TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00752-CV

G&A Outsourcing IV, L.L.C. d/b/a G&A Partners, Appellant

v.

Texas Workforce Commission, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT
NO. D-1-GN-14-005432, HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant G&A Outsourcing IV, LLC ("G&A") filed a suit for judicial review of the Texas Workforce Commission's refusal to refund certain unemployment-compensation taxes paid by G&A under protest pursuant to the Texas Unemployment Compensation Act. *See* Tex. Lab. Code §§ 213.072, .073. G&A disputed the Commission's conclusion that it was required to pay additional taxes as a consequence of its acquisition of a competitor's assets in 2012. After considering cross-motions for summary judgment, the trial court granted summary judgment in favor of the Commission, affirming the Commission's denial of G&A's request for a refund. On appeal, G&A argues that the trial court erred in granting summary judgment in favor of the Commission because, according to G&A, the summary-judgment record fails to establish that there was "substantially common management or control . . . of the entities" following G&A's acquisition of the assets.

See id. § 204.083. For the reasons explained below, we will reverse the trial court's judgment and render judgment in favor of G&A.

BACKGROUND

Under Chapter 204 of the Texas Labor Code, the Texas Unemployment Compensation Act (the Act), employers are required to "pay a contribution on wages for employment" into the State's unemployment-compensation fund. *Id.* § 204.002. An employer's unemployment compensation-tax rate is calculated by applying a statutory formula to the employer's "compensation experience." *See Texas Emp't Comm'n v. Manpower, Inc.*, 795 S.W.2d 261, 263 n.1 (Tex. App.—Austin 1990, writ denied). "Compensation experience" is a body of information about an employer, including the frequency of claims for unemployment benefits filed by its former employees. *See* Tex. Lab. Code §§ 204.042, .044, .047; *State v. Williams & Mettle Co.*, 888 S.W.2d 162, 163 (Tex. App.—Austin 1994, writ denied) (explaining that "compensation experience" is "a body of information that includes the frequency of claims filed by former employees, mergers by the employer with other companies, and the employer's entry into other industries"). In general, employers who generate more claims for unemployment benefits have higher "compensation experience" and, in turn, pay at a higher tax rate, than employers who generate fewer claims. An employer's experience tax rating is adjusted annually based on changes in its compensation experience. *See Texas Emp't Comm'n v. Ben Hogan Co.*, 854 S.W.2d 292, 293 (Tex. App.—Austin 1993, no writ).

Historically under the Act, when an employer acquired all or part of the workforce of another employer, the compensation experience of the workforce did not transfer. *Williams & Mettle Co.*, 888 S.W.2d at 163. Consequently, some employers acquired new businesses for the sole

purpose of paying unemployment taxes under the lower, "new employer" rate. *Id.*; *see* Tex. Lab. Code § 204.006 (initial contribution rate for new employers). To curb this practice, the legislature adopted a provision requiring the transfer of the compensation experience of the acquired business to the new employer under certain circumstances. *See* Act of May 17, 1985, 69th Leg., R.S., ch. 353, §§ 1, 2, 1985 Tex. Gen. Laws 1421, 1421-23, *amended by* Act of May 28, 1989, 71st Leg., R.S., ch. 436, § 1, 1989 Tex. Gen. Laws 1583, 1583 (current version at Tex. Lab. Code § 204.083). Specifically, section 204.083 provides:

> The transfer of the predecessor employer's compensation experience to the successor employer is required if [1] the predecessor employing unit transfers, through any means, all or part of the organization, trade, or business, to the successor employer and [2] there is substantially common management or control or substantially common ownership of the entities.

Tex. Lab. Code § 204.083.

G&A is a Professional Employer Organization ("PEO") licensed in the State of Texas to perform human resources related services for its clients.[1] In December 2012, G&A acquired certain assets from a group of its competitors, collectively known as the ProSource Companies or, simply, ProSource. At the time of the acquisition, six of the ProSource Companies were also operating as PEOs, and the primary assets purchased by G&A were the ProSource PEOs' client accounts. Pursuant to the parties' written asset-purchase agreement, G&A paid approximately $5.27 million for the ProSource Companies' assets: $2.5 million in cash at closing and $2.77 million

[1] As a PEO, G&A co-employs its clients' employees, typically providing payroll administration and other human resource related services to their clients including the payment of unemployment taxes. *See* Tex. Lab. Code § 91.0011.

in the form of two promissory notes payable in equal amounts to two officers of ProSource, Ronald Piperi and Kim Traylor.

On August 1, 2014, G&A received written notice from the Commission that it considered G&A to be a successor employing unit to the ProSource PEOs under section 204.083. Consequently, the Commission retroactively changed G&A's tax rate to reflect the transfer of ProSource PEO's compensation experience, resulting in an increase of unemployment taxes of approximately $3.513 million. Following a hearing, the Commission issued a decision upholding its assessment of the unemployment tax implications of G&A's acquisition of the ProSource assets. G&A paid the taxes allegedly due and applied to the Commission for a refund. *See id.* § 213.072. The Commission denied G&A's refund request, and G&A sought judicial review of the refusal in district court. *See id*. § 213.073(a).

After discovery, the parties filed cross-motions for summary judgment. In its motion, G&A argued that there was no evidence to support the Commission's conclusion that a transfer of ProSource's compensation experience was required pursuant to section 204.083 because there was no evidence that there was any "substantially common management or control" between G&A and the ProSource PEOs following its purchase of the ProSource assets. *See id.* § 204.083. Conversely, the Commission asserted that section 204.083 applied as a matter of law to G&A's acquisition of the ProSource assets because the evidence conclusively established that there was "substantially common management or control" between the two entities, as that phrase is defined in section 204.081 of the Labor Code. Specifically, the Commission asserted that the transfer of ProSource's compensation experience was warranted because (1) ProSource continued to control the acquired

client accounts through a security interest granted in the promissory notes to Traylor and Piperi and (2) ProSource continued to manage the acquired client accounts after the acquisition through certain transition-assistance activities. *See id.* § 204.081(3). After hearing argument on the motions, the district court granted the Commission's motion for summary judgment and denied G&A's motion. This appeal followed.

STANDARD OF REVIEW

Unemployment-tax refund cases are reviewed de novo by the trial court. *See id.* § 213.073(c); *see Critical Health Connection, Inc. v. Texas Workforce Comm'n*, 338 S.W.3d 758, 763 (Tex. App.—Austin 2011, no pet.) (explaining that substantial-evidence rule has no application to refund suit brought under section 213.073(c)). Similarly, on appeal, we review the trial court's rulings on motions for summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A traditional summary judgment is proper when the movant establishes that there are no disputed issues of material fact and that the movant is entitled to judgment as a matter o f law. Tex. R. Civ. P. 166a(c). A no-evidence summary judgment is proper when "(a) there is a complete absence of a vital fact, (b) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *see* Tex. R. Civ. P. 166a(i). When, as here, both parties move for summary judgment on overlapping issues and the trial court grants one motion and denies the other, we consider the summary-judgment evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have

rendered. *Texas Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004). When the trial court does not specify the ground for its ruling, summary judgment must be affirmed if any of the grounds on which the judgment was sought were meritorious. *State v. Ninety Thousand Two Hundred Thirty-Five Dollars & No Cents in U.S. Currency*, 390 S.W.3d 289, 292 (Tex. 2013).

To the extent our resolution of the issues turns on construction of the Unemployment Compensation Act, we review these questions de novo. *See First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008). When construing a statute, our primary objective is to ascertain and give effect to the legislature's intent. *Galbraith Eng'g Consultants v. Pochucha*, 290 S.W.3d 863, 869 (Tex. 2009). "Where text is clear, text is determinative of that intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). If the statute is ambiguous, we give serious consideration to the construction of the statute by the administrative agency charged with its enforcement, "so long as the construction is reasonable and does not conflict with the statute's language." *Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628-30 (Tex. 2011). However, this agency deference is appropriate only when the statutory language is ambiguous. *TracFone Wireless, Inc. v. Commission on State Emergency Commc'ns*, 397 S.W.3d 173, 182 (Tex. 2013).

ANALYSIS

In the proceedings below, the trial court's determination of whether G&A was entitled to a refund of unemployment-compensation taxes turned solely on whether the Commission properly transferred ProSource's compensation experience to G&A under section 204.083. Accordingly,

both parties moved for summary judgment on this dispositive issue. Before the trial court, and now on appeal, G&A does not dispute that ProSource, the "predecessor employing unit," "transfer[ed] . . . all or part of [its] organization, trade, or business, to [G&A,] the successor employer" under section 204.083. Instead, the parties join issue on whether the undisputed evidence establishes that "there [was] substantially common management or control . . . of the entities" following the transfer. *See* Tex. Lab. Code § 204.083.

Section 204.081 provides that "substantially common management or control" exists in the following circumstances:

> [A]fter the acquisition of the organization, trade, or business of an employing unit, the predecessor employing unit continues to:
>
> (A) own or manage the organization that conducts the organization, trade, or business;
>
> (B) own or manage the assets necessary to conduct the organization, trade, or business;
>
> (C) control through security or lease arrangements the assets necessary to conduct the organization, trade, or business; or
>
> (D) direct the internal affairs or conducts of the organization, trade, or business.

Id. § 204.081(3). In its motion for summary judgment, the Commission asserted two independent bases for its contention that there was "substantially common management or control" following G&A's acquisition of the ProSource assets. First, the Commission argued that under subsection (3)(C) of section 204.081, ProSource continued to "control through security or lease arrangements the assets necessary to conduct" ProSource operations. *See id*. § 204.081(3)(C). Second, the

Commission argued that ProSource continued to "own or manage the assets necessary to conduct the organization, trade, or business" under subsection (3)(B) when a ProSource employee and officer, Traylor, participated in certain activities following the acquisition by G&A. *See id*. § 204.081(3)(B). We will address each of these bases in turn.

Security Interest*, *subsection (3)(C)

We first examine whether the summary-judgment evidence establishes that there was "substantially common management or control" between G&A and ProSource under subsection (3)(C) of section 204.081. The Commission asserts that the trial court did not err in granting summary judgment in its favor on this ground because the evidence establishes that ProSource continued to control the assets acquired by G&A—including the client accounts—through a security interest contained in the $2.77 million promissory notes underlying the transaction. The promissory notes, made payable over a period of more than three years, included the following provision:

> To secure the full and complete payment, performance, and observance of this Note and all obligations hereunder, Buyer [G&A] hereby pledges, assigns, and grants to the Holder and her successors and assigns a security interest (the "Security Interest") in all right, title and interest of Buyer to the Acquired Assets and all products and proceeds thereof (the "Assets"). The Security Interest will be a perfected first priority security interest in the Assets and Buyer will not permit any other security interest, lien, or encumbrance on the Assets other than the Security Interest. Buyer will execute on Holder's request any and all UCC financing statements and other instruments or documents Holder may reasonably require to evidence the creation and/or perfection of the Security Interest granted herein. The Security Interest shall terminate upon payment in full of this Note in accordance with Section 2 below.

According to the Commission, this provision demonstrates that ProSource retained three distinct rights of control over the purchased assets: (1) the right to reclaim the assets if G&A defaulted on

its payments under the promissory notes; (2) the prohibition of any further encumbrance on the assets; (3) the prohibition of any transfer of the assets (including any sale, merger, or consolidation of G&A itself with another company) without prior written consent. These rights of control, the Commission reasons, establish that even after G&A acquired the ProSource assets, ProSource "continue[d] to control . . . the assets" within the meaning of section 204.081(3)(C).

In response, G&A does not dispute that the security interests in the assets created by the promissory notes include the right of reclamation and the rights of prohibition identified by the Commission. Instead, G&A argues that the prohibition rights identified by the Commission are not "security or lease arrangements" because such rights "were not contingent on repayment default." According to G&A, these prohibition rights "were fully enforceable on the date of the purchase agreement" and, as a result, do not constitute a "security arrangement" under section 204.081(3)(C). Moreover, to the extent the notes include a contingent right of reclamation, G&A asserts that there is no evidence that ProSource, as the "predecessor employing unit," maintained any control of the acquired assets through any security arrangement. According to G&A, even if the promissory notes created a security interest in the acquired assets through a contingent right of reclamation upon default, any such interest was held solely by Traylor and Piperi in their personal capacities, and not by ProSource.

We agree with G&A that, even if the promissory notes constitute security arrangements under section 204.081(3)(C), the evidence fails to establish that ProSource—the undisputed "predecessor employing unit"—continued to control the assets through these arrangements. The promissory notes identify "Ronald A. Piperi" and "Kim E. Traylor" as the "Holder(s)" of the notes, and the "security interest" provision refers to the "Holder and her successor or assigns," referring

to Traylor and Piperi, not ProSource. Nothing in the language of the promissory notes indicates that Traylor and Piperi would receive payments under the promissory notes in their capacities as employees or officers of ProSource. Consequently, G&A was obligated to pay Traylor and Piperi personally, and all of the rights identified by the Commission as evidence of "control" arising from the promissory notes are rights held by Traylor and Piperi, as individual holders of the notes, and not by ProSource.

Nevertheless, the Commission maintains that we should treat Traylor and Piperi as if they were acting on behalf of ProSource when they executed the promissory notes, despite the absence of any language in the notes themselves suggesting that the parties intended to do so. The Commission argues that this treatment is warranted because the "assets purchased belonged to the ProSource PEOs" and because "the resulting sale proceeds also belonged primarily to the ProSource PEOs." In short, the Commission argues that the "legal effect of [the] transaction" is that "Traylor and Piperi held the security interest on behalf of the ProSource PEOs."

We fail to see, and the Commission does not explain, why the prior owner of an asset (such as ProSource) would necessarily be a party to or benefit from an agreement in which the sold asset is separately pledged by the purchaser as security to third parties (such as Traylor or Piperi), or why a promissory note payable to third parties could not, as a matter of law, serve as all or part of the consideration for the sale of an asset. Nor does the Commission point to any evidence in the record suggesting that ProSource was not, in fact, a separate legal entity in its transaction with G&A or that ProSource was acting as a sort of alter ego of Traylor and Piperi, such that ProSource's corporate separateness should be disregarded. *Cf. Cappuccitti v. Gulf Indus. Prods., Inc.*,

222 S.W.3d 468, 481-82 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (recognizing reverse veil piercing in personal-jurisdiction analysis).

Based on the plain language of the promissory notes, we conclude that the contractual rights identified by the Commission as rights of "control" are rights that are intended to protect Traylor and Piperi, personally, in the event of default by G&A. There is no legal basis for contravening the plain language of the promissory notes by treating ProSource as if it were the holder of those rights. Because there is no evidence that would support the conclusion that after the acquisition, ProSource continued to maintain control over the transferred assets through a security or lease arrangement, the trial court erred to the extent it granted summary judgment in favor of the Commission on this ground.

Management of Assets, subsection (3)(B)

Next, we consider whether the summary-judgment evidence establishes that ProSource continued to "own or manage the assets necessary to conduct the organization, trade, or business" under subsection (3)(B) of section 204.081. In support of its motion for summary judgment, the Commission points to language in the asset-purchase agreement that obligated ProSource to "assist and facilitate" G&A in retaining the transferred client accounts and "maintain the same business relationships." According to the Commission, "ProSource PEOs discharged these contractual obligations primarily through the actions of Traylor, who continued to serve as an officer and director of the ProSource PEOs, working out of the ProSource office."[2] Thus, the Commission reasons,

[2] The summary-judgment evidence establishes that following the acquisition, Traylor become an employee of G&A, serving as Vice President of Operations. However, in her affidavit,

the evidence establishes that following the acquisition, ProSource, as the "predecessor employing unit," continued to manage the client accounts, "assets necessary to conduct the organization, trade, or business" of G&A.

G&A acknowledges that Traylor provided "transition assistance to help G&A retain the client accounts it purchased from the ProSource PEOs." However, G&A contends that, for two independent reasons, the evidence fails to establish that ProSource continued to "manage the assets necessary to conduct the organization, trade, or business." *See* Tex. Lab. Code § 204.081(3)(B). First, G&A argues that, as matter of statutory construction, the transition activities conducted by Traylor do not constitute "management," as that term is used subsection (3)(B). Second, G&A argues there is at least a fact question as to whether Traylor's transition-assistance activities are even properly attributable to ProSource.

Because the issue is potentially dispositive, we first address whether Traylor's activities constitute "management" under section 204.081(3). The Labor Code does not define "manage"; therefore, we look to well-established principles of statutory construction to determine its meaning, our primary objective being to give effect to the legislature's intent. *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). In discerning legislative intent, we consider the entire act, its nature and object, and the consequences that would follow from each construction. *Critical Health Connection*, 338 S.W.3d at 761(citing *Sharp v. House of Lloyd, Inc.*,

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attached to G&A's motion for summary judgment, Traylor averred that following the acquisition, she "continued be an officer in each of the ProSource Companies." The Commission asserts that this evidence establishes that Traylor was acting on behalf of both ProSource and G&A when conducting the transition-related activities.

815 S.W.2d 245, 249 (Tex. 1991)). Undefined terms are typically given their ordinary meaning, but if a different or more precise definition is apparent from the terms' use in context, we apply that meaning. *TGS-NOPEC Geophysical*, 340 S.W.3d at 439; *Marks v. St. Luke's Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010).

According to *Webster's Dictionary*, the word "manage" means "to handle or direct with a degree of skill: such as (a) to make and keep compliant (b) to treat with care or (c) to exercise executive, administrative, and supervisory direction of." *Webster's Third New Int'l Dictionary* 1372 (2002). Considering this definition in the context of section 204.081(3) and the statute as a whole, we conclude that the use of the term "manage," with respect to the "necessary assets" of a business, denotes a level of directing and decision-making. This interpretation is consistent with the statute's use of the phrase "substantially common management *or control* . . . of the entities," Tex. Lab. Code § 204.083 (emphasis added), and more importantly, comports with section 204.083's purpose of preventing the manipulation and circumventing of the experience-rating system through the transfer of workforces.[3] *See Williams & Mettle Co.*, 888 S.W.2d at 163.

The summary-judgment evidence establishes that the parties' asset-purchase agreement obligated ProSource to "cooperate and use their respective commercially reasonable efforts . . . to assist and facilitate [G&A] in (i) retaining all of the Target Accounts . . . and (ii) maintaining

[3] The Commission has not asserted that the term "manage" is ambiguous. In fact, the Commission acknowledges in its brief that the term should be given it ordinary meaning and contends that "manage" ordinarily means "to administer, to oversee" and "to conduct . . . carry on, or supervise." Nevertheless, the Commission seemingly takes an expansive view of what activities constitute "managing," such that almost any post-acquisition action taken by a predecessor employer would require a transfer of compensation experience under section 204.083.

the same business relationships with [G&A] after the closing with the Companies." In his affidavit, G&A CEO John Allen explained that this provision was included because "retain[ing] those [ProSource] accounts after the transaction was completed was paramount to getting full value out of the purchase" and thus, G&A "expected ProSource to do whatever they could to help [G&A]—to help transition those accounts." These activities were carried out by Traylor and consisted of (1) letters sent to the former ProSource clients, informing them of the sale of their accounts, assuring them that they would continue to receive a high level of service, encouraging each client to contact ProSource with any questions, and directing them to send a completed "acknowledgment and consent form" to ProSource; (2) arranging and participating in personal visits with client contacts to let them know that G&A was now their PEO provider, to introduce them to G&A personnel, and to persuade them to remain with G&A; and (3) helping resolve any problems experienced by the transferred clients during the transition to G&A. There is no evidence that ProSource continued to provide PEO services to the client accounts following the G&A's acquisition of the accounts.

Instead, the evidence establishes that the transition activities undertaken by Traylor were limited to assisting G&A as G&A began to provide, and ProSource ceased from providing, PEO services to the acquired client accounts. There is no evidence that ProSource retained, or that G&A ceded, any independent control or decision-making authority over the client accounts to ProSource once G&A acquired the accounts. As a result, assuming without deciding that Traylor's transition-assistance activities are properly attributable to ProSource, we conclude that there is no evidence in the summary-judgment record suggesting that ProSource "continue[d] to . . . manage the

assets," as that term is used in subsection (3)(B) of section 204.081.[4] Consequently, the trial court erred in granting summary judgment in favor of the Commission on this ground.

There is no evidence to support the conclusion that there was "substantially common management or control" between G&A and ProSource following G&A's acquisition of the ProSource assets. *See* Tex. Lab. Code § 204.083. Consequently, the trial court erred in granting the Commission's motion for summary judgment and in denying G&A's motion for summary judgment on its claim for a refund of unemployment taxes. *See id*. § 213.073.

CONCLUSION

We reverse the trial court's judgment in favor of the Commission and render judgment in favor of G&A.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Reversed and Rendered

Filed: August 17, 2017

[4] As a result, we need not consider G&A's alternative argument, whether a fact issue exists with regard to whether Traylor's activities are properly attributable to ProSource. We also need not consider an argument raised by G&A in its reply brief, concerning whether the client accounts are, in fact, the "trade or business" of G&A and, therefore, cannot reasonably be construed as "necessary assets" under section 204.083.