because we affirm the judgment of the district court dismissing this case, the defendants' motion to dismiss this appeal due to Hinojosa's failure to file her brief within the time provided in Rule 31 of the Federal Rules of Appellate Procedure is denied as moot.