IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4233
Summary Calendar

JANE TATE,

Plaintiff-Appellant,

VERSUS

GERVIS LAFLEUR and
EVANGELINE COMMUNITY ACTION, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(91-CV-1259)

(March 31, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Jane Tate appeals an adverse judgment as a matter of law ("j.m.l.") entered in her action brought pursuant to 31 U.S.C. § 3729 et seq. Finding no error, we affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

After Tate's contract of employment as a Headstart teacher with Evangeline Community Action, Inc. ("ECAI"), was not renewed (or after she was otherwise terminated from her employment),[1] she filed a civil action in her individual capacity and as qui tam plaintiff on behalf of the United States, naming, as defendants, ECAI and its director, Gervis Lafleur. Tate alleged that she was terminated because she reported financial improprieties to federal authorities. Specifically, Tate claimed that Lafleur caused a claim to be submitted to the Department of Health and Human Services for renovation of a building intending, instead, to use the funds for new construction of a building in which the United States had no interest. Tate further averred that Lafleur caused a request to be submitted for payroll checks, from the federal commodities program for persons who were not employed, to provide labor for that program, and that he diverted those funds to his personal use.

Tate prayed for judgment ordering her reinstatement as a Headstart teacher and for damages allowable under 31 U.S.C. § 3729 et seq. The United States declined to intervene in the litigation and elected to allow Tate to proceed with the action in her personal capacity.

[1] The question whether Tate was "terminated" or, instead, was a contract employee whose contract was not renewed was disputed. Tate testified that Lafleur told her that the annual contracts were executed so that teachers would be able to collect unemployment benefits during the summer months.

II.

A bench trial was held. Tate testified that she was employed as a Headstart teacher by ECAI for twelve years until she was terminated. A personal friend, Gayle Thomas, who was employed by ECAI as a bookkeeper, told Tate that she was concerned that she had been asked to prepare checks payable to persons who were not employees of ECAI and that checks had been cut to the same person using two different names.

The evidence showed that Tate and Thomas, accompanied by their husbands, met with Congressman Clyde Holloway, who stated that he would ask an FBI agent and, if necessary, the United States Marshal's Service to look into the allegations. Tate spoke with an FBI agent, Roland Powell, and with two investigators from Dallas, Audrey Warren and Robby Tye. She told Tye about the checks and about a purchase order for 100 trash cans that were never received by the program. Tate told Warren that the bookkeeper had told her about $10,000 that was intended for renovation of an ECAI facility but was used, instead, to build a new church.

Between 1985 or 1986 and 1990 when she was terminated, Tate was in continuous contact with Powell, Warren, and Holloway. During this period, she began to experience difficulties at work. She was "continuously written up" and suspended for violating program policies. Although Tate admitted to some minor infractions, she denied that she committed, or stated that she could not remember committing, most of the acts listed by the defendants as cause for their refusal to renew her contract. Some of the rules

that she did bend were commonly ignored by program employees. Tate testified that

> [B]efore all these things happened, I had never been reprimanded. I'd always been congratulated on my job. I had always had good evaluations. Nothing, none of that had ever happened to me. And then all of a sudden, after I made these reports, there were comments made, there were suspensions, there were reprimands, probation periods. And I felt that I was being harassed and pressured into quitting work.

Three of Tate's reprimands occurred in 1985. Holloway took office in 1987. When asked on cross-examination how the 1985 reprimands could have resulted from her meeting with Holloway, Tate recalled that she had met with another Dallas investigator, Dean Campbell, and with representatives of a parents' group prior to meeting with Holloway. She stated that she had never told program officials that she was reporting financial improprieties to federal authorities. Although she mentioned her activities to two employees of the program)) Wanda Skinner, a secretary, and Sandra Fontenot, in the nutrition program)) she did not know whether Skinner or Fontenot conveyed the information to Lafleur or anyone on the ECAI board of directors.

Tate rested without calling any other witnesses.[2] The defendants moved for "directed verdict." The district court found that Tate had failed to demonstrate that ECAI or Lafleur knew that Tate was involved in the federal investigation of ECAI. The court held that without proof of knowledge, Tate could not prove that she

[2] Although Powell, Tye, Warren, and Campbell were not available to testify, Tate had a number of other witnesses who had been subpoenaed to testify as rebuttal witnesses.

was terminated because of her involvement in the investigation. The district court granted the motion for "directed verdict" and entered judgment for the defendants.

III.

A.

The order granting a "directed verdict" should be construed as an order granting j.m.l. pursuant to FED. R. CIV. P. 52(c), which replaced FED. R. CIV. P. 41(b). See FED. R. CIV. P. 52 advisory committee note, 1991 amendment. Under new rule 52(c),

> If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim . . . that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . . . .

FED. R. CIV. P. 52(c). We review the district court's fact-findings under new rule 52(c) for clear error. Southern Travel Club v. Carnival Air Lines, 986 F.2d 125, 128 (5th Cir. 1993); see FED. R. CIV. P. 52(c), advisory committee note, 1991 amendment ("A judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be `clearly erroneous.'").

B.

1.

Tate's complaint sought relief under 31 U.S.C. § 3730(h).

Under that subsection,

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h). To prevail, Tate had to prove that she was terminated, or her contract was not renewed, because she assisted federal authorities investigating ECAI. The district court's conclusion that Tate failed to carry her burden on this crucial factual issue is not clearly erroneous.

Tate argues that the question whether Lafleur knew of her involvement in the federal investigation required her to prove a negative that was "peculiarly within the knowledge of" ECAI and Lafleur. Tate claims that she should not have been required to introduce evidence to disprove that ECAI and Lafleur did not know of her involvement. This reasoning is circular, as any affirmative fact can be posited as a negative.

Section 3730(h) requires proof that the negative job action was taken "because of" the employee's whistle-blowing activities. If Tate could not show that ECAI and Lafleur knew that she had cooperated with federal authorities, she could not show that she was terminated because of those activities.

Tate argues as follows:

> Should that Trial Court have allowed this matter to proceed defendant's [sic] undoubtedly would have called Mr. Lafleur to explain the actions of himself and the

> Agency. At this time a vigorous cross-examination of Mr. Lafleur would have exhibited to the Trail [sic] Court the alleged reasons in dismissing Miss Tate were "trumped up" reasons and a farce in the termination.

There was nothing, however, to prevent Tate from calling Lafleur as part of her case-in-chief. See FED. R. EVID. 611 ("When a party calls . . . an adverse party, . . . interrogation may be by leading questions.").

2.

Tate's complaint also sought damages available to a qui tam plaintiff under 31 U.S.C. § 3730(d), which provides that private attorneys general share the proceeds of the qui tam action with the United States. The question whether ECAI and Lafleur knew of Tate's involvement in the federal investigation is not relevant to this portion of her action. Tate did not present evidence at trial showing that ECAI and Lafleur actually diverted sums as alleged in the complaint, and she does not argue on appeal that the district court erred by entering judgment for the defendants on this issue. Issues that are not briefed are abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

AFFIRMED.