

905 S.W.2d 356 (Tex.App. —San Antonio 1995)

Debbora THOMPSON and Concepcion C. "Mike" Oropeza, Appellants,

v.

EL CENTRO DEL BARRIO and Dr. Ernesto Gomez, Appellees.

No. 04-94-00832-CV.

Court of Appeals of Texas, Fourth District, San Antonio

August 9, 1995

Rehearing Overruled Aug. 31, 1995.

Glen D. Mangum, Law Offices of Glen D. Mangum, San Antonio, for appellants.

Robert E. Bettac, Akin, Gump, Strauss, Hauer & Feld, L.L.P., San Antonio, for appellees.

Before CHAPA, C.J., and RICKHOFF and STONE, JJ.

OPINION

RICKHOFF, Justice.

This appeal questions the viability of a claim for "whistleblowing" when a private employer misuses public funds. The appellants and plaintiffs below, Debbora Thompson and Concepcion Oropeza, worked for El Centro Del Barrio (El Centro), a private nonprofit corporation that operates community health clinics with public funding. The appellants contend they were fired in retaliation for reporting "improper, fraudulent and unlawful" activities of Dr. Ernesto Gomez, El Centro's director. At El Centro's request, the trial court dismissed appellants' lawsuit. In a single point of error, the appellants argue that the trial court abused its discretion in determining that no cause of action exists for private whistleblowing. We affirm.

Background

1. Factual Summary

According to the appellants' live pleading, which forms the basis of their dismissal, El Centro operates a community health center and other social services in Bexar County, Texas. It receives local, state, and federal funding as well as private contributions. The funding sources require El Centro to use the money for stipulated purposes.

In 1992, El Centro's comptroller, Thompson, and its assistant comptroller, Oropeza, observed other employees working on private tasks for Gomez while on company time with company supplies. At oral argument, appellants'

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counsel described these tasks as research and word processing on a private contract between Dr. Gomez and another agency. Thompson and Oropeza believed these activities to be a misuse of public money, and Thompson twice reported them to Gomez, who promised to look into the matter. Thompson also complained to Gomez about an affair between two employees and about hiring students from the college where Gomez taught.

Gomez then investigated whether Thompson was having an affair with a co-worker. He requested that Thompson resign because he no longer had confidence in her judgment or

including a subsequent dismissal, will not be reversed absent an abuse of discretion. *Id.*; *Thompson v. Dart*, 746 S.W.2d 821, 829 (Tex.App.--San Antonio 1988, no writ). The trial court abuses its discretion when it acts without reference to any guiding rules and principles or acted in an arbitrary and unreasonable manner. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex.1985), cert. denied, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986). In making this determination, the appellate court accepts as true all factual allegations in the plaintiff's pleadings. *Burgess*, 881 S.W.2d at 554; *Ulloa v. Davila*, 860 S.W.2d 202, 205 (Tex.App.--San Antonio 1993, no writ).

2. Analysis

The appellants argue that *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723 (Tex.1990), is not controlling in their case because it is factually dissimilar and did not settle a rule of law; that is, did not reject private whistleblowing. In *Winters*, the Supreme Court affirmed a summary judgment against an at-will employee for failing to state a cause of action when he sued his former private employer for retaliatory discharge. 795 S.W.2d at 723. *Winters* claimed that he was discharged because he reported to his supervisors possible illegal activities, including inventory theft, kickbacks, and false reporting of an inflated number of subscribers. *Id.*

The Supreme Court reiterated the established rule in Texas that employment for an indefinite term may be terminated at will and without cause. *Id.* Aside from a number of statutory exceptions not applicable to *Winters* or our appellants, *id.* at 724 & n. 1, the Court noted only two common law exceptions to the at-will doctrine: (1) where an employee is terminated solely because he refused to perform an illegal act; and (2) where an employee is terminated primarily to avoid paying him pension benefits. ^[2] *Id.* at 724. The Court acknowledged that other jurisdictions protect private sector employees but declined to follow those jurisdictions "at this time on these facts." *Id.* at 725 & n. 3.

In a concurring opinion, Justice Doggett agreed that *Winters'* case was not the most appropriate to announce a new rule of law but wrote separately to outline the elements of private whistleblowing. *Id.* at 725. First, the employee must "prove by a preponderance of the evidence that the principal motivation for employer retaliation was that employee's report, either internally or publicly, of activities within the workplace that would have a probable adverse effect upon the public." *Id.* at 732. The employee must then show good faith in reporting the activities and in reasonably believing they would adversely affect the public. *Id.*

Justice Doggett's elements were reviewed by the El Paso Court of Appeals in *Burgess*, where an employee was terminated after reporting to his employer a conspiracy among fellow employees to put defective parts into their employer's radiation machines. 881 S.W.2d at 555-56. The discharged employee argued that, unlike the harm in *Winters*, the public's potential harm from this activity involved life and death; thus, public policy demanded that whistleblowers be protected against retaliatory discharge. *Burgess*, 881 S.W.2d at 556.

In declining to recognize a cause of action for private whistleblowing, the El Paso court said, "We can envision some real problems connected with such a cause of action as proposed and meticulously outlined by Justice Doggett." *Id.* The court concluded that a change in the common law should be left to the Supreme Court or the Texas legislature. *Id.*; see also *Ford v. Landmark*