

SUPREME COURT OF TEXAS

Kingsaire, Inc. d/b/a Kings Aire, Inc. v. Jorge Melendez

Kingsaire · No. 14-0006 · Decided December 4, 2015

SUMMARY

Justice Eva M. Guzman concurred in the Texas Supreme Court’s decision holding that Jorge Melendez failed to prove a retaliatory-discharge claim under the Texas Workers’ Compensation Act. The concurrence explains that uniform enforcement of a reasonable leave policy is an inferential rebuttal defense, not an affirmative defense, and that the employee retains the burden to prove causation and disprove the employer’s leave-policy explanation. It also addresses the treatment of that defense in legal-sufficiency review and jury-charge proceedings.

CASE DETAILS

COURT	Supreme Court of Texas
WRITING FOR THE COURT	Eva M. Guzman
JURISDICTION	Texas
DECIDED	December 4, 2015
DOCKET	14-0006
DISPOSITION	other
PROCEDURAL POSTURE	Petition for review from the Court of Appeals for the Eighth District of Texas following a jury finding that Melendez was terminated for filing a workers' compensation claim.
STANDARD OF REVIEW	No-evidence legal-sufficiency review.
PRECEDENTIAL VALUE	Published Texas Supreme Court concurring opinion; the concurrence's additional reasoning is not itself the majority holding.
PARTIES	Kingsaire, Inc. d/b/a Kings Aire, Inc. v. Jorge Melendez

TOPICS

[retaliation](#)[workers compensation](#)[family and medical leave act](#)[appellate procedure](#)[standard of review](#)

PRACTICE AREAS

[employment law](#)[workers compensation](#)[appellate procedure](#)[civil procedure](#)

QUESTIONS PRESENTED

1. Whether uniform enforcement of a reasonable leave policy is an inferential rebuttal defense to a retaliatory-discharge claim under the Texas Workers' Compensation Act.
2. Whether the employee bears the burden of disproving that termination resulted from uniform enforcement of a reasonable leave policy.
3. Whether the trial court erred by refusing to submit a separate jury question on the leave-policy defense.
4. Whether the evidence was legally sufficient to support the jury's retaliatory-discharge finding.

HOLDINGS

1. When an employer produces evidence that an adverse employment action resulted from uniform enforcement of a reasonable leave policy, the employee must prove the elements of retaliation and disprove that termination was based on the leave policy.
2. Uniform enforcement of a reasonable leave policy is an inferential rebuttal defense, not an affirmative defense, because it rebuts the causation element of the employee's retaliatory-discharge claim rather than avoiding liability after all elements are proved.
3. An inferential rebuttal defense cannot be submitted to the jury through a separate jury question; it must be presented through jury instructions.

KEY QUOTATIONS

“Absent evidence proving the leave policy was applied in a discriminatory manner or the reason for discharge was pretextual, a retaliatory discharge claim is not viable.” (at 1)

“If an employee’s termination is required by the uniform enforcement of a reasonable absentee policy, then it cannot be the case that termination would not have occurred when it did but for the employee’s assertion of a compensation claim or other conduct protected by section 451.001.” (at 2)

“A leave-policy defense cannot be treated as an affirmative defense because doing so would impermissibly shift the burden of causation to the defendant in contravention of the retaliatory-discharge statute.” (at 3)

FACTUAL BACKGROUND

Melendez filed a workers' compensation claim and remained on medical leave beyond the twelve weeks protected by the Family and Medical Leave Act. Kings Aire terminated him pursuant to a leave policy that the concurrence describes as reasonable and uniformly enforced. Although the jury found that the termination was for filing a workers' compensation claim, the record contained no evidence of employer subterfuge or that the leave policy was inapplicable or discriminatorily applied.

PROCEDURAL HISTORY

The case reached the Supreme Court of Texas on Kings Aire's petition for review. The jury found that Melendez was terminated for filing a workers' compensation claim, and the trial court declined to submit a separate jury question on Kings Aire's leave-policy defense. The concurrence states that the Supreme Court's disposition of

Kings Aire's first appellate point mooted the second point and that the Court held Melendez failed to prove retaliatory discharge.

DISPOSITION

other

CASES CITED

- Cont'l Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444 (Tex. 1996)
- Haggard Clothing Co. v. Hernandez, 164 S.W.3d 386 (Tex. 2005)
- Dillard v. Tex. Elec. Coop., 157 S.W.3d 429 (Tex. 2005)
- Tex. Beef Cattle Co. v. Green, 921 S.W.2d 203 (Tex. 1996)
- Select Ins. Co. v. Boucher, 561 S.W.2d 474 (Tex. 1978)
- Zorrilla v. Aypco Constr. II, LLC, 469 S.W.3d 143 (Tex. 2015)
- Cazarez, 937 S.W.2d at 452
- Bed, Bath & Beyond, Inc. v. Urista, 211 S.W.3d 753 (Tex. 2006)
- Lemos v. Montez, 680 S.W.2d 798 (Tex. 1984)

OPINION

PER CURIAM.

[illegible]

In enacting the Family and Medical Leave Act (FMLA), Congress struck a delicate balance to accommodate “the demands of the workplace” while promoting the “economic security of families.” 29 U.S.C. § 2601(b)(1). Congress ensured employees were entitled “to take reasonable leave for medical reasons,” but recognized the economic necessity of accommodating “the legitimate interests of employers.” 29 U.S.C. § 2601(b)(2)-(3).

An equilibrium between these counterpoints is achieved through the FMLA's limited guarantee of twelve weeks of job-protected leave. On occasion, workplace injuries may require employees to take medical leave extending beyond the FMLA's protections, but employers may nevertheless manage the resulting burdens on their businesses by enacting and enforcing reasonable leave policies.

If an employee remains on leave beyond twelve weeks, the employee can be terminated when such a policy requires it, even if the employee has engaged in protected conduct under the Workers' Compensation Act. Absent evidence proving the leave policy was applied in a discriminatory manner or the reason for discharge was pretextual, a retaliatory discharge claim is not viable.

See *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450-51 (Tex. 1996). Because no such evidence was introduced here, I join the Court's opinion and holding that Melendez failed to carry his burden of proving retaliatory discharge. I write separately, however, because I believe it is important to clarify which party bears the burden of proof in a retaliatory discharge case when sufficient evidence exists that termination resulted from the uniform enforcement of a reasonable leave policy.

The burden of persuasion compels the result in this case. I further note this issue is squarely presented in Kings Aire's second appellate point, which complains about the jury charge but is mooted by the Court's disposition of the first appellate point. Though we have not previously stated so, uniform enforcement of a reasonable leave policy is an inferential rebuttal defense to a retaliatory discharge claim.

When an employer produces evidence that an adverse employment action resulted from uniform enforcement of a reasonable leave policy, the employee must prove all the requisite elements of retaliation and disprove the employer's claim that termination was based on the leave policy. This burden-shifting scheme exists because, under the Texas Labor Code, the employee bears the burden of proving that a discharge (or other adverse action) "occurred 'because' of the protected activity." *Cazarez*, 937 S.W.2d at 450; see TEX. LABOR CODE §§ 451.001, 451.002(c).

To prove causation, the employee must demonstrate "that the employer's action would not have occurred when it did had the employee's protected conduct—filing a workers' compensation claim—not occurred." *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388 (Tex. 2005). 2 As we explained in *Cazarez*, even if an employee has engaged in protected conduct, the employee cannot establish a causal nexus between protected conduct and termination of employment if termination was required under a leave policy that is both reasonable and uniformly enforced.

937 S.W.2d at 451. In such circumstances, the employee's protected conduct is necessarily not the "but for" cause of the employee's termination. *Id.* ("If an employee's termination is required by the uniform enforcement of a reasonable absentee policy, then it cannot be the case that termination would not have occurred when it did but for the employee's assertion of a compensation claim or other conduct protected by section 451.001.").

Though we did not explicitly categorize the leave-policy issue as an inferential rebuttal defense, it naturally follows. "An inferential rebuttal defense operates to rebut an essential element of the

plaintiff's case by proof of other facts." See *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 430 (Tex. 2005).

In contrast, an affirmative defense enables a defendant to avoid liability even if the plaintiff successfully proves all the elements of a cause of action. *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996). Evidence that an employee was terminated based on uniform enforcement of a reasonable leave policy rebuts the conclusion that the employee was terminated in retaliation for engaging in protected conduct.

It presents a contrary theory of causation. Accordingly, the leave-policy defense illustrates the "basic characteristic" of an inferential rebuttal defense; "it presents a contrary or inconsistent theory from the claim relied upon for recovery." *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). A leave-policy defense cannot be treated as an affirmative defense because doing so would impermissibly shift the burden of causation to the defendant in contravention of the retaliatory-discharge statute.

See *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015) ("[T]he 3 hallmark characteristic of [an affirmative defense] is that the burden of proof is on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings."). Properly characterizing the leave-policy defense as an inferential rebuttal defense rather than an affirmative defense has important implications.

In the context of this case, at least two exist. First, it determines the applicable legal-sufficiency standard. In this case, the Court properly conducts a no-evidence legal-sufficiency review. And, as the Court ably explains, Melendez failed to prove that his termination did not result from a uniformly enforced, reasonable leave policy.

Although Melendez obtained a favorable jury finding that he was terminated for filing a workers' compensation claim, the jury's finding cannot stand because the record bears no evidence of employer subterfuge nor evidence that the leave policy was inapplicable or applied in a discriminatory manner. Cf. *Cazarez*, 937 S.W.2d at 452 (affirming a jury finding because there was some evidence the employer's three-day rule did not apply).

Second, because the inferential rebuttal defense is subsumed in the liability question, disposition of Kings Aire's first appellate issue answers its second issue—whether the trial court erred by not submitting a separate question and instruction to the jury on the leave-policy defense. Inferential rebuttal defenses cannot be submitted to the jury in separate jury questions.

TEX. R. CIV. P. 277. Instead, inferential rebuttal defenses raised by the evidence "must be presented through jury instructions." *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 757 (Tex. 2006); see also *Lemos v. Montez*, 680 S.W.2d 798, 800 (Tex. 1984).

The trial court did not err in refusing to submit a separate question on Kings Aire's leave-policy defense. 4 With these additional thoughts, I join the Court's opinion and judgment.

Eva M. Guzman Justice OPINION DELIVERED:
December 4, 2015 5

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