In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00292-CV

LAMAR UNIVERSITY, Appellant

V.

MICHAEL JORDAN, Appellee

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-181,188

MEMORANDUM OPINION

Appellant, Lamar University ("Lamar"), brings this interlocutory appeal from the trial court's order denying its plea to the jurisdiction. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (West 2008). The trial court determined appellee, Michael Jordan, timely filed suit against his former employer, Lamar, for discrimination and retaliation in his employment.

BACKGROUND

Jordan began his employment with Lamar University in the Fall of 2002 as a non-tenured faculty professor. Jordan made application for tenure and promotion with Lamar. In November 2005, Jordan's department chairperson informed him that the department would not recommend him for a tenured position. Upon learning of the department's decision, Jordan immediately retained legal counsel believing the department subjected him to gender discrimination.

In September 2006 Jordan received a terminal contract from the Office of the President of Lamar, wherein Lamar notified Jordan that it would not offer him a tenured position and that Lamar would not employ him after the 2007 Spring Semester. Jordan worked under the terminal contract from September 1, 2006 to May 31, 2007.

On December 7, 2006, Jordan filed a Charge of Discrimination alleging that Lamar discriminated against him based on his gender. Specifically, Jordan alleged that the department applied Lamar's tenure and promotion guidelines more strictly toward Jordan than to female candidates. On January 22, 2007, Jordan amended the charge to include an allegation that Lamar retaliated against him.[1] Jordan contends that Lamar retaliated against him for making internal complaints regarding the department's alleged gender discrimination. A liberal review of the pleadings indicates that Jordan alleges

[1] While the amended charge references an attached addendum that purportedly identified the particulars of Jordan's discrimination and retaliation complaints, the referenced addendum is not included in the appellate record.

Lamar retaliated against him by: (1) denying him an office computer from October to December 2005; (2) forcing him to perform the duties of another professor in January 2006; (3) refusing him a merit based raise in March 2006; (4) failing to grant his request for an altered schedule to meet his parenting obligations in Fall 2006; and (5) ultimately denying his tenure application in September 2006. Jordan alleges no other specific acts of retaliation.

Jordan filed this action in district court on February 6, 2008. Lamar timely answered and asserted the affirmative defense of sovereign immunity, and among other things, alleged that Jordan failed to exhaust his administrative remedies before filing suit under Chapter 21 of the Texas Labor Code. Thereafter, Lamar filed its Plea to the Jurisdiction alleging that Jordan filed his complaint for discrimination and retaliation more than 180 days after the alleged unlawful employment practice occurred, thereby depriving the district court of subject matter jurisdiction. After a hearing, the trial court entered its order denying Lamar's plea to the jurisdiction. On appeal, Lamar contends that the trial court erred in exercising jurisdiction over Jordan's claims.

APPLICABLE LAW & APPLICATION

Subject matter jurisdiction is a question of law and appellate courts review de novo a trial court's decision on a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226, 228 (Tex. 2004). The Texas Commission on Human Rights Act (TCHRA) prohibits discrimination and retaliation by employers. *See* Tex.

Lab. Code Ann. §§ 21.001, 21.051, 21.055 (West 2006). Because the TCHRA is modeled after federal civil rights law, "we look to analogous federal precedent for guidance when interpreting the Texas Act." *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999); *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 485 (Tex. 1991), *overruled in part on other grounds by In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 310 (Tex. 2010) (overruling footnote in *Schroeder* that suggested that the two-year statute of limitations in Texas Labor Code section 21.256 is "mandatory and jurisdictional").

Before suing an employer, an aggrieved employee must exhaust his or her administrative remedies. *Schroeder*, 813 S.W.2d at 485. An administrative complaint "must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred." Tex. Lab. Code Ann. § 21.202(a) (West 2006). This 180-day time limit is "mandatory and jurisdictional." *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996); *Schroeder*, 813 S.W.2d at 486. A claimant's failure to file a complaint within the 180-day period is a failure to exhaust administrative remedies that deprives the court of subject-matter jurisdiction. *See City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008); *Harris v. Showcase Chevrolet*, 231 S.W.3d 559, 561 (Tex. App.—Dallas 2007, no pet.).

The plaintiff bears the burden to allege facts that affirmatively demonstrate that the trial court has subject matter jurisdiction over the claims. *See Tex. Ass'n of Bus. v.*

Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993). In evaluating a plea to the jurisdiction, "we construe the pleadings in the plaintiff's favor and look to the pleader's intent." *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

Discriminatory Conduct

Our evaluation of the timeliness of Jordan's discriminatory conduct claim and subsequent lawsuit requires us to first identify the alleged "unlawful employment practice" and then determine when the practice "occurred." *See Del. State Coll. v. Ricks*, 449 U.S. 250, 257, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980); *see also* Tex. Lab. Code Ann. § 21.202(a).

Jordan essentially alleges that the department discriminated against him by applying Lamar's tenure and promotion guidelines more strictly as to him than to female candidates. Jordan does not allege that the college tenure committee, the university tenure committee, the Provost, the President, or the Board of Regents engaged in gender discrimination in denying his tenure application. Rather, Jordan alleges that Lamar's ultimate denial of his application was in retaliation for his complaint of gender discrimination at the department level.

Jordan contends that the filing limitations period should commence when Lamar communicated to Jordan its formal denial of his tenure application in September 2006. Jordan correctly states that Texas law provides that the filing limitations period "begins when the employee is informed of the allegedly discriminatory employment decision, not

when that decision comes to fruition." *DeMoranville*, 933 S.W.2d at 493. However, Jordan misapplies the law to the facts of his case.

Jordan argues that Lamar had not made an adverse employment decision regarding Jordan before December 2005. In support of this contention, Jordan relies on a December 7, 2005 letter, Fernando Gomez, Vice Chancellor and General Counsel for the Texas State University System, sent to Jordan's counsel. In relevant part, the letter states:

> As I am sure you realize, the tenure and promotion processes for 2005-06 are at the earliest stages. Faculty members have submitted their dossiers to department level reviewers (i.e., departmental committees and department chairs); recommendations by these initial reviewers have been made; and, now the dossiers have been submitted to the decanal level for review and evaluation by the college committees and the deans. Following these additional reviews, dossiers and appropriate recommendations are submitted to the university committees for review and evaluation, which, in turn, make recommendations to the Provost. The Provost, who receives the dossiers- which contain the recommendations from all previous levels- in early March, evaluates each of the candidates for promotion and tenure and makes a recommendation on each to the President. The President makes the final recommendation to the Texas State University Board of Regents in May.
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> Finally, I refer you to *Section 17, Page 2.18* of the Lamar University *Faculty Handbook,* which states, "Non-tenured faculty members who are properly notified that they will not be reappointed or notified that the subsequent academic year will be their terminal year of appointment shall not be entitled to a statement of the reasons upon which the decision for such action is based." That may or may not be the final result of Dr. Jordan's candidacy since, as stated earlier, the process has just begun. In any event, the tenure and promotion process for Dr. Michael Jordan will continue according to standard university process.

While this letter supports Jordan's contention that Lamar had not made a final tenure decision, it does not support Jordan's contention that Lamar had made no adverse employment decision regarding Jordan. In fact, the Gomez letter states "recommendations by these [department] reviewers have been made . . . ." The department's decision not to recommend Jordan for tenure was final. Jordan only alleges gender discrimination at the departmental level. Jordan does not dispute that he received notice of the department's decision. In fact, Jordan retained legal counsel to contest this decision. We hold that the filing limitations period commenced to run in November 2005, when Jordan received notice of the department's alleged discriminatory decision not to recommend him for tenure. Therefore, Jordan's administrative complaint of gender discrimination, filed December 7, 2006, was untimely, and the trial court erred in denying Lamar's plea to the jurisdiction as to his complaint of gender discrimination. We sustain issue one.

Retaliatory Conduct

In his petition, Jordan also alleges a retaliation claim against Lamar under section 21.055 of the Texas Labor Code. Jordan alleges that Lamar retaliated against him beginning from the time he obtained an attorney to complain of gender discrimination until he left Lamar's employment. Lamar contends that Jordan's retaliation claim is also barred by the 180-day statutory limitations period, and that the trial court does not have jurisdiction to hear this claim. Jordan responds that the 180-day statutory limitations

period does not apply to his retaliation claim because Lamar's retaliatory conduct constitutes a continual violation, as opposed to separate and discrete retaliatory acts. We disagree with Jordan.

The continuing violation doctrine relieves a plaintiff from proving that all of his employer's alleged acts of discrimination occurred within the actionable period if the plaintiff can show "a series of related acts, one or more of which falls within the limitations period." *Messer v. Meno*, 130 F.3d 130, 134-35 (5th Cir. 1997); *see Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30, 42 (Tex. App.—Austin 1998, pet. denied). A plaintiff can avoid the limitations bar for an alleged act that fell outside the actionable period where there is "'[a] persisting and continuing system of discriminatory practices in promotion or transfer [that] produces effects that may not manifest themselves as individually discriminatory except in cumulation over a period of time.'" *Messer*, 130 F.3d at 135 (quoting *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1561 (5th Cir. 1985)).

> The core idea [of the continuing violation theory] . . . is that equitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights.

Glass, 757 F.2d at 1560-61 (quotations, citation. and footnote omitted). The plaintiff "must show an organized scheme leading to and including a present violation, . . . such

that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action[.]" *Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998). To determine if this organized scheme exists, we consider various factors, including the type of discrimination of the alleged acts, the recurrence of the alleged acts, and the degree of permanence of the alleged acts. *Id*. "[U]nlike the cumulative effect of the petty annoyances of daily harassment," a one-time act such as termination, refusal to hire or promote, or demotion is a discrete act that "cannot be lumped together with the day-to-day pattern of racial harassment." *Id*. at 240; *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002) ("Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify[, and] [e]ach . . . constitutes a separate actionable 'unlawful employment practice.'").

Based on our review of this record, Jordan has alleged five acts of retaliation. Specifically, in his deposition, Jordan testified that he first complained in November 2005 that the department had not recommended him for tenure because of his gender. He also testified that he believed he "had been routinely discriminated against as a male" in the department. Jordan testified that Lamar retaliated against him in January 2006 by requiring him to perform the duties of another professor despite his protests that this was impossible for him given his childcare needs. He testified that he recognized this treatment as an act of retaliation at the time the department chairman requested him to

perform these additional duties. Thereafter, in March 2006, Jordan alleges Lamar retaliated against him when Lamar denied him a merit based raise. Jordan also claims that Lamar retaliated against him in the Fall of 2006 by not accommodating his requested class schedule, making it impossible for him to transport his daughter to school. Jordan alleges Lamar's final act of retaliation was its formal denial of his tenure application in September 2006.

Jordan filed his charge of discrimination in December 2006, and he amended his charge in January 2007 to include charges of retaliation. Jordan has not shown that the alleged events of retaliation are the type of persistent continuing acts of discrimination that can amount to an organized scheme but, rather, such events are separate and discrete acts. *See Morgan*, 536 U.S. at 114; *Huckabay*, 142 F.3d at 240. The only alleged retaliatory acts that fall within the 180-day time period are:

- Lamar's failure to accommodate Jordan's requested class schedule in the Fall of 2006, and
- Lamar's formal denial of his application for tenure in September 2006.

Jordan cannot rely on the continuing violation theory to save his untimely complaints that preceded June 2006.

Additionally, even if these expired actions were not discrete, isolated actions, Jordan's deposition testimony makes clear that he was aware and knew of facts in January and March 2006 that were supportive of a charge of unlawful employment

practices. Jordan cannot rely on this equitable exception to revive those claims he could have brought timely; therefore, Jordan's expired claims are dismissed. Since Jordan also alleged acts of retaliation that fall within the 180-day statutory limitations period, the trial court did not err in denying Lamar's plea to the jurisdiction as to those discrete acts that are alleged to have occurred after June 2006.

Jordan argues in the alternative for this court to toll the 180-day statutory period based on equitable considerations because Lamar led Jordan to believe he may be eligible for tenure. The Labor Code filing deadlines are jurisdictional in cases involving statutory requirements relating to governmental entities. *See* Tex. Gov't Code Ann. § 311.034 (West Supp. 2010); *see also United Servs. Auto. Ass'n*, 307 S.W.3d at 308. Subject-matter jurisdiction cannot be imparted on a court through consent, waiver, or estoppel. *See Bloom v. Bloom*, 935 S.W.2d 942, 948 (Tex. App.—San Antonio 1996, no writ). Likewise, the doctrine of equitable tolling does not apply to the jurisdictional requirement for exhaustion of remedies in filing a claim under the Labor Code. *See Guevara v. H.E. Butt Grocery Co.*, 82 S.W.3d 550, 552-53 (Tex. App.—San Antonio 2002, pet. denied). Jordan does not cite to any cases in support of this contention and we find none. Further, Jordan does not cite to any evidence in the record that Lamar misled him. We deny Jordan's request for equitable tolling. Thus, we overrule in part and sustain in part Lamar's second issue.

AFFIRMED IN PART, REVERSED AND RENDERED IN PART.

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CHARLES KREGER
Justice

Submitted on October 21, 2010
Opinion Delivered February 17, 2011

Before McKeithen, C.J., Gaultney and Kreger. JJ.

CONCURRING IN PART; DISSENTING IN PART

I concur with the majority's decision reversing the trial court's denial of Lamar University's plea to the jurisdiction on Jordan's gender discrimination claim. I respectfully dissent from the majority's decision to affirm part of the trial court's order on the retaliation claim. The formal notice was a predictable consequence of the decision to "not recommend" Jordan for tenure, a decision Jordan thought was discriminatory. *See Del. State Coll. v. Ricks*, 449 U.S. 250, 257-58, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980). In fact, the decision to "not recommend" prompted Jordan to hire an attorney. Under the circumstances, Jordan cannot make an untimely claim for alleged gender discrimination by reasoning that the notice was somehow distinct from the decision to not recommend tenure. *See id.*, 449 U.S. at 258 (application of principles in *Ricks* to be made on a case-by-case basis). Nor can Jordan claim that he did not know about alleged retaliation in time to file a claim based on retaliation; his affidavit states he was retaliated against as soon as he hired an attorney. There is no waiver of sovereign immunity for Jordan's untimely claims. We should reverse the trial court's order in its entirety, and dismiss the lawsuit.

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DAVID GAULTNEY
Justice

Concurrence in Part and
Dissent in Part Delivered
February 17, 2011