

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20379

VELMA D. MOORE,
Plaintiff-Appellant,
versus
WAL-MART STORES, INC., ET AL.,
Defendants,
WAL-MART STORES, INC.,
Defendants-Appellee.

Appeal from United States District Court
for the Southern District of Texas
(CA H 93 553)

June 30, 1995

Before POLITZ, Chief Judge, EMILIO M. GARZA and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:*

Velma D. Moore appeals the judgment of the district court dismissing her claims against Wal-Mart Stores, Inc. ("Wal-Mart") for the injuries she suffered when she was shot by a Wal-Mart security guard. For the following reasons, the judgment of the district court is affirmed.

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

On January 1, 1991, Moore unsuccessfully tried to buy several items from a Houston-area Wal-Mart with a forged check; daunted, she fled the store empty-handed and off-duty Harris County Deputy Sheriff Keith Pusser, working as a security guard at the store, was alerted. Officer Pusser, believing that a crime had been committed, ordered Moore to stop, but she refused and proceeded to drive away in a pick-up truck. In pursuit, Pusser jumped in the back of the truck. While in the back of the pick-up truck, Pusser's weapon discharged. Whether the discharge was accidental or intentional is disputed. The bullet struck Moore in the neck, inflicting serious injuries. Moore was later arrested and charged with two counts of forgery and aggravated assault on a peace officer; she later pleaded guilty.

Moore sued Wal-Mart alone in state court on a vicarious liability theory. The suit was removed to federal court, where Moore filed an amended complaint attempting to join a non-diverse Wal-Mart sales clerk, Benjamin Longoria; Longoria was dismissed from the proceedings by the district court. This amended complaint also alleged theories of liability based on negligent hiring.

In its grant of summary judgment dismissing Moore's complaint against Wal-Mart, the district court found that Pusser was acting within his statutory duty as a peace officer to apprehend Moore subsequent to her commission of a felony; consequently, it found Wal-Mart not to be responsible for his actions in his official capacity. The court also rejected Moore's negligent hiring theory.

After the district court denied Moore's motion to reconsider, she timely appealed.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. FDIC v. Duffy, 47 F.3d 146, 149 (5th Cir. 1995). Summary judgment is mandated when the evidence, viewed in the light most favorable to the non-moving party, presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Lindsey v. Prive Corp., 987 F.2d 324, 327 (5th Cir. 1993).

DISCUSSION

Moore contends that the district court erred in finding that Wal-Mart could not be held responsible for Officer Pusser's actions. Police officers have a duty to prevent crime and arrest offenders. Tex. Code Crim. Proc. art. 2.13. An off-duty police officer who observes a crime immediately becomes an on-duty police officer. See Vernon v. City of Dallas, 638 S.W.2d 5, 8-9 (Tex. Ct. App. 1982); see also, Tex. Code Crim. Proc. art. 2.13. Thus, at the time Officer Pusser was apprehending Moore, he was an on-duty police officer by operation of Texas law.

Moore argues that under the theory of joint control, Wal-Mart also was responsible for the actions of Officer Pusser.¹ We disagree. In City of Dallas v. Half Price Books, Records, Magazines, Inc., 883 S.W.2d 374 (Tex. Ct. App. 1994), an off-duty

¹Under the theory of joint control, two employers may be liable for an employee's actions, if they both exercised control over the employee's actions. Gulf Oil Corp. v. Williams, 642 S.W.2d 270, 272 (Tex. Ct. App. 1982).

police officer, who was providing security for a bookstore, shot and killed a suspect during an altercation in the bookstore's parking lot. In determining whether the police officer was entitled to qualified immunity, the Texas Court of Appeal stated that:

When [security guard] Harmon saw a crime being committed, he ceased being an employee or independent contractor of Half Price Books and became an on-duty police officer. As a matter of law, Harmon was an on-duty police officer at all relevant times. [Footnote omitted.] [Emphasis ours.]

Half Price Books, 883 S.W.2d at 377; see also, White v. Liberty Eylau School District, 880 S.W.2d 156, 159 (Tex. Ct. App. 1994)(holding that a person may be the servant of two employers if service to one does involve an abandonment to another). We conclude that the holding in Half Price Books is dispositive of this case. It is undisputed that Officer Pusser was a Wal-Mart employee at the time that Moore first tried to make her purchase with the forged check. When Officer Pusser sought to apprehend Moore, he ceased being a Wal-Mart employee and became an on-duty police officer. We therefore hold that summary judgment was properly entered against Moore.

Moore contends that the district court erred in dismissing Benjamin Longoria as a defendant. As alleged in Moore's amended petition, Longoria was a Wal-Mart sales clerk who informed Officer Pusser that Moore had attempted to commit forgery. The district court found that there was no legal basis for holding Longoria liable and dismissed him from the suit. Our research has also produced no authority under which Longoria could be held liable for

Officer Pusser's actions. Moore has cited no legal authority that would hold Longoria liable for actions that Officer Pusser performed while in the course of pursuing her. Consequently, we hold that the district court properly dismissed Longoria from the lawsuit.

Moore also contends that the district court erred by refusing to allow her to amend her petition to include a claim of negligent hiring. She argues that justice requires "the Court to have given Plaintiff leave to amend because the independent contractor issue was not a legal question for the Court to decide, due to the existence of the several disputed facts." However, as we have discussed above, Officer Pusser's employment status was a purely legal question. Consequently, Moore's contention has no merit.

Moore contends that the district court erred in excluding Jeffrey Moore as an expert witness at trial. Because we have affirmed summary judgment, we reject this contention as moot.

CONCLUSION

For the following reasons, the judgment of the district court dismissing Velma Moore's tort claims against Wal-Mart is AFFIRMED.