In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00426-CV

LAWRENCE SCHOVANEC, AS PRESIDENT OF TEXAS TECH UNIVERSITY, AND TEXAS TECH UNIVERSITY, APPELLANTS

V.

FARIBA ASSADI-PORTER, APPELLEE

On Appeal from the 99th District Court
Lubbock County, Texas
Trial Court No. 2015-516,076, Honorable William C. Sowder, Presiding

March 20, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

This is an accelerated appeal from the trial court's denial of a plea to the jurisdiction filed by Texas Tech University and Lawrence Schovanec, as president of Texas Tech University. Presenting one issue, the university and Schovanec contend the trial court's denial of the plea was erroneous because the trial court lacks jurisdiction over Assadi-Porter's due process claims. We agree and will reverse.

Factual and Procedural Background

This case arises from Assadi-Porter's employment at Texas Tech University, a state institution. The university hired Assadi-Porter on July 23, 2013, as a Research Associate Professor in the College of Human Sciences, Department of Nutrition, Hospitality, and Retailing. Assadi-Porter's position was a twelve-month, non-tenure track appointment.

On September 22, 2014, during her second twelve-month term, Assadi-Porter received written notice of her termination, effective October 31, 2014. Shortly thereafter, Assadi-Porter made inquiries with the university's human resources personnel concerning how she might contest the termination. Pursuant to their advice, she met with her departmental supervisors, who informed her that the decision to terminate would stand. On October 16, 2014, she filed a written grievance regarding her termination. The university deemed her grievance untimely and did not act upon it.

In May of 2015, Assadi-Porter filed suit against the president of Texas Tech,[1] alleging that the university's failure to allow her to pursue a grievance was a deprivation of her property interest in her job without due process under both the U.S. and Texas Constitutions. Assadi-Porter also alleged other causes of action which are not at issue in this appeal. She sought monetary damages, reinstatement, and an order directing the university to allow her to pursue her grievance.

[1] M. Duane Nellis, in his official capacity as president of Texas Tech University, was the original defendant in the suit. Texas Tech University was later added as a defendant, and the current president, Lawrence Schovanec, was later substituted for Nellis.

The university filed a plea to the jurisdiction, to which it attached supporting evidence, contending that Assadi-Porter had failed to establish a property interest in her employment and thus failed to invoke the trial court's jurisdiction. The trial court denied the university's plea to the jurisdiction regarding Assadi-Porter's due course of law and due process claims, and the university filed this appeal.

Standard of Review

A governmental entity's sovereign immunity deprives a trial court of subject matter jurisdiction. *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 512 (Tex. 2012). A trial court's subject matter jurisdiction of a cause of action may be challenged by a plea to the jurisdiction. *Bland Indep. School Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). We review the issue of whether a trial court has subject matter jurisdiction de novo. *State of Tex. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002).

When a plea to the jurisdiction includes evidence implicating the merits of the plaintiff's cause of action, as in this case, the trial court is to review the relevant evidence to determine whether a fact issue exists. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). A plea to the jurisdiction may not be granted if the evidence raises a fact question, as the factfinder should resolve the fact issue. *Id.* at 228. If, however, the evidence fails to raise a fact question on the jurisdictional issue, then the plea may be ruled upon as a matter of law. *Id.* When evidence has been submitted implicating the merits of the suit, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve all doubts in favor of the nonmovant. *Id.*

Applicable Law

Assadi-Porter asserts that the university violated her due process and due course of law rights under the federal and state constitutions. The United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . ." U.S. CONST. AMEND. XIV, § 1. The due process provision of the Texas Constitution states: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. The Texas Supreme Court has stated that there is no "meaningful distinction" between "due course of law" under the Texas Constitution and "due process" under the United States Constitution. *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). Therefore, we consider federal interpretations of procedural due process to be persuasive authority in applying our due course of law guarantee. *Id.*

Analysis

We apply a two-part test when analyzing due process: first, we must determine whether the plaintiff had a liberty or property interest entitled to procedural due process; if so, we next determine what process is due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). To invoke the protections of due process in a termination of employment decision, an employee must have a cognizable property interest in continued employment. *Mott v. Montgomery Cty.*, 882 S.W.2d 635, 638 (Tex. App.—Beaumont 1994, writ denied) (citing *Senegal v. Jefferson Cty.*, 785 F. Supp. 86 (E.D. Tex. 1992) *aff'd*, 1 F.3d 1238 (5th Cir. 1993)). More

specifically, an employee must have more than a unilateral expectation; she must have a claim of entitlement. *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). A claim of entitlement exists when an employee can only be dismissed for cause. *McCartney v. May,* 50 S.W.3d 599, 607 (Tex. App.—Amarillo 2001, no pet.) (citing *Kruger v. Cressy*, No. 99-1857, 2000 U.S. App. LEXIS 67 at *4 (1st Cir. Jan. 4, 2000). If there are no substantive limitations on the university's ability to remove a faculty member, the faculty member can be terminated without notice or hearing because no constitutionally-protected property interest exists. *Phelan v. Tex. Tech Univ.*, No. 07-07-00171-CV, 2008 Tex. App. LEXIS 500, at *24 (Tex. App.—Amarillo Jan. 23, 2008, pet. denied) (mem. op.).

The parties do not dispute that Assadi-Porter was employed in a faculty position. Nor do they dispute that it was neither a tenured nor a tenure-track position. However, they disagree as to Assadi-Porter's at-will status. Assadi-Porter maintains that because she was a faculty member in the midst of serving a twelve-month appointment, she was not an at-will employee and could only be fired for cause, while the university argues that Assadi-Porter was an at-will employee who did not have a vested property interest in her employment at Texas Tech University.

Under Texas law, an employment relationship is presumed to be at-will, and an employer may terminate at-will employees "for good cause, for bad cause, or no cause." *Mott*, 882 S.W.2d at 637. An at-will employment relationship creates no property interest in continued employment.

Generally, a faculty member's employment is subject to her contract and the school's operational policies. *Bowen v. Calallen Indep. Sch. Dist.*, 603 S.W.2d 229, 233 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). Assadi-Porter presented the university's operational policies as evidence that the university could only dismiss her with cause.

University Operating Policy and Procedure ("OP") 32.02 governs "Faculty Non-reappointment, Dismissal, and Tenure Revocation." OP 32.02(1) states:

> There are three categories of involuntary separation of employment for faculty: (a) Revocation of tenure, which is termination of a tenured faculty member's employment; (b) Non-reappointment, which is the cessation of a non-tenured faculty member's employment at the end of the stated appointment period; and (c) Dismissal, which is immediate termination for cause of a non-tenured faculty member's employment before the expiration of the stated appointment period.

Assadi-Porter argues that, because she was a faculty member, she could only be terminated in one of the three ways listed in OP 32.02(1). Revocation of tenure and non-reappointment do not apply to Assadi-Porter's circumstances. The "dismissal" provision, which arguably does apply, requires that her termination be "for cause." Assadi-Porter therefore relies on this provision as evidence that she was not an at-will employee who could be terminated without cause.

However, Assadi-Porter's approach requires reading 32.02(1) in isolation. The university urges that 32.02(1) must be read in conjunction with the provisions following it, particularly OP 32.02(3), which restricts the application of the provision. Subsection 32.02(3)(b) specifically addresses non-reappointment and dismissal of non-tenured faculty members and provides that the procedures outlined therein only apply to

"untenured tenure-track faculty members, and to non tenure-track faculty members who have served more than six full years and been granted continuing appointment status."

We agree that the two subsections must be read together, as this approach properly uses each clause to help interpret the other. *See, e.g., Manzo v. Ford*, 731 S.W.2d 673, 675 (Tex. App.—Houston [14th Dist.] 1987, no writ) ("Each and every part of the contract must be considered with every other part so that the effect or meaning of one part on any other part may be determined.").

Read together, the terms of 32.02(1) and (3) do not support Assadi-Porter's contention. Subsection (3) indicates that although OP 32.02 applies to some non-tenured, non-tenure track faculty members, it does not apply to all of them. The policy, read as a whole, reflects that only after six years can non-tenured, non-tenure track faculty members attain an employment status requiring dismissal only for cause. The parties agree that Assadi-Porter had not been employed at Texas Tech for six years.

A limitation on at-will employment "cannot simply be inferred." *Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 739 (Tex. 2006) (per curiam). To rebut the presumption of employment at will, an employment contract must directly limit in a "meaningful and special way" the employer's right to terminate the employee without cause. *Massey v. Houston Baptist Univ.*, 902 S.W.2d 81, 83 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Moreover, the express agreement to modify must be clear and explicit. *Martinez v. Hardy*, 864 S.W.2d 767, 775 (Tex. App.—Houston [14th Dist.] 1993, no writ). In the context of public employment, any ambiguity in the grant of a property

interest in employment is resolved in favor of the State. *See Batterton v. Tex. Gen. Land Office*, 783 F.2d 1220, 1223 (5th Cir. 1986).

The operating policy relied on by Assadi-Porter does not expressly, clearly, and specifically modify her at-will employment status. Therefore, the university's operating policy did not give Assadi-Porter a property interest in continued employment. Because Assadi-Porter identifies no other evidence in support of her claim that she was not an at-will employee, we conclude that Assadi-Porter failed to raise a fact issue on that point. Accordingly, we find that no due process considerations were implicated in her dismissal from the university.

Conclusion

We conclude the trial court erred in denying the university's plea to the jurisdiction. We reverse the trial court's order and render judgment dismissing Assadi-Porter's due process claims for lack of jurisdiction."

Judy C. Parker
Justice