

Affirmed and Memorandum Opinion filed June 24, 2008.

In The

Fourteenth Court of Appeals

NO. 14-06-01022-CV

TARRIS WOODS, Appellant

V.

**CITY OF GALVESTON, TEXAS and CITY OF GALVESTON FIRE FIGHTERS'
AND POLICE OFFICERS' CIVIL SERVICE COMMISSION, Appellees**

**On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 05CV0638**

MEMORANDUM OPINION

In this employment discrimination suit, a former fire fighter appeals a summary judgment in favor of the City of Galveston and its civil service commission. Specifically, the fire fighter asserts that the trial court erred in granting summary judgment because the city and the city civil service commission did not establish as a matter of law that (a) res judicata barred his claims, (b) his claims of substantive and procedural due process violations were barred because he sought only monetary relief, and (c) he did not establish a prima facie case of racial discrimination. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Tarris Woods was employed as a firefighter by the City of Galveston (the "City") in February 1980. In March 1988, Woods wrote to the City's fire chief, Willie Wisko,

requesting disability retirement due to a work-related disability. Wisko responded that Woods's "resignation" had been accepted and referred Woods to the Civil Service and Finance Directors regarding any compensation, insurance benefits, or retirement options. Woods subsequently received disability retirement benefits from the Fireman's Relief and Retirement Fund (the "FRRF").

Several years later, in November 1996, the FRRF received a physician report stating that Woods was no longer disabled, and it terminated his disability retirement benefits. Woods appealed this decision to an administrative law judge, who upheld it. After receiving a right-to-sue letter from the Equal Employment Opportunity Commission (the "EEOC"), Woods sued the City and the FRRF in federal district court, alleging racial discrimination in the City's failure to reinstate his employment and in the FRRF's termination of his disability benefits. *Woods v. City of Galveston*, 5 F. Supp. 2d 494, 494 (S.D. Tex. 1998). Both the City and the FRRF moved for summary judgment. As is relevant to this appeal, the trial court granted the motion on the ground that Woods failed to establish a prima facie case of discrimination. *Id.* at 501. The federal court reached this conclusion in part because Woods had not sought, and therefore did not receive, a hearing before the City's Civil Service Commission (the "Commission") as required by the Texas Local Government Code. *Id.* The court reasoned that Woods was not "qualified" for the position he sought. *Id.* The federal court further noted that Woods and Kenneth Coleman, the individual Woods had identified as similarly situated, were not comparable because Coleman had followed the proper procedure for reinstatement. *Id.* at n.7.^{[11](#)}

Two years after the federal court dismissed Woods's discrimination claims with prejudice, Woods requested reappointment to the classified position he had held with the Galveston Fire Department (the "Department") before his disability retirement. In a letter dated April 13, 2000, the City's Civil Service/Personnel Director, Carolyn Cox, informed Woods that she had received his request for reappointment to active duty with

the Department. Cox informed Woods that, for the Commission to consider his request, he needed to apply for recertification with the Texas Commission for Fire Protection (the "TCFP").^[2] Over two years later, in August 2002, Woods sent a similar letter requesting reappointment to active duty with the Department; Cox again responded that Woods needed to apply for recertification with the TCFP to have his request considered. On March 8, 2004, Woods requested a hearing before the Commission for appointment to the classified position he held with the Department before his disability. Cox responded to this letter on March 19 by reiterating that Woods needed to apply for recertification with the TCFP before his request could be considered.

Also on March 19, Woods sent another letter to Cox, in which he claimed that he had been instructed to return to Cox's office on two occasions to receive a reply to his March 8, 2004 request, but one had not been ready. Woods concluded this letter as follows:

I have reach[ed] the conclusion that I would allow this letter to serve the City of Galveston notice that I have exhausted all the municipal administrative remedies for reappointment after recovery from a disability found under the Texas Local Government Code, Chapter 143. And, I will no longer pursue redress at this level.

The record does not contain a response to Woods's final letter. Further, the record is devoid of any indication that Woods applied for recertification with the TCFP.

Subsequently, Woods filed a charge of racial discrimination against the City with the EEOC, detailing his complaint as follows:

- I. I was employed by Respondent as a Firefighter. Around 1988, I went out on disability retirement. On or about 1999, a physician working for Respondent, determined that I was no longer disabled. Therefore in April 2000, August 2002 and most recently on March 8, 2004, I made a formal request for a hearing before the Civil Service Commission so that I could get my job back. On March 19, 2004, Ms. Carolyn Cox, Civil Service Director, denied my request for a hearing.

- II. According to Ms. Cox, I need to apply for recertification with the Texas Commission for Fire Protection before the Civil Service Commission will consider my request. However, I am aware of a similarly situated Caucasian employee who was granted a hearing in spite of the fact that he was not certified by the Texas Commission for Fire Protection.
- III. I believe that I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

After being issued a right-to-sue letter by the EEOC, Woods filed suit against the City and the Commission, alleging racial discrimination in violation of the Texas Commission on Human Rights Act (“TCHRA”) and denial of his due process rights. He again identified Kenneth Coleman as his comparator as part of his prima facie case of discrimination.

The City and the Commission filed a traditional motion for summary judgment, asserting that Woods’s claims should be dismissed because (1) there was no implied right of action for damages under the Texas Constitution; and (2) Woods was not similarly situated to Coleman. Further, the Commission argued that it was not Woods’s employer and would therefore have no liability under Woods’s pleadings. On October 6, 2006, the trial court granted the summary judgment and dismissed Woods’s claims with prejudice. This appeal timely followed.^[3]

II. ISSUE PRESENTED

In a single issue, Woods asserts that summary judgment was not supported by the grounds presented in the summary judgment motion. Specifically, he contends that the three asserted bases for summary judgment—which Woods identifies as *res judicata*,^[4] dismissal of due process violations because he sought monetary relief, and failure to establish his prima facie case of discrimination—cannot support summary judgment in this case. The City and the Commission respond, *inter alia*, that summary judgment was appropriate because Woods did not establish his prima facie case of discrimination

as he and Coleman were not “similarly situated.”

III. ANALYSIS

A. Standard of Review

We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Where, as here, the trial court grants the judgment without specifying the grounds, we affirm the summary judgment if any of the grounds presented are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000). In a traditional motion for summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff’s causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). Once the defendant establishes its right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678–79 (Tex. 1979).

B. Prima Facie Case of Discrimination

As a preliminary matter, we note that Woods failed to respond in either the trial court or this court to the Commission’s argument that it had no liability under Woods’s pleadings for racial discrimination because it was not his employer. Woods has therefore waived any argument that the trial court erred in granting summary judgment to the Commission on this claim, and we only address his discrimination contentions as they relate to the City. *See, e.g., Wortham v. Dow Chem. Co.*, 179 S.W.3d 189, 202–03

(Tex. App.—Houston [14th Dist.] 2005, no pet.) (upholding summary judgment on unchallenged grounds). Although alleged under Texas law,^[5] we may look to federal precedent for guidance because the relevant parts of our state law “are patterned after Title VII of the federal Civil Rights Act.” *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 474 (Tex. 2001). In the absence of direct evidence of discrimination, we review cases brought under the TCHRA by applying the burden-shifting analysis established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.^[6] See *Russo v. Smith Int'l, Inc.*, 93 S.W.3d 428, 434 & n.5 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Under this standard, Woods must first establish a prima facie case of discrimination. *Id.* To establish a prima facie case of discrimination under the TCHRA, Woods must show that (1) he is a member of a protected class, (2) he suffered an adverse employment action, and (3) similarly-situated non-protected class members were not similarly treated. See *Winters v. Chubb & Son, Inc.*, 132 S.W.3d 568, 574 (Tex. App.—Houston [14th Dist.] 2004, no pet.). As part of his prima facie case, Woods must demonstrate by a preponderance of the evidence that there were non-protected class members similarly situated in all material respects to him who were treated differently. See *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005) (per curiam); see also *Gillmore v. AT&T*, 319 F.3d 1042, 1046 (8th Cir. 2003). “Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct.” *Monarrez*, 177 S.W.3d at 917.

In its motion for summary judgment, the City argued that Woods could not establish a prima facie case because Kenneth Coleman's circumstances were not comparable in all material respects with Woods's circumstances. Specifically, the City asserted that Woods, unlike Coleman, never sought recertification from the TCFP. Coleman, on the other hand, had taken steps to recertify: he had taken and passed both the written and the skills exams prior to seeking re-appointment. This distinction between the circumstances of Woods and Coleman is highlighted by a letter from the TCFP to the City's former fire chief:

Mr. Coleman was placed on disability retirement on or about October 2, 1989, at which time the notice of termination was filed with the TCFP by the Galveston Fire Department. Apparently, on or about August 10, 1994, Mr. Coleman was released by his doctor . . . to return to work. *Mr. Coleman passed the proficiency examination on or about April 20, 1995, and sought reinstatement with the Galveston Fire Department within one year of his examination.* Apparently, a local civil service commission ordered Mr. Coleman's reinstatement effective June 20, 1996.

(emphasis added). Woods's response to the City's summary-judgment motion also included the deposition testimony of Danny Weber,^[7] the City's fire chief at the time Woods sought reinstatement. In his deposition, Weber testified that he had explained the steps Woods needed to follow to be reappointed:

He would have to receive and take from the [TCFP] the written exam and the skills exam. . . . And in fact [I] called the [TCFP] while Mr. Woods was there in my office and explained to them that I had a prior fire fighter who had been off on disability for a number of years and was looking to be recertified and asked what would he have to do. They told me he would have to take the tests and they would forward to him a packet of information, study materials, what he needed to do etcetera. . . . I know that I gave Mr. Woods . . . the [TCFP]'s phone number, address and what have you. I don't know whether they spoke that day or not. And so that he would be in contact with whom he needed to get the proper - follow the proper procedures to be recertified.

Weber highlighted the distinctions between Woods's situation and Coleman's situation as follows:

Mr. Coleman, upon being released from disability, went through each step of the process that he needed to go through to be reinstated. He first went to the fire chief, then he went to the Fire Commission. He took the tests, he passed the tests, he applied for the hearings.

Mr. Woods, conversely, just came back to the City and said I'm released and by law you have to put me back to work.

Woods ignores the fact that Coleman requested reinstatement only *after* he had taken and passed the examinations required by the TCFP for certification. Woods

provides no evidence that he took and passed the TCFP examinations before seeking reinstatement. Woods attempts to blur this vital distinction between himself and Coleman by repeatedly emphasizing that Coleman was given a hearing even though he was not certified by the TCFP, and that Woods was denied a hearing. But the letters from the City do not indicate that Woods had to be certified prior to obtaining a hearing; instead, Cox stated that Woods needed to *apply for recertification*.

Although Coleman was not certified prior to his hearing before the Commission, Coleman and Woods were not similarly situated in all material respects because Coleman had become eligible for recertification as a fire fighter and Woods had not.^[8] Accordingly, Woods failed to establish a prima facie case of discrimination, and summary judgment was proper regarding his claims of racial discrimination.

C. Declaratory Relief and Constitutional Claims

Woods further contends that summary judgment was inappropriate on his constitutional claims regarding violation of his due process rights. He acknowledges that he is precluded from seeking monetary relief by *City of Beaumont v. Bouillion*. 896 S.W.2d 143, 147 (Tex. 1995). He complains, however, that he sought “declaratory and equitable relief for violations of his due process rights; specifically, Woods asserted that denial of his right to a hearing under the applicable Texas statutes was a violation of substantive and procedural due process.”

Regarding Woods’s contention that summary judgment was inappropriate on his request for declaratory relief, Woods does not specify the declaratory relief sought in his briefing before this court. But in his fourth amended petition, apparently his live pleading before the trial court, Woods requested that the trial court “declare the rights of the parties as a matter of law with respect to the question of the hearing and/or whether Woods is entitled to a hearing.”

The City and the Commission sought summary judgment on Woods’s request for

declaratory relief on the basis that a judicial declaration would add nothing to the causes of action and requests for relief Woods asserted under the TCHRA. We agree. Generally, “[t]here is no basis for declaratory relief when a party is seeking in the same action a different, enforceable remedy, and a judicial declaration would add nothing to what would be implicit or express in a final judgment for the enforceable remedy.” *Universal Printing Co. v. Premier Victorian Homes, Inc.*, 73 S.W.3d 283, 296 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Thus, we hold the court did not err in granting summary judgment regarding Woods’s request for declaratory relief.

Woods’s due process complaint is premised on the alleged denial of a hearing. But, as previously discussed, Woods was not denied a hearing; he was informed that he needed to follow a particular process to obtain a hearing. Nothing in our record indicates that Woods followed this process. Woods has provided no argument or authority that denial of a hearing under these circumstances is a violation of his due process rights.^[9] We therefore affirm the trial court’s grant of summary judgment on Woods’s constitutional claims.

IV. CONCLUSION

In sum, Woods has failed to establish a prima facie case of discrimination. Thus, the trial court properly granted summary judgment on his discrimination claims. In addition, summary judgment was appropriate on his constitutional claims and his claims for declaratory relief. We therefore overrule his sole issue on appeal and affirm the judgment of the trial court.

/s/ Eva M. Guzman
 Justice

Judgment rendered and Memorandum Opinion filed June 24, 2008.

Panel consists of Justices Yates, Guzman, and Brown.

^[1] In its entirety, this footnote provides:

Mr. Coleman, on the other hand, followed proper procedure; therefore, Coleman and Plaintiff were not similarly situated. The Court is aware that at least part of Plaintiff's complaint is that he was not informed of the proper procedures for reinstatement, while a white male was so informed. Even if the Court believed that this assertion rises to the level actionable under § 1981, which it does not, after an exhaustive review of the summary judgment evidence, the Court finds absolutely nothing to support this contention. Furthermore, the comprehensive knowledge of Texas law evidenced in his letter of retirement induces this Court to seriously question Plaintiff's claims of ignorance.

Id. The federal court went on to determine that, even if Woods had established his prima facie case of discrimination, the City's proffered reasons for its failure to rehire him were legitimate and nondiscriminatory. *Id.* at 501. Because the only evidence of pretext was Wood's assertion of racial discrimination, with no evidence to support these assertions except his personal belief, the court concluded that Woods failed to show pretext. *Id.* at 501-02.

^[2] The TCFP is the state agency charged with establishing qualifications for fire fighters. *See* TEX. GOV'T CODE ANN. § 419.032 (Vernon 2005).

^[3] Woods filed both his notice of appeal and a motion to extend time for filing it on November 14, 2006. The motion to extend time to file the notice of appeal was granted by this court.

^[4] The City and the Commission respond that they did not assert res judicata as a basis for summary judgment.

^[5] Section 21.051 of the Texas Labor Code provides:

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer:

- (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or
- (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

^[6] 411 U.S. 792, 792-93 (1973).

^[7] The record reflects that the fire chief at the time Woods sought reappointment was Danny Weber. On the other hand, when Coleman sought reappointment, the fire chief was Willie Wisko. This difference between Coleman's and Woods's circumstances is yet another reason the two are not comparable. *See Monarrez*, 177 S.W.3d at 917.

^[8] Woods focuses on the following sentence in the federal court opinion to explain his continued claim of discrimination in light of that court's conclusion that he failed to establish a prima facie case of discrimination:

Prior to filing this suit in 1997, Plaintiff did not request, and therefore did not receive, a hearing before the Commission. Plaintiff therefore was not "qualified" for the position sought, and thus fails even to establish a *prima facie* case.

Woods, 5 F. Supp. 2d at 501. But, as discussed above, in the footnote to this sentence, the federal court concluded that Woods and Coleman were not similarly situated. *Id.* at n.7.

^[9] The City and the Commission repeatedly emphasized throughout their summary judgment motion that Woods did not follow the proper process to obtain a hearing before the Commission, whereas Coleman did.

<http://www.houston-opinions.com/files/14thCoA-2008-Woods-v-City-of-Galveston-by-Guzman-fire-fighter-discrimination-suit.mht>