Third District Court of Appeal

State of Florida

Opinion filed September 23, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1144
Lower Tribunal No. 12-35125

Miami-Dade County,
Appellant,

vs.

Faye Davis,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Rodney Smith, Judge.

Abigail Price-Williams, Miami-Dade County Attorney, and Marlon D. Moffett, Assistant County Attorney, for appellant.

Amlong & Amlong, P.A., and William R. Amlong (Fort Lauderdale) and Karen Coolman Amlong (Fort Lauderdale), for appellee.

Before EMAS, C.J., and FERNANDEZ and HENDON, JJ.

EMAS, C.J.

Miami-Dade County, the defendant below, appeals the trial court's order granting a motion for directed verdict, or in the alternative, a new trial in favor of Faye Davis, the plaintiff below. For the reasons that follow, we reverse the trial court's order with directions to reinstate the jury's verdict and to enter judgment accordingly.

BACKGROUND AND PROCEDURAL HISTORY

In 1987, the Miami-Dade Fire Rescue Department ("MDFR") hired Faye Davis, an African American female, as a Firefighter. Davis took the promotional exam to become a Chief Fire Officer ("CFO") in 2007, 2008, 2009, and 2010, but was not promoted. Davis is a member of the Progressive Firefighters Association and served for several years as the association's first female president, advocating for diversity and fairness in the hiring process.

In 2012, Davis filed a complaint against Miami-Dade County, alleging that her lack of promotion to the rank of CFO during the promotional cycles in 2009-10 and 2010-11 was due to: (1) racial discrimination; (2) gender discrimination; and (3) retaliation for her activism, all in violation of the Florida Civil Rights Act ("FCRA").[1]

[1] Before suing the County, Davis filed a charge of discrimination with the Florida Commission on Human Relations ("FCHR") and Equal Employment Opportunity Commission ("EEOC"). Later, in the instant legal action, the County moved for

The following evidence was presented at trial:

During the time period at issue (2009-10 and 2010-11), MDFR Fire Chief Herminio Lorenzo was responsible for making promotional decisions. To determine which employees qualified for promotions, the County (in this case Chief Lorenzo) was required to follow written procedures contained in its Collective Bargaining Agreement ("CBA") with the Union. The CBA requires that an employee seeking a promotion must take an objective promotional exam which is offered every year; the exam scores remain in effect for one year from the date they are released. Employees who pass the exam are placed on a certified promotional-eligible list ranked according to their respective exam scores. During the 2009-10 hiring cycle, Davis ranked 2 out of 4 on the promotional list, and, in 2010-11, she ranked 5 out of 6 on the promotional list.

MDFR developed a relief factor to calculate the number of CFOs required to provide "365 days a year, 24 hours a day" coverage for the upcoming year. Once the number of CFO positions is budgeted according to the relief factor, positions are filled within two pay periods of any position becoming vacant. For instance, the

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summary judgment on the claims pertaining to the 2010-11 cycle on the basis that Davis failed to exhaust her administrative remedies where the EEOC complaint only challenged the 2009-10 cycle. The County appeals the trial court's denial of that motion. In light of our decision, however, we do not reach the merits of the trial court's ruling on summary judgment.

parties agree that there were seventy-nine budgeted CFO positions during the 2009-10 hiring cycle.

However, a *budgeted* vacancy does not necessarily result in an *actual* vacancy. More specifically, a vacancy does not result immediately through retirement, resignation, or promotion, but occurs only if there are no overages in the job classification at the time of departure. As Davis herself testified: "There has to be a vacancy for you to go into. If there's no vacancy, there's nowhere for you to get promoted into." Here, the parties agree that there was an overage during the 2009-10 year where there were eighty-one employees in the CFO position at the beginning of the year.

Throughout trial, the parties' primary disagreement was the number of actual vacancies during the 2009-10 promotional cycle. Chief Lorenzo testified at trial that the County and the Union entered into an agreement for the County to pay existing CFOs thirty minutes overtime per shift in exchange for the Union's agreement to reduce the MDFR's required number of CFOs by two, resulting in seventy-seven *actual* vacancies for the relevant promotional period. As noted above, there were eighty-one employees in the CFO position at the start of the 2009-10 cycle, and four retirements and promotions over the course of that year. That left seventy-seven employees in the CFO position at the end of the 2009-10 promotional period. Thus,

accepting that the agreement testified to by Chief Lorenzo existed, no vacancy would have existed to permit Davis to be promoted.

Conversely, Davis maintained that because the CBA requires vacant CFO positions to be filled based on the budgeted number of positions, she was improperly denied a promotion during the 2009-10 cycle where there were seventy-nine budgeted positions but only seventy-seven people in the CFO position by the end of the year. This would have required Chief Lorenzo to promote two individuals from the list to CFO—the individual who had the highest score and Davis, who placed second. As for the 2010-11 list, she maintained that—because the 2009-10 vacancies were never filled—they rolled over to the next cycle to create five vacancies, and therefore she should have at least been promoted in 2010 where she ranked fifth among exam takers. Stated differently, under Davis' theory of the case, no agreement existed between the County and the union to reduce by two the number of CFOs.

After each party rested its case, and the trial court reserved ruling on motions for directed verdict, the jury returned a verdict in the County's favor finding that, by the greater weight of the evidence, the County did not deny Davis a promotion from the 2009-10 or 2010-11 lists. The jury also found that the County did not deny Davis a promotion because of her protected activity. Because of the jury's response to these threshold questions, it was not required to reach the remaining questions on

the verdict form (e.g., whether the denial of a promotion was motivated by race or sex, or in retaliation for Davis engaging in protected activity).

The County submitted a proposed final judgment to the trial court requesting it to enter final judgment in favor of the County. Davis filed a renewed motion for directed verdict and motion for new trial. The trial court orally granted Davis' motion for a directed verdict in March 2019, directing a verdict in favor of Davis on the issue of liability. On June 6, 2019 (nineteen months after trial began), the trial court adopted Davis' proposed written order granting her motion for directed verdict and, in the alternative, new trial. This appeal followed.

DISCUSSION AND ANALYSIS

The trial court granted both of Davis' motions (for directed verdict and new trial) in a single order and in the alternative. For ease of discussion, however, we treat them separately.

Order Granting Directed Verdict in Favor of Davis

We review a trial court's ruling on a motion for directed verdict *de novo*. Competitive Softball Promotions, Inc. v. Ayub, 245 So. 3d 893, 895 (Fla. 3d DCA 2018). Importantly, when ruling on a directed verdict, a trial court must view all evidence and inferences of fact in a light most favorable to the non-moving party, and should only grant the motion "if there is no evidence or reasonable inferences to support the opposing position." Kopel v. Kopel, 229 So. 3d 812, 818-19 (Fla. 2017).

In directing a verdict in favor of Davis, the trial court failed to view the evidence and all inferences flowing from the evidence in a light most favorable to the County as the nonmoving party.

The plaintiff in a Title VII trial carries the initial burden of establishing a prima facie case of racial discrimination. McDonnell Douglas Corp v. Green, 411 U.S. 792, 802 (1973); see, e.g., Palm Beach Cty. Sch. Bd. v. Wright, 217 So. 3d 163, 165 (Fla. 4th DCA 2017). To meet this burden, the plaintiff must show that: (1) plaintiff belongs to a racial minority; (2) plaintiff applied, and qualified, for a job for which the employer was seeking applicants; (3) despite meeting qualifications, plaintiff was rejected; and (4) after the rejection, the position remained open and the employer continued seeking applicants with similar qualifications. McDonnell Douglas Corp., 411 U.S. at 802.

To prove a prima facie case of retaliation under Title VII, the plaintiff must show that she: (1) engaged in statutorily protected expression; (2) suffered an adverse employment action; and (3) there is a causal relation between (1) and (2). Olmstead v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). "The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

There is no dispute that Davis, an African American woman, qualified for a promotion (given she took and passed the required test), and was included on the eligibility lists for promotion to CFO. Instead, the case came down to whether, despite being qualified, Davis was rejected from a job for which the employer was seeking applicants. In other words, was there an actual vacancy in 2009-10 and 2010-11 available to be filled by Davis?[2] By its verdict, the jury answered this question "no," determining that Davis had failed to establish this element. In order to set aside the jury's verdict and to direct a verdict in Davis's favor, the trial court would have had to conclude that there was no evidence at trial, nor any reasonable inferences from the evidence, to support the County's position that it was not actively seeking applications because (due to overages) there was no vacancy in the CFO position. Kopel, 229 So. 3d 818-19. We conclude, upon our *de novo* review, that there was in fact evidence presented at trial to support the County's position

[2] The number of actual vacancies during the 2009-10 hiring cycle (either seventy-seven or seventy-nine) became one of the most intensely disputed issues at trial. Because Davis's argument pertaining to the 2010-11 hiring cycle necessarily relies on whether there was evidence to support a finding that there was a CFO position available during the preceding cycle—i.e., whether the County was *required* to fill all seventy-nine budgeted positions—it rises and falls with the success of her challenge to the 2009-10 hiring cycle. As a result, the parties' briefs (as well as this opinion) focus on the 2009-10 hiring cycle.

(and the jury's verdict) and that the trial court erred in entering a directed verdict (and new trial) in favor of Davis.

To be sure, there was conflicting testimony and other evidence presented on the issue of whether there was an actual vacancy. But the jury resolved those conflicts in the evidence and, in doing so, returned a verdict in favor of the County. A review of the record establishes there was evidence to support that verdict, e.g., Chief Lorenzo's testimony that the County entered an agreement with the Union to better compensate current CFOs if the required number of CFOs for 2009-2010 was reduced by two, from seventy-nine to seventy-seven, and that this agreement was the reason that Davis was not promoted. See Kent v. City of Homestead, No. 00-3601-CIV, 2002 WL 732109, at *10 (S.D. Fla. Mar. 14, 2002), aff'd, 54 F. App'x 691 (11th Cir. 2002) (holding the city reducing the funding from making any promotions for one year was a legitimate, non-discriminatory reason for refusing promotions). In moving for a directed verdict, Davis must admit not only all evidence presented at trial, but also every conclusion a jury might freely and reasonably infer from the evidence. Stirling v. Sapp, 228 So. 2d 850, 852 (Fla. 1969). Given the evidence presented, and viewing it in a light most favorable to the County, the jury certainly could have reasonably reached the determinations reflected by its verdict, and concluded that Davis did not establish her prima facie case. Since Davis did not meet her burden to prove a prima facie case, the County

did not need to rebut any presumption through its asserted defenses.[3] The trial court erred in disregarding the jury's verdict and instead directing a verdict in Davis's favor.

Order Granting New Trial

The same twenty-four-page order that directed a verdict in favor of Davis also granted, in the alternative, a new trial on all issues. This portion of the order (in like fashion) merely adopted the proposed order submitted by Davis. The order stated that the jury's verdict was against the manifest weight of the evidence, concluding that "Miami-Dade County produced no admissible evidence of any legitimate, non-discriminatory reason for not promoting Captain Davis during either of those two

[3] To find that the County failed to present any evidence showing a non-discriminatory reason for Davis's lack of promotion, the trial court's order relied on Lorenzo's inability to remember his reasons for not promoting Davis. Such reliance is misplaced where, viewing the evidence in the light most favorable to the County, a reasonable inference can be drawn that the County's decision was based on legitimate, non-discriminatory, non-retaliatory reasons i.e., overages and an agreement between the County and the union prohibited Chief Lorenzo from filling the two "vacant" positions. We also note that Chief Lorenzo testified that the only criteria he used to make CFO promotions was to go "straight down the list," and that he never took race into consideration. Davis' own testimony on cross-examination allowed for the reasonable inference that Chief Lorenzo simply went "straight down the list" where she acknowledged that, from 2005 to 2009, he had promoted Blacks, Hispanics, women, and active members of the PFA.

[2009 and 2010] cycles."[4] That conclusion is incorrect, is not supported by the record, and requires reversal.

While it is well-settled that "[a]n order granting new trial is generally reviewed for an abuse of discretion, Finkel v. Batista, 202 So. 3d 913, 915 (Fla. 3d DCA 2016) (citing Van v. Schmidt, 122 So. 3d 243, 252–53 (Fla. 2013)), it is also "well settled that a trial court abuses its discretion when its reasons for granting a new trial are not supported by the record." Hashmi-Aikhan v. Staples, 241 So. 3d 264 (Fla. 5th DCA 2018). Further, we apply a *de novo* standard of review to the legal conclusions contained in an order granting new trial. Van, 122 So. 3d 246.

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[4] The order also concluded the jury was "deceived as to the force and credibility of the evidence or [] [] influenced by considerations outside the record," a reference to a small portion of testimony stricken by the trial court. More specifically, the trial court struck testimony from Robin Duran (a division chief and then-Deputy Chief to Alfredo Suarez) stating that there were only seventy-seven "required" CFO positions for the 2009-10 promotional cycle. Duran further explained that she prepared a report reaching the same number of available CFO positions—seventy-seven. Because the report was never provided to plaintiff's counsel, the trial court struck the testimony as a "blatant, willful violation of discovery."

The trial court's finding that the jury was influenced by the stricken testimony is not supported by the evidence. We also note that the trial court gave a curative instruction as requested by Davis, and that Davis did not make a contemporaneous motion for mistrial. Black v. Cohen, 246 So. 3d 379, 384 (Fla. 4th DCA 2018) (noting: "[T]he Florida Supreme Court has held that a trial court may not grant a new trial based upon objections to attorney misconduct which were sustained, but for which no motion for mistrial was requested."). The testimony in question was at most cumulative, did not advance the County's theory beyond that which had already been established by other evidence at trial, and any potential prejudice was cured by the court's curative instruction.

Where, as here, the evidence presented at trial is in conflict, it is also well settled that it is within the jury's province to resolve that conflict, and the trial court may not act as a seventh juror with a "veto" power to decide that the verdict is against the manifest weight of the evidence. State Farm Mut. Auto. Ins. Co. v. Caboverde, 65 So. 3d 46 (Fla. 3d DCA 2011) (citing Midtown Enterps, Inc. v. Local Contractors, Inc., 785 So. 2d 578 (Fla. 3d DCA 2001)). "In deciding whether the evidence manifestly weighs against the verdict, the trial court must examine all of the evidence—giving consideration to its weight and credibility." Midtown Enterps., 785 So. 2d 582 (quoting Brown v. Estate of Stuckey, 749 So. 2d 490, 497 (Fla. 1999) (citations omitted)).

As our sibling court has cogently observed:

> For a verdict to be against the manifest weight of the evidence, so as to warrant a new trial, the evidence must be clear, obvious, and indisputable; where there is conflicting evidence, the weight to be given that evidence is within the province of the jury.

Harlan Bakeries, Inc. v. Snow, 884 So. 2d 336, 340 (Fla. 2d DCA 2004).

> A trial judge is not free to behave as a super-juror by disregarding a jury's verdict simply because the judge would have rendered a different one had it been the judge's choice to make.

Meyers v. Shontz, 251 So. 3d 992, 999–1000 (Fla. 2d DCA 2018).

Upon our thorough review of the record, we conclude that the trial court abused its discretion in granting a new trial to Davis and reverse that order as well.

CONCLUSION

We hold that the evidence supported the jury's verdict, in which it determined that the County did not deny Davis a promotion during the 2009-10 and 2010-11 promotional cycles based on her race or sex, and further determined that the County did not deny her a promotion because she engaged in protected activity. The trial court erred in granting Davis' motion for directed verdict and abused its discretion in alternatively granting a new trial.

We reverse the trial court's orders granting Davis' motion for directed verdict and, in the alternative, a new trial, with directions to reinstate the jury's verdict in favor of the County, enter judgment in accordance with that verdict and for further proceedings consistent with this opinion.

Reversed and remanded with directions.