Opinion issued June 2, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-01043-CV

LILA GHEMRI, Appellant

V.

WEI WAYNE LI, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Case No. 2015-21071

MEMORANDUM OPINION

Appellant, Lila Ghemri, sued appellee, Wei Wayne Li, for tortious interference with prospective employment relationship and fraud. Li filed a plea to the jurisdiction. The trial court granted the motion, and Ghemri appealed. In one issue, Ghemri argues the trial court had jurisdiction over her claims.

We affirm.

Background

Ghemri is an associate professor at Texas Southern University ("TSU"). Li is the Interim Chair of the Computer Science Department at TSU. In April 2015, Ghemri filed suit against Li. Ghemri identified three wrongdoings by Li that formed the bases for her claims against him.

First, Ghemri asserted that, during the Fall 2014 semester, Li provided Ghemri with a "12th Class Day Workload Report." The report contained Ghemri's assigned classes and "industry appointments." Ghemri looked over the report, determined it was correct, and signed the report.

Ghemri further asserted, however, that Li altered the report, changing the assigned classes and industry appointments to suggest that Ghemri worked fewer hours than she did. According to Ghemri, Li attached the page she had signed to the altered report "and filed this false document with [some] State Agency." Ghemri alleged that Li modified the reports for her and other professors to misrepresent that he was keeping the department under budget in the "hopes that he would ultimately obtain the full time Department Chair position" along with its accompanying pay raise.

Second, Ghemri asserted that she prepared for the classes assigned to her for the Spring 2015 semester. Five students were enrolled in a class designated CS434.

One of the students told her that Li had told the student earlier that day that CS434 was being cancelled. According to Ghemri, Li told "several other students" and told them that CS434 "was going to be cancelled and discouraged them from enrolling." She further asserted that, on January 22, 2015, she learned that four other students wanted to enroll in the class, but Li had cancelled the class. Ghemri spoke to Li, telling him "that it might have been premature to cancel this class, since enrollment period was still open, [but] Dr. Li responded by shouting that 'the decision was taken last week, it's done. Don't talk about it.'" Ghemri asserted, "Students were penalized by Dr. Li's wrongful and fraudulent decision."

Third, Ghemri complains about the 12th Class Day Workload Report for the Spring 2015 semester. "This time Dr. Li falsified and altered Dr. Ghemri's work assignments by unilaterally low[er]ing the multiplier by which her Master's Research Thesis advising time is worth." Ghemri asserted that "Li held a faculty vote on the multiplier value of this time." Ghemri asserts that Li knew that the faculty would vote to retain the original multiplier value, so "he allowed the faculty members to vote for as many choices as they wanted. When that vote tied, Dr. Li made a unilateral decision against policy and practice."

After answering, Li filed a plea to the jurisdiction, arguing that the trial court lacked subject-matter jurisdiction pursuant to section 101.106 of the Texas Civil Practice and Remedies Code. He further argued that Ghemri lacked standing to sue

as she failed to establish she had suffered a distinct injury or that a real justiciable dispute existed between the parties.

In support of the plea, Li attached the affidavit of Desiree Jackson, the Assistant Dean of Student Services and Instructional Support in the College of Science and Technology for TSU. In her affidavit, she averred that she read Ghemri's petition and "attest[ed] that the specific actions alleged to have been taken by . . . Li reflect work that is in the general scope of Dr. Li's employment, and are part of Dr. Li's administrative duties as Interim Chair of the Computer Science Department." Jackson asserted that "[a] 12th Class Day workload Report . . . is an administrative document created and kept in the ordinary course of business by administrators at TSU, including Dr. Li." The reports are used for internal documentation of professors' work assignments. Pursuant to the TSU Faculty Manual, Li had been assigned the duty "to submit the reports of Plaintiff and other professors in the Computer Science Deparment." Jackson further asserted that the reports "would not and did not affect the salary or working conditions of" Ghemri.

Additionally, Jackson asserted that it was part of Li's administrative duties to cancel classes "when enrollment is not large enough. Registration for a class must have had to contain at least ten (10) students to avoid cancellation." Jackson reported that the class CS434 had four students enrolled "on the date cancellations were due to the Office of the Dean." Jackson asserted that she asked Li to cancel the class.

"The cancellation of CS 434 would not and did not affect the salary or working conditions of [Ghemri]."

Ghemri responded to the plea to the jurisdiction. In the response, Ghemri argued that Li was not entitled to dismissal based on official immunity because official immunity was an affirmative defense and because it requires a showing of acting in good faith. Ghemri argued that the facts alleged in her pleading showed Li was not acting in good faith.

In support of her response, Ghemri attached her petition, a copy of the original 12th Day Report for Fall 2014, and a copy of the substituted 12th Day Report for Fall 2014. The original and substituted Fall 2014 reports are largely identical. The only differences are in the listing of assigned classes, specifically in the semester hours designated for the assigned classes.

Subject-Matter Jurisdiction

In her sole issue, Ghemri argues the trial court had jurisdiction over her claims.

A. Standard of Review

We review the trial court's ruling on a plea to the jurisdiction de novo. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004)). The plaintiff must allege facts that affirmatively establish the trial court's subject matter jurisdiction. *Id.*; *City of*

Pasadena v. Kuhn, 260 S.W.3d 93, 95 (Tex. App.—Houston [1st Dist.] 2008, no pet.). In determining whether the plaintiff has satisfied this burden, we construe the pleadings liberally in the plaintiff's favor and deny the plea if the plaintiff has alleged facts affirmatively demonstrating jurisdiction to hear the case. *Miranda*, 133 S.W.3d at 226–27; *Smith v. Galveston Cty.*, 326 S.W.3d 695, 698 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

If the plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties. *Miranda*, 133 S.W.3d at 227. When the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228. After a defendant asserts, and supports with evidence, that the court lacks subject matter jurisdiction, the plaintiff must show the existence of a disputed fact issue in order to avoid dismissal for want of jurisdiction. *Id.* at 227–28. The standard of review for such jurisdictional disputes "generally mirrors that of a [traditional] summary judgment." *Id.* at 228. On the other hand, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* In reviewing the evidence presented, we take as true all evidence favorable to the plaintiff, indulging every reasonable inference in the plaintiff's favor. *Id.*

B. Analysis

Li's plea to the jurisdiction argued the trial court lacked subject matter jurisdiction pursuant to section 101.106 of the Texas Civil Practice and Remedies Code and that Ghemri lacked standing because she failed to establish she had suffered a distinct injury or that a real justiciable dispute existed between the parties. Section 101.106 of the Texas Civil Practice and Remedies Code provides, in pertinent part,

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (Vernon 2011). Ghemri did not amend her petition to add TSU as a defendant and to dismiss Li from the suit. Accordingly, if Li carried his burden, then the trial court was required to dismiss the suit against Li. *See id.* In reviewing a plea to the jurisdiction based on this subsection,

> we consider whether [the movant] conclusively proved that he met all three of the statute's requirements: (1) he was a governmental unit employee at the relevant time; (2) the complained-of conduct was within the general scope of his employment with a governmental unit; and (3) the plaintiffs' suit could have been brought under the Tort Claims Act against [the movant's] governmental employer.

Fink v. Anderson, 477 S.W.3d 460, 465–66 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

Ghemri's only complaint on appeal concerning the application of section 101.106 is that Li failed to establish that the complained-of conduct against him was within the general scope of his employment with TSU.[1] For purposes of the statute, "scope of employment" is defined as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(5) (Vernon 2011). "The Restatement (Third) of Agency provides additional clarity by defining the term negatively: '[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.'" *Alexander v. Walker*, 435 S.W.3d 789, 792 (Tex. 2014) (quoting RESTATEMENT (THIRD) OF AGENCY § 7.07(2)). "Thus, when an employee engages in conduct 'for the sole purpose' of furthering someone else's interests and not his employer's, the conduct is outside the employee's scope of employment." *Fink*, 477 S.W.3d at 466 (quoting RESTATEMENT (THIRD) OF AGENCY § 7.07(2), cmt. b.). Conduct that serves the purpose of the employment but escalates beyond the

[1] While Ghemri does argue that her suit could not have been brought against TSU, her basis for this argument is that the complained-of conduct of Li was not within the general scope of his employment with TSU.

assigned or permitted conduct is within the scope of employment. *Id.* In contrast, "conduct that is better viewed as a deviation from an assigned task instead of an escalation beyond what was authorized is not within the employee's scope of employment." *Id.*

Both Ghemri and Li argued that it was part of Li's assigned duties in his employment with TSU to submit the professors' 12th Class Day Workload Reports for each semester. Li presented evidence to this effect with his plea to the jurisdiction. For the first report, Ghemri asserted in her petition that Li modified the report she signed to "reflect that Dr. Ghemri worked [fewer] hours than she did." Her proof attached to her response to the plea to the jurisdiction does not support this contention.

Ghemri attached the original and substituted reports for Fall 2104 to her response to the plea to the jurisdiction. The only difference between the two reports was in the designation of the semester hours for her assigned classes. The original report contained, in pertinent part, the following information:

Course Title	Sem Hrs.	Time	Meeting Days
Theory of Computation	4.5	17:30-20:20	T
Advanced data base Management Systems	4.5	17:30-20:20	R
Master's Thesis research II	2.26	TBA	TBA

The substituted report contained, in pertinent part, the following information:

Course Title	Sem Hrs.	Time	Meeting Days
Theory of Computation	3	17:30-20:20	T
Advanced data base Management Systems	3	17:30-20:20	R
Master's Thesis research II	1.5	TBA	TBA

Both reports indicate that the first two classes met one day a week for two hours and fifty minutes. The original report designated this as four-and-one-half semester hours, while the substituted report designated this as three semester hours. Given that the substituted report is closer to the amount of class time, the evidence does not show that Li's filing the substituted report was an escalation of Li's work duties, let alone a deviation from them. *See id.*; *Miranda*, 133 S.W.3d at 227–28 (holding, after defendant supports with evidence that court lacks jurisdiction, plaintiff must show existence of disputed fact issue).

For the third class, the two reports only reflect that the designation of semester hours was reduced from 2.26 to 1.5. The reports do not indicate, in themselves, that the modification was incorrect or improper. Accordingly, there is no proof that filing the substituted report was a deviation from Li's work duties. *See Fink*, 477 S.W.3d at 466; *Miranda*, 133 S.W.3d at 227–28.

Likewise, for the Spring 2015 report, Ghemri alleged in her petition that Li "falsified and altered" the report by "unilaterally low[er]ing the multiplier by which her Master's Research Thesis advising time is worth." Ghemri alleges that Li

achieved this by presenting the matter for a vote at a faculty meeting and "allow[ing] the faculty members to vote for as many choices as they wanted. When the vote tied, Dr. Li made a unilateral decisions against policy and practice." Ghemri presented no evidence, however, to establish that breaking a tie vote on a departmental matter was a *deviation* from Li's work duties. *See Fink*, 477 S.W.3d at 466; *Miranda*, 133 S.W.3d at 227–28.

Finally, for the cancelling of CS434, Li's evidence established that classes had to have ten students enrolled to avoid being dropped, that, on the date the enrollment report was sent to the dean, only four students were enrolled in the class, and that Jackson asked Li to drop the class. Ghemri complains about Li's advising students not to enroll for the class because it was going to be cancelled. Ghemri's allegations and Li's proof establish, however, that it was factually correct to state that the class was going to be cancelled. By Ghemri's allegations, only four additional students had expressed an interest in taking the class. At best, this would have led to nine students enrolling in the class, not ten. Ghemri has presented no evidence that she had any vested right in teaching the class, that ten or more students would have enrolled in the class but for Li's statements, or that Li's complying with the request to cancel the class from the Assistant Dean of Student Services and Instructional Support in the College of Science and Technology was a deviation from his work duties. *See Fink*, 477 S.W.3d at 466; *Miranda*, 133 S.W.3d at 227–28.

We hold Li carried his burden of establishing that the conduct of which Ghendri complains was within the general scope of his employment with TSU. We further hold that Ghendri failed to present evidence to create a fact issue.

Lastly, Ghemri devotes the bulk of her response to the plea to the jurisdiction and of her brief on the merits on appeal to the argument that Li had not established that he was entitled to the protections of official immunity. Li asserts that argument is not relevant to his arguments raised in the plea to the jurisdiction. We agree.

"While governmental immunity only protects an officer *in his official capacity* up until he acts 'without legal authority,' official immunity may more broadly protect him when sued *in his personal capacity*." *Hous. Belt & Terminal Ry. Co. v. City of Houston*, No. 14-0459, 2016 WL 1312910, at *6 n.7 (Tex. Apr. 1, 2016). It is an affirmative defense. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Inquiry into the defense of official immunity is not at issue for dismissal under 101.106(f). *Alexander*, 435 S.W.3d at 792 n.2.

We overrule Ghendri's sole issue.[2]

[2] Because we have affirmed the trial court's grant of the plea to the jurisdiction based on the application of section 101.106, we do not need to reach the issue of whether Ghemri lacked standing to assert her suit. *See* TEX. R. APP. P. 44.1.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Higley, Bland, and Massengale.