UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1660

DON L. WILSON, ET AL.,

Plaintiffs-Appellants,
Cross-Appellees,

VERSUS

DALLAS COWBOYS FOOTBALL CLUB, INC., and JERRAL W. JONES,

Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:90 CV 1084 P)

March 16, 1995

Before REAVLEY, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:[1]

Plaintiffs sued alleging unlawful termination of their employment in violation of the Age Discrimination in Employment Act (ADEA) and fraudulent inducement, and Plaintiff Peggie Bullock, a female, asserted claims for detrimental reliance and sex discrimination. The court granted summary judgment on the fraudulent inducement claims and Bullock's detrimental reliance claim. A jury found no age discrimination against Plaintiffs and

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

in an advisory verdict found no sex discrimination against Bullock. The court entered judgment accordingly and denied Plaintiffs' motions for new trial and to change venue. Plaintiffs appeal, and Defendants cross-appeal on court costs.

I. Summary Judgment.

The court awarded Defendants summary judgment on the Plaintiffs' fraudulent inducement claims and Bullock's detrimental reliance claim.

The elements of Plaintiffs' claims for fraudulent inducement are 1) a promise to perform an act in the future 2) which defendant has no present intention of performing 3) upon which plaintiff relies 4) and acts to his detriment 5) causing damages. Crenshaw v. General Dynamics Corp., 940 F.2d 125, 128 (5th Cir. 1991).

Under a view of the summary judgment evidence favorable to the nonmoving parties, Plaintiffs were all high-level employees of the Defendant Dallas Cowboys Football Club. After announcing plans to purchase the Cowboys and after firing Coach Tom Landry, Defendant Jerral W. Jones met with staff members Plaintiffs Donald Wilson and Raymond Todd and promised, "There won't be anymore changes." Plaintiff Ann Lloyd heard about this statement secondhand. Plaintiff Bullock also was assured by Cowboys officials that she should not worry about losing her job. In reliance on these and other statements suggesting that their jobs were safe and that Plaintiffs were part of the future of the Cowboys, Plaintiffs forewent a search for other employment. All the Plaintiffs were

terminated from their employment shortly after Jones purchased the Cowboys.

The court granted summary judgment on the fraudulent inducement claims on various grounds. We affirm on the ground that the Texas Statute of Frauds bars the fraud claims.

The Statute provides that "an agreement which is not to be performed within one year from the date of making the agreement" is unenforceable unless in writing. Tex. Bus. & Com. Code Ann. § 26.01(a) & (b)(6) (West 1987). We reject Plaintiffs' suggestion that these promises are outside the scope of the Statute of Frauds because they are for an indefinite period rather than for a term greater than one year. Plaintiffs took the statements as promises that they would never be discharged and that they would have employment with the Cowboys until retirement (Lloyd dep. at 78-79; Wilson dep. at 58-59; Todd dep. at 127), or for life (Bullock dep. at 31-32), so long as Plaintiffs performed their jobs. A promise of employment for life or until retirement for as long as the employee is performing the duties of her job is that type of employment agreement that must be written to be enforced. Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403, 407 (Tex. App.))Beaumont 1987, writ ref'd n.r.e.) (promise of lifetime employment or employment until age 65 must be in writing); cf. Perez v. Vinnell Corp., 763 F.Supp. 199, 201 (S.D. Tex. 1991) (no right to rely on oral promise of employment as long as employee did a satisfactory job).

This requirement of a written employment contract to modify

the employment-at-will doctrine stems from the writing requirement of the Statute of Frauds for agreements which are not to be performed within a year. Stiver v. Texas Instruments, Inc., 750 S.W.2d 843, 846 (Tex. Ct. App.))Houston [14th Dist.] 1988, writ ref'd n.r.e.); see also Schroeder v. Texas Iron Works, Inc., 813 S.W.2d 483, 489 (Tex. 1991) (oral promise of employment until retirement unenforceable under Statute of Frauds); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.))Houston [1st Dist.] 1983, writ ref'd n.r.e.) (same); cf. Gerstacker v. Blum Consulting Eng'rs, Inc., 884 S.W.2d 845, 849-51 (Tex. App.))Dallas 1994, writ requested) (oral agreement for employment term measured by quality of performance rather than years or months not within Statute of Frauds).

Nor can Plaintiffs evade the Statute of Frauds by contending that they are claiming fraud rather than wrongful termination or breach of contract. See Nagle v. Nagle, 633 S.W.2d 796, 800-01 (Tex. 1982) (recognizing that Statute of Frauds would become meaningless if court enforced unenforceable oral promise via a common-law fraud claim "merely because [Defendant] did not perform that promise"); Webber v. M.W. Kellogg Co., 720 S.W.2d 124, 129 (Tex. App.)) Houston [14th Dist.] 1986, writ ref'd n.r.e.) (barring fraud claim seeking to enforce oral employment agreement); Collins v. Allied Pharmacy Management, 871 S.W.2d 929, 936 (Tex. App.))Houston [14th Dist.] 1994, no writ) (holding that application of the Statute of Frauds to a contract vitiates fraud claim based on the same facts).

Plaintiffs also seek to distance themselves from the unenforceable employment contract and the Statute of Frauds by seeking damages for lost employment opportunities rather than damages for breach of contract. This argument recognizes Texas jurisprudence allowing a claim for fraud despite the Statute of Frauds if the alleged misrepresentation is collateral to or independent of the unenforceable oral contract. If the claim is based only on the allegation that defendant intended not to perform an unenforceable agreement, the Statute of Frauds remains a bar. See generally McClure v. Duggan, 674 F. Supp. 211, 221-22 (N.D. Tex. 1987) (discussing Texas jurisprudence). In this case the Plaintiffs' fraud claim is not based upon factual misrepresentations which were collateral to the unenforceable agreement. Rather, the fraud claim is based on the promises of continued employment))the very promises rendered unenforceable by the Statute of Frauds. We affirm the summary dismissal of the fraud claim.

In addition to fraudulent inducement, Plaintiff Bullock also claimed detrimental reliance, alleging that she received assurances

> prior to her acceptance of a job offer, that she would have the security of a job for the rest of her life and have retirement. [I]t was reasonably foreseeable that Plaintiff Bullock would rely upon such promises. In reliance upon such promises, Plaintiff Bullock resigned from her position with another employer and accepted the Dallas Cowboys['] offer of employment [and suffered damages] . . . .

Pls.' 3d Am. Compl., para. XXI.

The doctrine under which a plaintiff may recover damages for detrimental reliance is called promissory estoppel. Wheeler v.

White, 398 S.W.2d 93, 96 (Tex. 1965). Promissory estoppel is available to a promisee who has acted to his detriment in reasonable reliance on an otherwise unenforceable promise. Id.; Henderson v. Texas Commerce Bank-Midland, N.A., 837 S.W.2d 778, 781-82 (Tex. Ct. App.))El Paso 1992, writ denied).

We disagree with Bullock's argument that the court erred in granting summary judgment on her promissory estoppel claim without notice to her. Bullock alleges and the summary judgment evidence showed an oral promise of employment for more than one year, i.e., a promise that cannot be performed within one year. When a motion for summary judgment establishes the applicability of the Statute of Frauds as a matter of law, the movant does not have the burden to negate the plaintiff's claim of promissory estoppel; rather, the nonmovant has the burden to raise a fact issue as to its promissory estoppel defense. "Moore" Burger v. Phillips Petroleum Co., 492 S.W.2d 934, 935-37 (Tex. 1972); Collins, 871 S.W.2d at 936.

In "Moore" Burger, the Texas Supreme Court recognized the limited override of the Statute of Frauds in promissory estoppel cases where a promise "to sign a written agreement which itself complies with the Statute of Frauds" existed. "Moore" Burger, 492 S.W.2d at 940. In addressing a motion for rehearing in that case, the Court clarified that the Statute of Frauds generally applied to promissory estoppel cases and that the rule recognized in that case was a limited one. Id.; see also Nagle v. Nagle, 633 S.W.2d at 800 (emphasizing that on rehearing the Court in "Moore" Burger wrote to narrow the promissory estoppel exception).

As in Nagle, the exception recognized in "Moore" Burger is not present in this case. Bullock has not alleged that there was an oral promise to sign a written agreement that satisfies the Statute. Therefore Bullock failed to raise a fact issue on her claim for promissory estoppel.

In addition to those obstacles, Bullock fails to state a claim as a matter of law. In alleging that she accepted the Cowboys' offer of employment, Plaintiff concedes that she entered into an employment contract. A plaintiff cannot disregard a legally sufficient contract and sue for her reliance damage. Prince v. Miller Brewing Co., 434 S.W.2d 232, 240 (Tex. Civ. App.))Houston [1st Dist.] 1968, writ ref'd n.r.e.). The promissory estoppel theory may be invoked to enable an injured party to be compensated for his foreseeable reliance "where there is actually no contract." Wheeler, 398 S.W.2d at 97; see also Prince, 434 S.W.2d at 239. Moreover, a claimant may not recover for detrimental reliance when there is a valid contract terminable at will. Collins, 871 S.W.2d at 937 (promisee of employment contract may not use promissory estoppel to estop the employer from asserting its at-will termination rights); see also Conway v. Saudi Arabian Oil Co., 867 F.Supp. 539, 543 (S.D. Tex. 1994) (plaintiff who has valid at-will employment contract cannot assert a claim for reliance damages based on promise in conjunction with contract).

Bullock has not met her burden of raising a fact issue and indeed cannot establish a claim for promissory estoppel or

detrimental reliance. We therefore affirm the summary dismissal of her detrimental reliance claim.

II. ADEA and Title VII; New Trial.

After an adverse verdict, Plaintiffs moved for a new trial on the discrimination claims. The court denied the motion and we affirm. The Plaintiffs' age-discrimination and Bullock's sex-discrimination claims involved factual determinations based on credibility choices by the jury. While Plaintiffs point to remarks that could be interpreted as age- or sex-related, Defendants show that sufficient evidence of age- and sex-neutral reasons for the terminations supports the verdict. The court did not abuse its discretion in leaving the believability of the Defendants' articulated non-discriminatory reasons for the jury. See Bergeron v. Central Freight Lines, 504 F.2d 889, 890 (5th Cir. 1974) (reviewing denial of a motion for new trial only for clear abuse of discretion); see also Scott v. Monsanto Co., 868 F.2d 786, 790 (5th Cir. 1989) (recognizing jury's role as principal trier of fact). None of the considerations discussed in Monsanto convinces us that the court abused its discretion in denying the motion.

III. Venue.

Plaintiffs also moved for a change of venue upon requesting a new trial. Plaintiffs contend that a new trial in the Northern District (Dallas) would be unfair because of the local popularity of the Cowboys. A motion to transfer venue is addressed to the

discretion of the district court. See Peteet v. Dow Chem. Co., 868 F.2d 1428, 1436 (5th Cir. 1989), cert. denied, 493 U.S. 985 (1989). After reviewing the record, we concluded that the district court did not abuse its discretion in denying the motion to change venue.

IV. Cross Appeal; costs.

Defendants contend that, as prevailing parties, they should have been awarded court costs under Rule 54(d). In view of our partial remand, the extent to which Defendants will prevail against Bullock is uncertain, but Defendants have definitely prevailed against the remaining Plaintiffs. The district court assessed costs against the party who incurred them. We vacate the district court's assessment of costs and remand for reconsideration of its decision in light of Schwartz v. Folloder, 767 F.2d 125, 131-32 (5th Cir. 1985). If the district court determines that the prevailing parties are not entitled to costs, it should state its reasons for this conclusion. Id. at 132.

Conclusion.

We affirm the judgment dismissing the Plaintiffs' fraudulent inducement claims, Bullock's detrimental reliance claim, and the age and sex discrimination claims. We find no abuse of discretion in the court's venue ruling. The cost award is vacated and remanded for reconsideration. The judgment of the district court is therefore

AFFIRMED in part, VACATED in part, and REMANDED.