879 S.W.2d 47
Supreme Court of Texas.

GOODYEAR TIRE AND RUBBER COMPANY, Petitioner,

v.

Hortencia PORTILLA, Respondent.

No. D–3000.
|
June 22, 1994.

Synopsis

Wrongful termination action was brought against former employer. The County Court at Law No. 1, Calhoun County, Michael Fricke, J., held for employee under contract claim, and appeal was taken. The Corpus Christi Court of Appeals, J. Bonner Dorsey, J., 836 S.W.2d 664, affirmed, and writ of error was sought. The Supreme Court, Gammage, J., held that employer wrongfully terminated otherwise at-will employee for violation of antinepotism policy where employer had expressly waived its right to fire employee under that policy.

Affirmed.

Hecht, J., dissented and filed opinion.

West Headnotes (4)

[1] Contracts Waiver

When contractual provision runs in favor of one party, that party may unilaterally waive it, making the waiver an enforceable right against party making it, without additional consideration, meeting of the minds or even communication to other party.

3 Cases that cite this headnote

[2] Labor and Employment Definite or Indefinite Term; Employment At-Will

Employment-at-will doctrine is subject to specific contractual agreement defining exception.

21 Cases that cite this headnote

[3] Labor and Employment Definite or Indefinite Term; Employment At-Will

Employment-at-will doctrine only applies absent specific contractual provision to the contrary.

16 Cases that cite this headnote

[4] Labor and Employment Particular cases

Employer wrongfully terminated otherwise at-will employee for violation of antinepotism policy where employer had expressly waived its right to fire employee under that policy; waiver constituted specific modification of what was otherwise at-will employment contract.

29 Cases that cite this headnote

Attorneys and Law Firms

***48** Joe R. Greenhill, Patrick O. Keel, Austin, Richard R. Brann, Reagan Burch, Houston, for petitioner.

John Griffin, Jr., Cynthia T. Sheppard, Robert P. Houston, Victoria, Christa Brown, Austin, for respondent.

Opinion

GAMMAGE, Justice, delivered the opinion of the Court, in which PHILLIPS, Chief Justice, and GONZALEZ, HIGHTOWER, DOGGETT, CORNYN and SPECTOR, Justices, join.

This is an employment contract dispute in which the jury made findings that Goodyear had modified its "at-will" employment contract with Hortencia Portilla in at least two ways: Portilla could be terminated only for "good cause," and could not be discharged for violating Goodyear's anti-nepotism policy. The trial court rendered judgment on the jury verdict, and the court of appeals affirmed. 836 S.W.2d 664. We granted writ of error on the broad issue of whether oral statements assuring job security could constitute some evidence of a modification of at-will employment to a contract

requiring "good-cause" for termination. After reviewing the record, we have concluded it is unnecessary to reach this broad legal issue. The jury found that Goodyear had expressly waived its right to fire Portilla under its anti-nepotism policy. This waiver constituted a specific modification of what we will otherwise assume was Portilla's at-will employment "contract."[1] The jury found that Goodyear, seventeen years later, terminated Portilla because her brother's managerial position over her violated the anti-nepotism policy. Since there is evidence to support the jury findings of this specific modification, we affirm the judgments of the courts below.

The manager for Goodyear Tire & Rubber Company's Port Lavaca store hired Hortencia Portilla in 1965. She served through a succession of store managers in the early years. Sometime during 1969 or early 1970, her brother Reynaldo "Rey" Reyes, also a Goodyear employee, was transferred from another store to the Port Lavaca location, for the specific purpose of being trained and elevated to the position of store manager. Not only did everyone at the store know Rey was Hortencia Portilla's brother, but all the first and second levels of Goodyear management also knew it. Those with knowledge included particularly the assistant district managers and district managers at that time for the whole South Texas quadrant of Goodyear's sales operations.

Goodyear had an anti-nepotism policy which did not change at any time relevant to ***49** the dispute. Under the policy, a store managerial employee was not supposed to oversee a family member. It is undisputed that Portilla's working directly under her brother contravened this policy.

The anti-nepotism policy was a significant part of Goodyear's employment relationships. The policy had existed since at least 1947, and Goodyear had a set procedure to enforce it. The related employee had to accept a transfer or be terminated, unless a specific exception to the anti-nepotism policy was granted by a Goodyear executive at headquarters (Akron) having personnel jurisdiction over the employee. Numerous Goodyear executives testified that granting an exception was very rare.[2]

Around or just before 1987 an audit "rediscovered" that Portilla was managed by her brother. The directive came from Goodyear executives in Akron that she had to be transferred or discharged. Portilla, then over forty years of age, could not transfer. She had documented throughout her employment with Goodyear that because of her husband's job and family commitments, she could only work in Port Lavaca. Thus in 1987, after Portilla had been employed by Goodyear for 22 years, and after she had worked in open contravention of the anti-nepotism policy for over 17 years, Goodyear discharged her for refusing to accept a transfer to cure the policy conflict.[3] Portilla had received numerous commendations for her excellent work during her employment with Goodyear. Goodyear has no complaints about her actual performance. Violation of the nepotism policy was the sole reason Goodyear discharged her. Portilla sued Goodyear for wrongful termination of her employment contract.

Every pleading by Portilla, from her Original Petition to her Fifth Amended Original Petition with Supplemental Pleading on which she went to trial, included the specific allegation that Goodyear had expressly modified its employment-at-will relationship with Portilla by waiving enforcement of the anti-nepotism policy against her. Goodyear's Sixth Amended Original Answer with supplement, on which it went to trial, recognized the allegation of express contractual waiver of the policy with numerous specific pleadings, including affirmative defenses.[4] Portilla's supplemental pleading alleged certain affirmative defenses to Goodyear's affirmative defenses, including that Goodyear was estopped to claim that Portilla had waived enforcement of her 1975 exception because for over seventeen years knowing of the violation it failed to enforce it, even if it claimed no knowledge its own expressly-authorized executive granted the 1975 exception.

Trial was to a jury, which answered broad questions for Portilla that Goodyear had agreed that it would not fire her except for ***50** good cause, and that Goodyear discharged her without good cause. These broad questions form the basis for the two points of error on which we granted writ of error. In a cluster of four far more specific jury questions, however, the jury also found (1) that Goodyear had expressly waived its anti-nepotism policy with respect to Portilla; (2) that Goodyear had discharged Portilla because she was related to Rey Reyes; (3) that Goodyear had waived its right to require Portilla to transfer for being related to Reyes; and (4) that Goodyear had discharged Portilla because she refused to transfer. Without addressing whether there was evidence of the broad "good cause" modification of the employment-at-will relationship, we focus our attention on the specific findings on the anti-nepotism policy.

[1] There is evidence to support the jury findings of express waiver of the anti-nepotism policy as to Portilla.[5] A 1974

audit expressly brought the situation to Goodyear's attention. In 1975 Reyes as store manager specifically requested a waiver in his written response to the audit. A copy of Reyes' letter is in evidence. Reyes testified the conduct of district managerial personnel indicated the waiver was granted. There was testimony that the assistant district manager during the relevant time had known of the situation and specifically obtained approval of the waiver.

Also in evidence was the sworn statement[6] by the retired former Goodyear executive who would have had authority[7] to grant the written exception during his tenure at Goodyear headquarters in Akron. The sworn testimony states:

> During 1975, as part of my responsibilities, I received an audit of the Port Lavaca, Texas Goodyear Store, done by Bob Moore. The auditor had pointed out that the manager of the store was supervising his sister. Mr. Rey Reyes was the manager and Mrs. Portilla was the employee he was supervising.
>
> I learned then that Mr. Reyes had been promoted to manager by district supervisory personnel with full knowledge of his relationship with Mrs. Portilla. I also learned then that this situation had been in existence several years, and that she had been an employee at the Port Lavaca store for ten years.
>
> After considering the circumstances, I issued a letter to district supervisory personnel. Because she had been an employee for many years, and because the situation had gone on for several years with the knowledge of Goodyear's supervisory personnel, I decided that we should offer her a transfer, and if she was not able to transfer, that she would remain in her present position as an exception to the policy. This was a single, isolated, approved ***51** exception which was not to be construed as a change in the Goodyear policy.
>
> This letter should be in Goodyear's files, unless it has been destroyed or lost.

A current Goodyear executive testified that he could not determine whether the written exception had issued, because under Goodyear's document retention policies it would have been destroyed because it was so old.

The retired executive testified that the granting of the exception was intended to be communicated down the chain of command to the store level. He further testified to the contractual nature and intention by Goodyear in granting it:

> Q. You told me on the tape, and I believe we still established today, you had the authority to grant the exception?
>
> A. The delegated authority, yes.
>
> Q. Right. Have you ever seen in the company policies or has anyone at Goodyear ever told you that anyone at Goodyear would have the right to come in behind you after you had made the decision on the exception and change their mind?
>
> A. No.
>
> Q. All right. And your intent at the time would have been to allow her to continue working for her brother as long as she did her job and her job was open?
>
> A. That would have been my intent had I made that decision, yes.
>
> * * * * * *
>
> Q. But it was your word, wasn't it, it wasn't just Goodyear's. It was Joe Beckley who made that decision?
>
> A. Joe Beckley made a decision, yes, but it wasn't my word.
>
> Q. Why not?
>
> A. I merely made a call, that's all. That wasn't Joe Beckley promising anything. What I did—what I would have done, I would have done in the name of the Goodyear Tire & Rubber Company.
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> * * * * * *
>
> Q. And do you remember at the conclusion of the affidavit, at the end of the time we were visiting on the phone and after we'd cleared up the affidavit when you told me, "That's exactly what happened"?
>
> A. If it's on the tape, that exactly what I said.
>
> Q. Okay. No one has ever told you that anyone overruled your decision, have they?
>
> A. No.

There is evidence to support the jury findings on the express waiver of the anti-nepotism policy. At trial and on appeal, Goodyear maintained that the nepotism issues were immaterial. Goodyear apparently contends, as do several

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