Affirmed and Memorandum Opinion filed June 15, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01094-CV

PATRICE BARNES, Appellant

V.

PRAIRIE VIEW A&M UNIVERSITY, Appellee

On Appeal from the 506th Judicial District Court
Waller County, Texas
Trial Court Cause No. 11-10-21109

M E M O R A N D U M O P I N I O N

Appellant Patrice Barnes appeals the trial court's order granting summary judgment in favor of appellee Prairie View A&M University on Barnes's claim of employment discrimination based on hostile work environment. Barnes argues on appeal that the summary judgment evidence demonstrated a genuine issue of material fact that she was subjected to a hostile work environment. We conclude that the record includes evidence negating essential elements of a hostile work

environment, and Barnes did not raise a genuine issue of material fact regarding those elements. Specifically, the record indicates that most of the harassing conduct of which Barnes complains was not based on her race, and the remaining conduct was not objectively severe and pervasive enough to alter the terms, conditions, or privileges of her employment. We therefore affirm.

BACKGROUND

Barnes, an African-American female, was hired by Prairie View in 1994 as an extension agent in the Cooperative Extension Program (CEP). In Texas, two organizations affiliated with state educational institutions provide educational programs to farmers and ranchers. Those organizations are the CEP of Prairie View and the AgriLife Extension Service of Texas A&M University.[1] CEP serves families and individuals with limited resources, while AgriLife serves the entire Texas population. CEP agents and AgriLife agents work together in many offices across Texas. In these joint county offices, AgriLife employees supervise CEP agents.

In 2007, Barnes started making complaints about alleged harassment and a hostile work environment. Most of Barnes's complaints stemmed from interactions with and treatment by her AgriLife supervisor, Lupe Linderos, but also included incidents with other colleagues. Her complaints included a racial slur made by a colleague; a secretary telling a client to go to the "white" agent's office because Barnes's office is the "black" program; Linderos and other colleagues

[1] These two organizations were created in 1915 to bring the resources of the Agricultural and Mechanical College of Texas to bear upon problems faced by farmers and ranchers. The organizations' employees extended the College's scientific findings throughout the state and helped farmers and ranchers to use them. AgriLife was originally known as the Texas Agricultural Extension Service. *See* Irvin M. May, Jr., *Texas Agricultural Extension Service*, THE HANDBOOK OF TEXAS ONLINE, https://www.tshaonline.org/handbook/online/articles/amtpw (last modified Sept. 4, 2013).

degrading her in front of clients and taking over meetings, hiding paperwork and files, requiring Barnes to resubmit documents, and repeatedly asking Barnes the same questions in staff conferences; and Linderos refusing to sign documents needing approval.

Barnes's complaint regarding a racial slur involved an interaction with a colleague, Mike Shockey. Barnes alleged Shockey made a racist comment about "tar and feathering" while at a rodeo event. According to Barnes, workers were sawing through insulation, and Shockey said it looked like the workers were "having a good old-fashioned tar and feathering party" when the insulation fell and stuck to people below. Another agent asked what tar and feathering meant, and Barnes replied that tar and feathering was used against African-Americans in slavery or even more recently. Barnes alleges Shockey made the comment again after she explained what it meant.

CEP officials conducted an investigation and held a meeting to address Barnes's complaints. Barnes continued making complaints after the meeting, so in late 2009 her CEP supervisor authorized her to work from home. About four months later, Prairie View notified Barnes that her employment was terminated effective April 15, 2010.

Barnes sued Prairie View alleging employment discrimination based on hostile work environment under the Texas Commission on Human Rights Act (TCHRA).[2] Prairie View filed a traditional motion for summary judgment and

[2] We have seen this case before. *Barnes v. Texas A&M University System*, No. 14–13–00646–CV, 2014 WL 4915499 (Tex. App.—Houston [14th Dist.] Sept. 30, 2014, no pet.) (mem. op.). We affirmed the trial court's order granting summary judgment in favor of Texas A&M University and Prairie View on Barnes's discrimination claims based on theories of disparate impact and retaliation but remanded the case as to her theory of hostile work environment. *Id.* at *6. After the case was remanded, Texas A&M was dismissed from the case. Prairie View is the only remaining defendant, and hostile work environment the only remaining claim.

Barnes timely filed a response. The trial court granted Prairie View's motion and Barnes appealed.

ANALYSIS

Barnes argues in her sole issue on appeal that it was error to grant Prairie View's traditional motion for summary judgment because there is evidence creating a genuine issue of material fact as to her claim of employment discrimination in the form of a hostile work environment. Prairie View responds that it has negated, and Barnes cannot establish a genuine issue of material fact regarding, one or more elements of her claim. Specifically, Prairie View argues that the evidence shows Barnes's harassment complaints were not based on race. Even if based on race, Prairie View contends, those harassment complaints were not sufficiently pervasive to constitute a hostile work environment under the governing legal standard. Prairie View also argues it promptly responded to Barnes's complaints and investigated her allegations.[3]

I. Standard of review and applicable law

We review the trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A movant for traditional summary judgment has the burden of showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166(a)(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When the movant is a defendant, a trial court should grant summary judgment if the defendant conclusively negates at least one element of the plaintiff's claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex.

[3] Prairie View argues in its brief that it could not be vicariously liable for actions of AgriLife employees because they are not employees of Prairie View. Prairie View withdrew this contention at oral argument, so we do not address it.

2010). If the defendant meets this burden, then the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

The TCHRA prohibits discrimination by employers based on "race, color, disability, religion, sex, national origin, or age." Tex. Lab. Code. § 21.051 (West 2015). The Act is intended to "provide for the execution of the policies of the Title VII of the Civil Rights Act of 1964 and its subsequent amendments." *Id.* § 21.001(1). Therefore, we look to federal precedent for guidance. *Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 898 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

One form of employment discrimination actionable under the TCHRA and Title VII is a hostile work environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The elements of a race-based claim of employment discrimination in the form of a hostile work environment are (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Harris Cty. Hosp. Dist. v. Parker*, 484 S.W.3d 182, 197 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

A work environment is hostile when it is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to affect a term, condition, or privilege of employment. *Harris*, 510 U.S. at 21. The work environment must be both objectively and subjectively hostile. *Id.* Whether an environment is objectively hostile is determined by considering all the circumstances, including factors such as (1) the frequency of the discriminatory

conduct; (2) the severity of it; (3) whether it is physically threatening or humiliating or a mere offensive utterance; or (4) whether it unreasonably interferes with an employee's work performance. *Id.* at 23. "Mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to create a hostile work environment." *Parker*, 484 S.W.3d at 197. The conduct complained of must be extreme to alter the terms and conditions of employment. *Id.*; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

II. Barnes's evidence does not create a genuine issue of material fact regarding the existence of a racially hostile work environment.

Prairie View argues that Barnes did not experience a hostile work environment because the alleged harassment was not based on her race. Prairie View points to its investigation of Barnes's complaints, which concluded that they "appear to be based on misunderstanding and/or miscommunication rather than acts of discrimination, harassment[,] or disparate treatment by her supervisor or co-workers." Prairie View also argues that even if some of the allegations of harassment were based on race, the evidence shows the conduct was infrequent, not severe, and not threatening; thus, it was not sufficiently severe or pervasive to affect a term, condition, or privilege of employment.

Barnes responds that she raised a genuine issue of material fact, pointing to her colleague's "tar and feathering" remark. There is also evidence that a secretary told one of Barnes's clients to go to the "white" agent because Barnes's office was the "black" program.

Assuming that the colleague's "tar and feathering" remark and the secretary's statement were based on Barnes's race, which we do not decide, these

two isolated and non-threatening[4] comments are not objectively severe or pervasive enough to affect a term, condition, or privilege of employment. *See Parker*, 484 S.W.3d at 198 (harassment not sufficiently pervasive when plaintiff's allegations of harassment included supervisor commenting that "black males don't work" and that plaintiff was "just here to sit on the clock," blaming plaintiff for work problems unrelated to performance, requiring plaintiff to improperly write up employees, yelling at plaintiff in front of employees, and giving poor performance evaluations); *see also Howse v. Nw. Mem'l Hosp.*, No. 98 C 448, 2000 WL 764952, at *5 (N.D. Ill. June 13, 2000) (holding allegation that "tar and feather" comments were based on race was an unsupported conclusion and, even if based on race, these comments were not sufficiently pervasive to create a hostile work environment); *cf. Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 422 (4th Cir. 2014) (holding issue of material fact existed whether harassment was objectively severe and pervasive when plaintiff's allegations included repeated sexual and racial epithets and lewd comments).

As to Barnes's other allegations of harassing conduct, which primarily involved her supervisor, she does not point to any evidence that they were racially motivated or part of a pattern of race-based harassment. *See Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 656 (5th Cir. 2012) (affirming summary judgment where no identified facts showed pervasive harassment of plaintiff was in response to his association with minorities). Barnes argues that because she was the only African-American in the office, we can infer that the harassment was based on race. We have found no precedent to support such an inference.

At oral argument, Barnes cited to *Williams v. General Motors Corporation*

[4] Barnes does not contend, and the record does not indicate, that the "tar and feathering" comment was threatening.

to support her position. 187 F.3d 553 (6th Cir. 1999). *Williams* involved allegations of a sexually hostile work environment. *Id.* at 558. The Sixth Circuit held that the harassment need not be overtly sexual to qualify as harassment based on sex. *Id.* at 565. The court explained that harassment that is "not sexually explicit but is directed at women and motivated by discriminatory animus against women satisfies the 'based on sex' requirement." *Id.* We acknowledge that harassment need not necessarily be racially explicit to be actionable, but Barnes has not identified any evidence that the supervisor's conduct of which she complains was motivated by discriminatory animus. *Cf. id.* (holding harassment that was not overtly sexual combined with gender-specific epithets created inference that gender was the motivating impulse for discriminatory behavior).

Because the record includes evidence negating essential elements of a hostile work environment, and Barnes did not raise a genuine issue of material fact regarding those elements, the trial court properly granted summary judgment for Prairie View. We overrule Barnes's sole issue.

CONCLUSION

Having overruled Barnes's sole issue on appeal, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Boyce, Busby, and Wise.