Affirmed and Opinion filed April 27, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00787-CV

JACK SWISHER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 129th District Court
Harris County, Texas
Trial Court Cause No. 94-26371

O P I N I O N

Jack Swisher appeals from a summary judgment granted in favor of the State of Texas in his lawsuit alleging disability-based discrimination. Because we find that certain of Swisher's claims are waived, that certain claims are barred by sovereign immunity, and that certain claims are disproved as a matter of law, we affirm the judgment.

I. Background

Swisher, an attorney who represents clients before the Texas Workers' Compensation Commission, alleges that he is disabled. In his Fourth Amended Petition, he does not specify the nature

of his disability. In his affidavit accompanying his Plaintiff's Response to Defendant's Motion for Summary Judgment, he avers that because of physical paralysis, he has difficulty manipulating papers and has difficulty traveling to commission hearings. He states that since 1952 both of his arms have been paralyzed along with more than two-thirds of his breathing strength, that he must sleep in an iron lung at night, and that he has been using a respirator since 1994. Because of his disabilities, he argues, it is difficult for him to manipulate paper physically, making it difficult for him to file and mail paper documents. He must use employees to help with paperwork, and this expense reduces the profitability of his law practice. He also argues that because he is dependent upon a respirator, travel to commission hearings is difficult or impossible.

In his live petition, he complains that (1) the State, without justification, has denied more than twenty of his requests for certain fees; (2) the State has unlawfully requested additional verification for certain fee requests; (3) the State unlawfully discriminates against him by failing to allow him to submit his various commission filings electronically rather than by mail; (4) the State unlawfully requires him to give seven-days' notice of his intent to attend a commission hearing by speaker phone; and (5) the State unlawfully has failed to install a system that would allow him to attend commission hearings statewide by computer video conference. Swisher alleged that the State's actions and omissions violated Chapter 104 of the Civil Practices and Remedies Code, TEX. CIV. PRAC. & REM. CODE ANN. §§ 104.001-.009 (Vernon 1997 & Supp. 2000) (State Liability for Conduct of Public Servants); Chapter 106 of the Civil Practices and Remedies Code, TEX. CIV. PRAC. & REM. CODE ANN. §§ 106.001-.004 (Vernon 1997) (Discrimination Because of Race, Religion, Color, Sex, or National Origin); the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1997 & Supp. 2000); the American's with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 1999); the Federal Rehabilitation Act, 29 U.S.C.A. §§ 701-7961 (West 1999 & Supp. 1999); and that the State's actions and omissions deprive him of rights under the Fourteenth Amendment of the United States Constitution and under article 1, sections 3 and 19, of the Texas Constitution.

The trial court granted the State's motion for summary judgment. On appeal, Swisher lists sixteen "points of error," in which he complains of various aforementioned State actions and omissions, arguing that

such actions and omissions violate article 1, sections 3, 3a, 13, and 19, of the State constitution, the Tort Claims Act, and Chapter 106 of the Civil Practices and Remedies Code. He then lists four "issues presented" in which he complains that (1) his summary judgment evidence raises issues of material fact as to whether the State violated the ADA; (2) the State is not entitled to Eleventh Amendment immunity from his claim asserted under either the ADA or the Tort Claims Act; (3) his summary judgment evidence has raised an issue of material fact as to whether the State violated the Tort Claims Act; and (4) his summary judgment evidence raises issues of material fact as to whether the State is entitled to its res judicata defense as to his claims asserted under the ADA or the Tort Claims Act.

II. Discussion

A. Summary judgment

A summary judgment is proper only when a movant establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972). In a summary judgment proceeding, the burden of proof is on the movant and all doubts as to the existence of a genuine issue of fact are resolved against the movant. *See Roskey v. Texas Health Facilities Comm'n*, 639 S.W.2d 302, 303 (Tex. 1982). Once the movant has established a right to summary judgment, the burden sifts to the nonmovant, who must respond to the motion by presenting to the trial court any issues precluding summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex. 1979).

On appeal, 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. In deciding whether there is a disputed material fact issue precluding summary judgment, we must take as true proof favorable to the nonmovant and must indulge every reasonable inference and resolve any doubts in favor of the nonmovant. *See American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

A motion for summary judgment must expressly present the grounds upon which it is made and it must stand or fall on these grounds alone. *See* TEX. R. CIV. P. 166a(c); *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). When the motion for summary judgment is based on

several different grounds and the order granting the motion is silent as to the reason for granting the motion, the appellant must show that each independent ground alleged in the motion is insufficient to support summary judgment, and the summary judgment must be affirmed if any of the theories is meritorious. *See Malooly Bros. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970).

A party without presenting summary judgment proof may move for summary judgment on the ground that there is no proof of one or more essential elements of a claim on which an adverse party would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i).

B. Waiver

On appeal, Swisher alleges that the trial court granted summary judgment in violation article 1, sections 3a and 13, of the State constitution and that the State is not entitled to immunity under the Eleventh Amendment of the United State Constitution on his ADA and Tort Claims Act claims. We cannot reverse a summary judgment on any issue not specifically presented to the trial court. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1983). Swisher waived any appellate complaint by failing to raise article 1, sections 3a and 13, of the state constitution or the Eleventh Amendment before the trial court.

Swisher has waived other issues. In his Fourth Amended Petition, Swisher alleges violations of article 1, sections 3 and 19, of the state constitution and of the Federal Rehabilitation Act, 29 U.S.C.A. §§ 701(8) [sic] & 794 (West 1999). As to the state constitutional complaints, Swisher merely complains that the summary judgment violated the cited constitutional provisions. Therefore, Swisher has waived his constitutional challenge by providing no appellate argument or authorities. *See* TEX. R. APP. P. 38.1(h); *Missouri Pac. RR. Co. v. Lemon*, 861 S.W.2d 501, 528 (Tex. App.–Houston [14th Dist.] 1993 writ dism'd by agr.) (Where party presents no argument or authorities, party presents nothing for review). As for his FRA claims asserted in his fourth petition, he has waived the complaints by failing to raise the issues on appeal.

C. Tort Claims Act

The State moved for summary judgment, in part, on grounds that Swisher's claims under the Texas

Tort Claims Act are barred by sovereign immunity.

Under the doctrine of sovereign immunity, the State is not liable for the negligence of its employees absent constitutional or statutory provision for liability. *See Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976). Under the Tort Claims Act, the State has waived immunity for property damage and personal injury arising from the use of a motor vehicle under certain circumstances and for personal injury or death caused by a condition or use of tangible personal or real property under certain circumstances. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997).[1]

Swisher does not allege injury arising from the use of a motor vehicle. He alleges, rather, that the State's use of office equipment, which forced him to handle paper for various commission filings, was an unlawful use of tangible personal property. We disagree. The use of computers and other equipment to collect, record, or communicate information is not a use of "tangible personal property," as required to subject the State to liability under the Tort Claims Act. *See Thomas v. Brown*, 927 S.W.2d 122, 128 (Tex. App.–Houston [14th Dist.] 1996, writ denied). Swisher complains of the commission's policy barring electronic filing. The State's use of office equipment to collect, record, and communicate information in compliance with this policy barring electronic filing is not a use of tangible personal property as required to subject the State to liability under the act. We overrule Swisher's issue under the Tort Claims Act.

D. ADA

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[1] The statute provides as follows:

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

The State moved for summary judgment on grounds that there was no proof of one or more essential elements of Swisher's claims asserted under the ADA, *see* TEX. R. CIV. P. 166a(i), or that the State conclusively negated an essential element of Swisher's cause of action, *see* TEX. R. CIV. P. 166a(c).

Under the ADA, no qualified individual with a disability shall by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity. *See* 42 U.S.C.A. § 12132 (West 1995). To prove a public program or service violates Title II of the ADA, a plaintiff must show (1) he is a qualified individual with a disability; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. *See Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). The discrimination that must be eliminated is the discriminatory effect that results because of the disability. *See Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996).

Although regulations promulgated by the Justice Department interpreting the ADA are not binding on us, we may look to the regulations as an aid in interpreting the ADA. At least one federal court has held that the regulations are entitled to "considerable weight." *See id.* The regulations require a public entity to make reasonable modifications in policies, practices, or procedure when the modifications are necessary to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity. *See* 28 C.F.R. § 35.130(b)(7) (1999). Under the regulations, a public entity must operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. *See* 28 C.F.R. § 35.150(a) (1999). In those situations where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity, or would result in undue financial and administrative burden, the public entity has the burden of proving that compliance with § 35.150(a) would result in such alteration or burdens. *See* § 35.150(a)(3).

For a disabled individual's complaint to be redressible under the ADA, the individual's inability to participate in a program or to receive a benefit must arise from the disability. In *Weinreich*, a public

transit system refused to exempt a disabled individual from its policy requiring disabled participants in its reduced-fare program to provide certain medical information. The admittedly disabled plaintiff alleged that his poverty prevented him from employing a private doctor to provide the information. The court held that his inability to participate in the program stemmed not from his disability, but from his indigence, which was not covered under the ADA. *See Weinreich*, 114 F.3d at 978.

1. Delays and Added Requirements

As mentioned above, Swisher complains of five commission actions or omissions. In his first and second complaints, he argues that the commission delayed or rejected twenty of his requests for attorney's fees and that the commission required him to provide extra verification for his attorney fee and expense requests. Swisher provides no proof to support his ADA claims. *See* TEX. R. CIV. P. 166a(i). For summary judgment purposes, we must assume that Swisher is a qualified individual with a disability and that the commission is a public entity. Without commenting on how onerous each requirement may be, we note that Swisher fails to allege how his disability prevents him from participating in commission programs or prevents him from receiving commission benefits. Whatever difficulties Swisher may have in connection with his delayed expense and fee requests and in connection with additional verification of such requests, he does not allege that such difficulties arise from his disability. The complained-of tasks are simply additional requirements related to his request for certain fees and expenses. To the extent that either of the two actions or omissions relates to his complaint about having to manipulate additional paper physically, we address such complaint below.

2. Electronic Filing

In his third complaint, Swisher argues that the commission's failure to accept electronic filings is discriminatory because due to his paralysis, he cannot physically manipulate the sheets of paper and he must hire office help to manipulate the paper for him. Swisher does not allege he lacks meaningful access to commission programs or benefits. He complains of the added expense of hiring employees to manipulate paper. Like the plaintiff in *Weinreich*, Swisher argues that such programs and benefits cost him more than he can, or wishes to, spend. If the *Weinreich* plaintiff's indigence did not entitle him to a modification of governmental policy, neither will Swisher's lack of profitability entitle him to a modification. Swisher's

pleadings allege no communications barrier arising from his disability. As to this complaint, Swisher provides no proof that any presumed exclusion, denial of benefits, or discrimination was by reason of his disability. *See* TEX. R. CIV. P. 166a(i).

3. Notice Requirement

In his fourth complaint, Swisher argues that the State discriminates against him by requiring him to provide seven-days' notice of his intent to attend a commission hearing by speaker phone. Swisher complains not only of the added expense, but complains additionally that while a non-disabled attorney is able to appear at a hearing in person at the last minute without giving advanced notice, Swisher is prevented by the requirement from similarly appearing by teleconference at the last minute without notice .

Initially we note that the commission generally requires ten days' notice from an individual wishing special accommodations due to a language barrier or a handicap.[2] The uncontroverted evidence shows that, for Swisher, the commission trimmed the required notice to seven days. The commission also told Swisher that although written notice was preferred, it was not required, and that he could trim his expense by submitting his request by telephone. As an alternative, the commission told Swisher he could give teleconference notice by requesting such appearance when he filed his routine paperwork with the commission, such as his representation notices[3] or his requests for Benefit Review Conferences.[4]

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[2] 28 TEX. ADMIN. CODE § 140.2 (1999) (Tex. Workers' Compensation Comm'n, Special Accommodations) provides as follows:

> (a) The commission, on its own motion or upon request, will provide special accommodations to an individual who intends to participate in a proceeding and who does not speak English, or who has a physical, mental or developmental handicap.
>
> (b) A request for special accommodations may be made by the individual desiring them, the carrier, or anyone knowing of the need.
>
> (c) The request:
>
> (1) may be made in any manner;
>
> (2) should describe the special accommodations needed; and
>
> (3) should be sent to the commission no later than 10 days before the date of the proceeding.

[3] 28 TEX. ADMIN. CODE § 150.2(b) (1999) (Tex. Workers' Compensation Comm'n, Qualification (continued...)

The uncontroverted proof shows that the commission needed the advance notice to provide notice to other parties of Swisher's telephone appearance; to arrange teleconferencing through the state telephone network; and to designate a staff person who would be responsible for getting the applicable parties on the line, for dealing with technical problems such as busy long-distance circuits, and for reconfiguring the hearing room for speaker-phone use.

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[3] (...continued)
and Authorization of Attorney to Practice Before the Commission) provides as follows:

> An attorney who represents a claimant for benefits shall notify the commission in writing within ten days of undertaking the representation of the party. The written notice shall identify the attorney and the claimant and the injured employee (if different from the claimant).

[4] 28 TEX. ADMIN. CODE § 141.1 (1999) (Tex. Workers' Compensation Comm'n, Requesting and Setting a Benefit Review), provides as follows:

> a) A request for a benefit review conference may be made by a claimant, a sub-claimant, a carrier, or an employer who has contested compensability.
>
> b) Except as provided in subsection (c) of this rule, a request for a benefit review conference shall:
> 1) be made on form TWCC 45, Request for Setting a Benefit Review Conference;
> 2) identify and describe the disputed issue or issues; and
> 3) be sent to the commission.
>
> c) An unrepresented claimant may request a benefit review conference by contacting the commission in any manner. The commission shall acknowledge to the claimant in writing receipt of the request.
>
> d) The commission shall set a conference to be held:
> 1) within 40 days of the date the request is received; or
> 2) if the commission determines that an expedited setting is needed, as provided by §§140.3 of this title (relating to Expedited Proceedings), within 20 days of the date the request is received.
>
> e) After setting the conference, the commission shall provide, by first class mail or personal delivery, written notice of the date, time and location to the parties and to the employer. The notice shall be provided:
> 1) at least 30 days before a conference set under subsection (d)(1) of this rule; or
> 2) at least 10 days before a conference set under subsection (d)(2) of this rule.
>
> f) The conference will be conducted at a site no more than 75 miles from the claimant's residence at the time of injury, unless the commission determines that good cause exists for selecting another site.

The uncontroverted summary judgment proof shows that the State offered to make reasonable modifications and that the notice requirement did not deprive Swisher of program participation or of commission benefits. Swisher provided no controverting evidence to raise a genuine issue of material fact as to his ADA claim in connection with this act or omission. *See* TEX. R. CIV. P. 166a(c).

4. Video conferencing

In his fifth complaint, Swisher argues that the commission's failure to install video conferencing equipment forced him to rely only on telephone conferencing and deprived him of the chance to be present visually at commission hearings. In his Fourth Amended Petition he alleges only that the video conferencing capabilities would allow him to "see others at such hearings and be seen by them." In his summary judgment proof, he avers that the lack of video conferencing prevents his taking cases outside of his home city of Houston and requires him to hire other attorneys to attend hearings.

His arguments fail for three reasons.

First, the uncontroverted proof shows that he has access to hearings by teleconferencing. He does not argue and provides no proof to demonstrate that his lack of visual presence at hearings deprives him of meaningful access to commission programs or benefits.

Second, although the proof differs as to the cost to the commission of such a system,[5] the commission offered two affidavits stating that the system Swisher proposed was technically inadequate. Commission employee Eileen Miller, who attended three software demonstrations, stated that the system limited the size of the viewing box to about one-quarter of the computer monitor's screen, that the movement of the remote party on the screen was choppy, and that the audio was choppy and not of an acceptable quality. She stated that four Houston benefit review officers and the two hearing officers all hold hearings and that it was possible that all of their offices would have to be wired, adding to the expense and disruption. She further stated that in order to be heard and seen, the participants at the software demonstration were required to lean into the microphone and into the video camera. Paul B. Diaz, a data

[5] The State alleges the system would cost approximately $500,000 while Swisher alleges it would cost approximately $5,000 for the video conferencing station.

services director with the commission, who also attended demonstrations, stated that the system had difficulties with picture fluidity and clarity and that improvements in picture quality would require more expensive hardware and that improvements in the audio signal would require a high quality, more expensive communication line. A summary judgment may be based on such uncontroverted testimonial proof of an interested witness if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies and could have readily controverted. *See* TEX. R. CIV. P. 166a(c). Swisher fails to controvert this proof, offering only his affidavit in which he states that he has used the system previously at various court hearings and in which he quotes a judge as saying of the system, "This is fascinating technology and I think will be the wave of the future and I have been real impressed with it."

Third, although the ADA may require the State to make reasonable modifications, it does not require it to institute only the modification requested by Swisher. The record contains no proof that the proposed system would alleviate any presumed disadvantage that Swisher alleges. The system advocated by Swisher may be the most convenient for him, but we can say, as a matter of law, that the ADA does not require the State to adopt the proposed system.

The uncontroverted proof shows that the commission made reasonable modifications and that the system proposed by Swisher would fundamentally alter the nature of the service, program, or activity. The uncontroverted proof also shows that the services, programs, and activities of the commission, when viewed in their entirety, are readily accessible to and usable by Swisher. The uncontroverted proof also shows that the system proposed by Swisher would result in undue administrative burden on the State. The uncontroverted proof demonstrates that the commission is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c).

III. Conclusion

Having overruled all of Swisher's issues, we affirm the trial court's judgment.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed April 27, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).