1 of 1 DOCUMENT

BETTY MAYS, Appellant v. CITY OF PLANO, Appellee

No. 05-97-00391-CV

COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS

1999 Tex. App. LEXIS 9105

December 6, 1999, Opinion Issued

NOTICE: [*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

SUBSEQUENT HISTORY: Petition for Review Denied March 23, 2000.

PRIOR HISTORY: On Appeal from the 366th Judicial District Court. Collin County, Texas. Trial Court Cause No. 366-567-94.

DISPOSITION: AFFIRMED.

JUDGES: Before Justices Kinkeade, Ovard, and Whittington. Opinion By Justice Whittington.

OPINION BY: MARK WHITTINGTON

OPINION

Opinion By Justice Whittington

Betty Mays appeals a take nothing judgment in her discrimination suit against the City of Plano (Plano). In fifteen points of error, Mays contends generally that (1) the trial judge erred in entering a JNOV against Mays because she satisfied all administrative requirements of the Texas Commission on Human Rights Act (TCHRA) [1], (2) the evidence is legally and factually insufficient to support the failure to mitigate damages finding, (3) the evidence is legally and factually insufficient to support the jury finding on the after-acquired evidence defense, (4) the trial judge erred in refusing to include Mays's instruction on the after-acquired evidence defense, (5) the trial judge erred in granting partial summary judgment on the issue of compensatory damages, and (6) the trial judge [*2] erred in failing to grant Mays a new trial because the amount of damages and attorney's fees found by the jury was manifestly too small. [2] We overrule appellant's points of error and affirm the trial court's judgment.

1 Throughout their briefs, the parties contend that the trial court entered a judgment notwithstanding the verdict. Plano filed a motion for final judgment or, alternatively, motion for JNOV. The trial court did not grant Plano's alternative motion for JNOV The trial court simply entered a judgment on the jury verdict. Accordingly, Mays's first point of error dealing with administrative requirements is moot.

2 In point of error eleven, Mays contests the partial summary judgment on her breach of contract claim. At oral argument, counsel for Mays conceded this point of error. Therefore, we do not address point of error eleven.

FACTUAL BACKGROUND

In 1988, Plano began searching for a person to direct the newly created Plano Convention and Visitors Bureau. Mays applied for the position. [*3] Plano offered Mays the job by letter dated August 4, 1988. The annual salary for the position was $ 42,000 plus a $ 355 monthly car allowance. Mays accepted the position and began on September 1, 1988.

As a director, Mays reported to one of three assistant city managers. During her first three years of employment, Assistant City Manager Ron Holifield supervised Mays. Holifield gave Mays several critical job performance reviews and discussed with her several times the need for improvement.

Her poor reviews continued with the other two supervisors. Interim Assistant City Manager Linda Keylon supervised Mays after Holifield. After receiving numerous, serious complaints about Mays, Keylon concluded that Mays should be terminated. Keylon communicated her conclusion about Mays to both the city manager and the director of human resources. In light of her interim status as assistant city manager, Keylon did not terminate Mays.

All the while, complaints from other department directors continued. Further, fifteen of the seventeen people on Mays's staff complained about her to Assistant City Manager Elvenn Richardson.

The primary complaints received about Mays were frequent and prolonged **[*4]** absenteeism and tardiness, falsification of time records, improper employee supervision, personal use of city property, and unprofessional conduct. Mays's poor performance resulted in a frustrating working environment, poor morale among her staff, and delayed decision making.

Richardson began his supervision of Mays following Keylon. Keylon alerted Richardson to the significant problems with Mays's performance. In January 1993, Richardson conducted a meeting with Mays and her entire staff to discuss the problems. A similar meeting was held in September 1993. At this time, Richardson learned that things at the Visitor's Bureau had not improved. Richardson informed Mays that they needed to discuss her future with Plano. On November 29, 1993, Richardson told Mays that she should not receive any raise due to her poor performance.

On December 6, 1993, Mays handed Richardson her "non-negotiable conditional" letter of resignation. On December 22, 1993, Mays received her annual review. Richardson stated that when Mays returned after the holidays, they would discuss her future with Plano. On January 3, 1994, Richardson terminated Mays.

Subsequently, Mays filed a discrimination complaint **[*5]** with the Texas Commission on Human Rights and later filed suit on May 23, 1994. After a two-week jury trial, the jury returned a verdict in favor of Plano. The jury found that Plano did not discriminate against Mays. The jury did find that Plano retaliated against Mays causing Mays $ 20,000 in lost wages. However, such damages were reduced to zero by the jury's finding that Mays failed to mitigate her damages in the amount of $ 87,500. The jury further found that after Mays was terminated, Plano discovered serious policy violations that would have led to Mays's termination anyway. The trial judge entered a take nothing judgment.

MITIGATION OF DAMAGES

In points of error two, three, and four, Mays complains of the mitigation of damages finding. Specifically, Mays contends the evidence is both legally and factually insufficient to support the jury's finding that she failed to make reasonable efforts to mitigate her damages.

In reviewing a legal sufficiency point of error, we consider only the evidence and inferences that tend to support the finding and disregard all the evidence and inferences to the contrary. *Dupree v. Texas Dept. of Protective & Regulatory Servs., 907 S.W.2d 81, 83* **[*6]** (Tex. App.-Dallas 1995, no writ). If there is more than a scintilla of evidence to support the finding, we uphold the finding. *Dupree, 907 S.W.2d at 83.*

In reviewing a factual sufficiency point of error, we consider all of the evidence in the record, including any evidence contrary to the judgment. *Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989).* The party challenging the factual sufficiency of the evidence must establish that the evidence is so weak that it could not produce a firm belief or conviction in the mind of a rational trier of fact that the challenged finding is true. *Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).*

A discharged employee must use reasonable diligence to mitigate damages by seeking other employment. *Gulf Consolidated Int'l, Inc. v. Murphy, 658 S.W.2d 565, 566 (Tex. 1983)* (per curiam) (op. on reh'g). It is the employer's burden to show that the discharged employee failed to use reasonable diligence to mitigate her damages. Once the employer meets that burden, the employer does not have an additional burden to show (1) what the employee could have earned by the exercise **[*7]** of reasonable diligence because such proof is an element of damages, to which the employee is not entitled, or (2) whether the employee could have secured other employment had he tried. *City of Laredo v. Rodriguez, 791 S.W.2d 567, 572* (Tex. App.-San Antonio 1990, writ denied).

The jury found that Mays failed to make reasonable efforts to mitigate her damages. The jury also found that had Mays used reasonable efforts, she would have earned $ 87, 500.

Mays testified that she did look for a job following her termination. She testified that from January to November of 1994, she spent approximately twenty hours per week sending out resumes, checking the newspaper, and making telephone calls. In November, 1994, Mays obtained a part-time position as an office assistant with the City of Henderson, Nevada. After obtaining part-time employment, she continued spending approximately five hours per week searching for a better job.

On cross-examination, Mays testified that in the spring of 1994 she married and soon moved to Las Ve-

gas, Nevada to live with her husband. A comparable job to the one she held with Plano was not available in Las Vegas. Mays understood that to obtain **[*8]** a comparable job she would have to look outside of Las Vegas. She testified that she thought her husband would be willing to leave his long time employment and move to wherever she found a job. Mays then admitted that she has not looked for employment outside of Las Vegas even though she knew that it would be necessary to obtain a comparable position.

Through its cross-examination of Mays, Plano presented some evidence that Mays did not use reasonable diligence to mitigate her damages. Plano showed that Mays knew that she had to look in other cities and she chose not to do so. The law does not require Plano to show that comparable jobs were in fact available. *See Rodriquez, 791 S.W.2d at 572*. We conclude the evidence is both legally and factually sufficient to support the jury finding that Mays did not make reasonable effort to mitigate her damages. We overrule points of error two, three, and four.

In Mays's fifth and sixth points of error, she attacks the sufficiency of the evidence to support the jury finding that had she mitigated her damages, she would have earned $ 87,500. Because we conclude the evidence is sufficient to support the failure to mitigate finding, **[*9]** we do not address Mays's fifth and sixth points of error. *See Rodriguez, 791 S.W.2d at 572*.

DAMAGES

In points thirteen and fourteen, Mays contends the trial judge erred in overruling her motion for new trial because the amount of damages found by the jury was manifestly too small. Specifically, Mays contends the jury finding of $ 20,000 in back pay was inadequate. Mays also assigns error to the jury's failure to find any front pay damages.

Rule of appellate procedure 44.1(b) provides that "the court may not order a separate trial solely on unliquidated damages if liability is contested." *TEX. R. APP. P. 44.1(b)*. Because we affirm the trial court's take nothing judgment, we have no authority to remand the issue of damages alone. *See Redman Homes, Inc. v. Ivy, 920 S.W.2d 664, 669 (Tex. 1996)*. Accordingly, we overrule Mays's thirteenth and fourteenth points of error.

ATTORNEY'S FEES

In her fifteenth point of error, Mays contends the trial judge erred in overruling her motion for new trial because the amount of attorney's fees found by the jury was manifestly too small.

TCHRA, provides that attorney's fees may be awarded to the prevailing party. **[*10]** *TEX. LAB. CODE ANN. § 21.259(a)* (Vernon 1996). We look to the judgment, not the verdict, in determining whether attorney's fees are appropriate. *Southwestern Bell Mobile Systems, Inc. v. Franco, 971 S.W.2d 52, 56 (Tex. 1998)*.

The trial court entered a take nothing judgment against Mays. We look to that judgment to determine whether she is a prevailing party for the purpose of attorney's fees. Mays was not a prevailing party under the judgment. Accordingly, Mays was not entitled to recovery of her attorney's fees. We overrule Mays's fifteenth point of error.

In points of error seven through ten, Mays alleges certain errors pertaining to the after-acquired evidence defense. Because we conclude that the evidence is sufficient to support the finding on failure to mitigate, we do not address these points.

In her twelfth point of error, Mays complains of the trial court's partial summary judgment on her claim for compensatory damages. Because we conclude that Plano is not liable to Mays, this point is moot.

We affirm the trial court's judgment.

MARK WHITTINGTON

JUSTICE