

SUMMER - 2017 NEWSLETTER

LOCAL GOVERNMENT CASE LAW UPDATE

By Stephen D. Henninger

Laverie v. Weatherbe, 2017 WL 1301501 (Tex.- April 7, 2017)

This is a case interpreting the election of remedies provision of the Texas Tort Claims Act found at §101.106(f) of the statute. The Plaintiff in the case was a Texas Tech professor and associate dean who sued a colleague at the university for defamation after he was passed over for promotion. The Defendant had been made part a of search committee tasked with finding a new dean of the Rawls College of Business Administration. Plaintiff was a candidate for the position who was looked at by the search committee. In the course of conducting the search, the Defendant allegedly made negative statements about the Plaintiff. After the Plaintiff did not receive the deanship, he sued the Defendant for defamation.

The Defendant moved for summary judgment under the election of remedies provision of the Texas Tort Claims Act that provides if an individual employee of a governmental unit is sued based upon conduct within the employee's general scope of employment, and if the case could have been brought against the governmental employer, then the suit against the employee should be dismissed unless the Plaintiff files an amended pleading naming the governmental unit as the Defendant. In response, the Plaintiff claimed that the Defendant was not acting within the scope of her employment when she made the defamatory statements. The trial court denied the Defendant's motion for summary judgment and the court of appeals affirmed. In doing so, the court of appeals noted that while the Defendant's statements may have been within the scope of her employment, denial of the motion was warranted because the record did not conclusively establish the Defendant's intentions and subjective motivations when she made the statements so that it could be established that she was acting within the course and scope of her employment, as opposed to furthering her personal purposes.

The Supreme Court granted a petition for review and reversed the court of appeals. The Court noted that under the under the election of remedies provision, an individual defendant is entitled to dismissal of a claim upon proof that the suit is: (1) based upon conduct within the scope of the defendant's employment; and (2) could have been brought against the governmental unit under the Texas Tort Claims Act. "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." The Supreme Court went on to hold that nothing in the election of remedies provision or in the statutory definition of scope of employment indicates that there is a subjective intent component of the scope of employment analysis. It is, instead, a fundamentally objective inquiry into whether there is a connection between the employee's job duties and the allegedly tortious conduct in the case. Thus, an employee may be acting within the scope of employment even if the employee performs negligently or is motivated by ulterior motives. To obtain a dismissal under the election of remedies provision, an employee need not prove their subjective intent or motivations to establish that they were acting within the course and scope of employment. They must merely show some objective connection between the allegedly tortious conduct and their job duties.

Dallas Cty. Sch. v. Vallet, 2016 WL 7163824 (Tex. App. Dec. 8, 2016)

This case involves the waiver of governmental immunity for school districts under the Texas Tort Claims Act. Plaintiff sued Dallas County Schools for negligence and intentional infliction of emotional distress after a Dallas County School bus driver left her six year old child on the side of a highway. The child had been placed on the bus at the end of school after missing the daycare vehicle he was supposed to be transported in. Thereafter, despite the child's plea to be let off, the bus driver refused to open the doors to let him leave. Eventually, the school bus left the school. It later pulled over to the side of a road, opened the doors, expelled the child from the bus on the side of a highway, and left.

Plaintiff sued the Dallas County Schools alleging it was negligent in the operation and use of a motor vehicle by opening and closing the doors of the school bus, confining the child inside the bus, and in opening the doors and expelling the child from the bus. Plaintiff also sued Dallas County Schools for intentional infliction of emotional distress. Dallas County Schools filed a motion to dismiss for want of jurisdiction, asserting that Plaintiff had failed to plead a cause of action based upon the negligent operation or use of a motor vehicle, and also asserting that it was immune from claims for intentional torts. The trial court denied the motion, and Dallas County Schools appealed.

The Dallas Court of Appeals noted that school districts are immune from suits for all torts under the Texas Tort Claims Act except for suits involving the negligent operation or use of motor vehicles. "Operation" means the doing or performing of a practical work, and "use" means to put or bring into action or service; to employ for or apply to a given purpose. The Texas Tort Claims Act requires that there be a nexus between the injury alleged and the operation or use of a motor vehicle. This nexus means that more than mere involvement of a motor-driven vehicle must be alleged. Rather, the operation or use of the motor-driven vehicle must have actually caused the injury. The operation or use of a motor-driven vehicle does not cause injury if it does nothing more than furnish a condition that makes an injury possible.

Dallas County Schools argued that the acts complained of by the Plaintiff, which were boarding a student on a bus and then leaving him in an incorrect location at the side of the road, related to the supervision or control of the student, not the operation or use of the bus. The Court of Appeals agreed, citing several previous cases holding that when the tenor of a plaintiff's complaint involves a bus driver's supervision or control of students, rather than the actual operation or use of a motor-driven vehicle, then there is no waiver of immunity. In this case, the injuries to the minor child did not arise directly from any operation or use of the school bus. The child was not injured by the opening or closing of the school bus doors, nor by the manner in which the bus was driven while the child was being transported. Rather, any injuries alleged arose from the decisions that were made to place the child on the bus, and then expel him from the bus. These are acts concerning negligent supervision or control of the child, not the operation or use of the bus. Accordingly, the Plaintiff had failed to state negligence claims based upon a negligent operation or use of a motor-driven vehicle, and Dallas County Schools was immune. As for Plaintiff's intentional infliction of emotional distress claim, §101.057(2) of the Texas Tort Claims Act expressly retains immunity for any claims based upon intentional torts.

Barnett v. City of Southside Place, 2017 WL 976067 (Tex. App. – Houston [1st Dist.], March 14, 2017)

This is a suit involving the waiver of immunity provided by the Texas Whistleblower Act. Plaintiff was a former police officer at the Defendant city. In 2014, Plaintiff told the Chief of Police that he believed the City had implemented an illegal ticket quota practice with its police officers. The Police Chief reported this to the City Manager and Mayor, and thereafter Plaintiff and the Police Chief met with the Texas Rangers to report the allegations of the illegal ticket quota practice.

The day after meeting with the Texas Rangers, Plaintiff, on August 19, 2014, submitted a letter of resignation with an effective date of September 3, 2014. Thereafter, while the City was investigating complaints that had been made about the Police Chief, two officers informed the city that the Plaintiff had encouraged them on several occasions in the previous two weeks to leave the city's employment.

On September 2, 2014, the City Manager informed the Plaintiff that he was conducting an investigation into the allegations that the Plaintiff had encouraged city employees to quit. The city gave Plaintiff a set of written questions to answer and advised him that the allegations against him, if true, would constitute insubordination that would justify his termination. Plaintiff refused to answer the questions and informed the City Manager that he was resigning his position with the city, effective immediately. That same day, the City Manager prepared a notice of termination letter stating that the Plaintiff was being terminated for refusing to answer the written questions, and for encouraging other employees to resign. Later, in October 2014, the city submitted a separation of license form to the Texas Commission on Law Enforcement reflecting that Plaintiff had been "dishonorably discharged". In a letter to the Texas Commission on Law Enforcement that accompanied the F-5 form, the city also stated that the F-5 form that was being submitted was intended to amend a previous F-5 form that the Plaintiff had completed himself, and also claimed that the Plaintiff had completed F-5 documents for two other officers improperly.

Plaintiff subsequently filed suit against the city under the Texas Whistleblower Act, alleging that he had suffered adverse employment actions in retaliation for reporting a violation of the law by the city to the Chief of Police and to the Texas Rangers. The city filed a plea to the jurisdiction arguing that the trial court lacked subject matter jurisdiction over the Plaintiff's Whistleblower claims because the city had not taken any adverse personal action against the Plaintiff; that there was no evidence that any alleged adverse employment action was because of Plaintiff's report of the city's alleged violation of the law; and the city had a legitimate basis to terminate Plaintiff's employment based upon his insubordination. The trial court granted the plea to the jurisdiction and dismissed Plaintiff's claims. Plaintiff appealed, claiming that the trial court improperly determined that he had not pled an adverse personnel action because a report of a violation of the law.

The Court of Appeals noted that the Texas Whistleblower Act contains two jurisdictional requirements before its waiver of governmental immunity is effective: (1) a plaintiff must be a public employee; and (2) a plaintiff must allege violation of the Act. To allege a violation of the Act, a plaintiff must allege that an adverse employment action was taken because of a good faith report of a violation of law by the employer or another public employee

to an appropriate law enforcement authority. Plaintiff claimed he had suffered an adverse employment action when the city: (1) terminated his employment; (2) drafted a notice of termination letter and placed it in his employment file; (3) submitted an F-5 form to the Texas Commission on Law Enforcement that stated he had been dishonorably discharged; and (4) in the accompanying letter to the Texas Commission on Law Enforcement falsely accused Plaintiff of submitting improper F-5 forms. The Court of Appeals rejected Plaintiff's arguments. First, the court pointed to sworn testimony from the Plaintiff wherein he claimed that he had resigned his position, effective immediately, and prior to the city terminating him. As Plaintiff himself admitted that he resigned prior to any termination action by the city, he could not point to the termination as an adverse employment action. The Court of Appeals went on to find that Plaintiff could also not rely on the subsequent submission of an F-5 form and accompanying letter to the Texas Commission on Law Enforcement as adverse employment actions. The Court of Appeals noted that those alleged actions occurred two months after the Plaintiff had resigned his employment with the city. Reviewing the definitions of "employee" and "personnel action" in the Whistleblower Act, the Court of Appeals found that the statute prohibited adverse personnel actions that effect benefits flowing from an *ongoing* employment relationship. Thus, post-termination actions by a governmental employer cannot serve as a basis for an adverse personnel action under the Texas Whistleblower Act. This distinguishes the Texas Whistleblower Act from claims under Title VII of the Civil Rights Act, which have been expressly held to allow retaliation claims for post-termination adverse actions by an employer.