Opinion issued June 23, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00611-CV

TYRA P. WILLIAMS, Appellant

V.

FORT BEND INDEPENDENT SCHOOL DISTRICT, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Case No. 08DCV164954

MEMORANDUM OPINION

Tyra P. Williams appeals the trial court's rendition of summary judgment in favor of Fort Bend Independent School District. Williams filed suit alleging racial

discrimination in violation of the Texas Commission on Human Rights Act.[1] The District filed a combined traditional and no-evidence motion for summary judgment. Williams did not file a response. After denying Williams's motion for leave to file a late response and to continue the summary judgment hearing for one week, the trial court granted the District's motion. On appeal, Williams asserts that the trial court abused its discretion by denying her motion for leave to file a late response and to continue the hearing by seven days and that summary judgment was improper because the summary judgment evidence raises fact issues on her claims. We conclude that the trial court abused its discretion in denying Williams's motion for leave to file a late response. We therefore reverse and remand this cause.

Procedural Background

Williams filed this suit alleging the District had engaged in racially discriminatory employment practices and retaliated against her for reporting alleged racial discrimination. The District answered, generally denying Williams's claims and pleading affirmative defenses.

In May 2010, the District filed a motion for summary judgment. The motion contained both traditional grounds and no-evidence grounds attacking Williams's discrimination and retaliation claims. The hearing on the motion was set for

[1] TEX. LAB. CODE ANN. §§ 21.001–.556 (West 2006 & Supp. 2010).

Friday, June 18, 2010. Accordingly, Williams's response was due by June 11.[2] On June 16, Williams's counsel realized the summary judgment motion was set for a hearing on June 18. The next day, she filed a motion for leave to file a late summary judgment response and for continuance, requesting that the hearing be continued until the following Friday, June 25, and allowing her to file a summary judgment response on Monday, June 21.

On June 18, the trial court heard the motion for leave to file a late response and continuance. After questioning Williams's counsel concerning the circumstances of the missed June 11 deadline and hearing argument from both sides, the trial court denied the motion. The trial court proceeded to hear the motion for summary judgment and rendered judgment in favor of the District.

Late-filed Response to Motion for Summary Judgment

In her first issue, Williams contends that the trial court erred by denying her motion for leave to file a late response to the District's motion for summary judgment. We review for an abuse of discretion a trial court's ruling on a motion for leave to file a late response to a motion for summary judgment. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Id.* at 687.

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[2] *See* TEX. R. CIV. P. 166a(c).

A late summary judgment response should be allowed upon a showing of good cause and no undue prejudice to the opposing party. *Id.* at 688. This is the same standard used for allowing a party to withdraw deemed admissions. *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005). "Good cause" means the failure to timely file a summary judgment response was due to an accident or mistake and was not intentional or the result of conscious indifference. *Id.* Conscious indifference is more than negligence; it involves behavior such as a "pattern of ignoring deadlines and warnings from the opposing party." *Levine v. Shackleford, Melton & McKinley, L.L.P.*, 248 S.W.3d 166, 168–69 (Tex. 2008). Under the good cause standard applicable to these types of cases, "[e]ven a slight excuse will suffice, especially when delay or prejudice to the opposing party will not result." *Boulet v. State*, 189 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (quoting *Spiecker v. Petroff*, 971 S.W.2d 536, 538 (Tex. App.—Dallas 1997, no pet.)).

Williams's counsel explained that she miscalendared the date that the response was due. The District counters that a "bare assertion" that an attorney miscalendared the response date is insufficient to show good cause. *See Carpenter*, 98 S.W.3d at 686. *Carpenter*, however, is distinguishable. First, the counsel in that case did not file an affidavit supporting the explanation of good cause. *Id.* Thus, the only support for the motion for leave was the unsupported, or

bare, assertion in the motion. *Id.* Williams's counsel did file an affidavit with the motion for leave. In addition, the trial court closely questioned Williams's counsel at the hearing on the motion to file a late response. Williams's counsel explained that when she received the motion on June 2, she miscalendared the response date and immediately drafted and sent a letter to her client, Williams, which contained the erroneous response date.[3] We conclude Williams has shown good cause for filing a late response. *See Boulet*, 189 S.W.3d at 838 (holding attorney's mistake in calendaring response date for requests for admission by using date requests were delivered to her desk and not date they were delivered to office constituted good cause); *Galindo v. Imperial Group, L.P.*, No. 2-04-040-CV, 2005 WL 1244691, at *3 (Tex. App.—Fort Worth May 26, 2005, no pet.) (finding trial court abused its discretion in refusing to allow late-filed summary judgment response when attorney stated that he received notice but mistakenly did not calendar it).

Undue prejudice depends on whether allowing "a late response will delay trial or significantly hamper the opposing party's ability to prepare for it."

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[3] In the letter, Williams's counsel also stated that Williams, the client, had to pay an outstanding balance due for attorney's fees before counsel would file a response. The District argues that this establishes counsel's intent to not file a response. However, at the hearing Williams's counsel showed the District and the trial court correspondence to Williams just days later indicating she would file a response whether payment was received or not. Counsel also explained that she would not intentionally fail to file something on behalf of a client over a late payment. Other than the single sentence in the June 2 letter itself, this explanation is not controverted.

Wheeler, 157 S.W.3d at 443. In this case, the hearing was held on Friday, June 18. Williams asked for the deadline to file a response to be moved to Monday, June 21 and the hearing to be postponed for one week until June 25. Williams's counsel explained that no trial setting existed and, therefore, a one week delay would not prejudice the District. The District did not argue or produce evidence before the trial court and does not argue on appeal that it would suffer undue prejudice from a one week delay—either by a delay in the trial or being hampered in its ability to prepare for trial. We conclude that, based on the record in this case, the District would not be harmed by a one week delay in hearing its motion for summary judgment. *See Galindo*, 2005 WL 1244691, at *3 (no undue prejudice shown when party sought only two days to file late response and no trial date had been set).

Accordingly, we hold that the trial court abused its discretion in denying Williams's motion to file a late summary judgment response. *See id.*; *see also Boulet*, 189 S.W.3d at 838 (holding trial court abused discretion in denying withdrawal of deemed admissions because appellant had established accident or mistake in failing to respond and no undue prejudice was shown); *City of Houston v. Riner*, 896 S.W.2d 317, 320 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (same).

We sustain Williams's first issue. Because we sustain this issue, we do not address her second issue, which presents an alternative reason to reverse the trial court. *See* TEX. R. APP. P. 47.1.

Conclusion

We reverse the judgment of the trial court and remand this cause for further proceedings.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.