Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00029-CV

CITY OF HOUSTON AND SUSAN MCMILLIAN, Appellants

V.

JUANITA FLETCHER, Appellee

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Cause No. 98-05588

O P I N I O N

In this accelerated interlocutory appeal, the City of Houston and City employee, Susan McMillian, the appellants[1] and defendants in the court below, challenge the trial court's denial of a summary judgment motion based on the affirmative defense of official immunity.[2] We

[1] Although both the City and McMillian are denominated as appellants, the only ruling at issue in this appeal is the trial court's denial of summary judgment based on McMillian's affirmative defense of official immunity.

[2] The denial of a summary judgment motion is an interlocutory order and ordinarily not appealable; (continued...)

affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Juanita Fletcher, a 53 year old woman, brought suit against her former employer, the City of Houston, and Susan McMillian, the City employee who served as her immediate supervisor, alleging age discrimination and intentional infliction of emotional distress. The City hired Fletcher in September 1996, as an administrative assistant III, in the Department of Public Works & Engineering, Traffic Management Division, and terminated her employment in May 1997, while she was on probation due to poor job performance.

Fletcher claims that McMillian prevented her from performing her duties, told her to perform clerical duties that were not in her job description, gave to younger employees duties that were supposed to have been Fletcher's responsibility, prevented Fletcher from getting certain necessary training, prevented her from attending certain important meetings, and eventually fired her. Fletcher also alleges that McMillian belittled her in front of other employees, at one point referring to her as the "stupid old woman." The City and McMillian contend that Fletcher was fired for unsatisfactory performance and for insubordination.

The City and McMillian moved for summary judgment, claiming Fletcher was unable to establish by competent summary judgment evidence (1) a *prima facie* case of age discrimination, or (2) that the City and McMillian created a hostile work environment, (3) that the acts alleged do not, as a matter of law, constitute conduct sufficiently outrageous to support recovery for intentional infliction of emotional distress, and (4) that McMillian has official immunity. The trial court denied the motion for summary judgment. They now claim the trial court erred in doing so because (1) the City has sovereign immunity and that McMillian, as a public official, is entitled to the same immunity; (2) the City cannot be liable

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[2] (...continued)
however, a person may appeal a court order denying a motion for summary judgment that is based on an assertion of immunity by an individual who is an employee of a political subdivision of the state. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon 1997).

to Fletcher and, pursuant to section 101.106 of the Texas Civil Practice and Remedies Code, McMillian is not liable to Fletcher; (3) as a matter of law, a claim for employment discrimination cannot give rise to a claim of intentional infliction of emotional distress; and (4) McMillian has official immunity. In her response to the City's motion, Fletcher abandoned all claims against McMillian except for the tort claim of intentional infliction of emotional distress, for which she seeks actual and punitive damages.

LIMITED NATURE OF APPEAL

Section 51.014(5) of the Texas Civil Practices and Remedies Code grants an appellate court the power, on interlocutory appeal, to review claims of official immunity and claims arising from official immunity. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon 1997); *City of Houston v. Kilburn*, 838 S.W.2d 344, 345 (Tex. App.–Houston [14th Dist.] 1992), *writ denied*, 849 S.W.2d 810 (Tex. 1993)(per curiam); *see also City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374, 376 (Tex. App.–Dallas 1994, writ dism'd w.o.j.) (appellate court may review denial of governmental entity's summary judgment motion based on employee's qualified immunity defense). Because we have legislative authority to address only McMillian's official immunity claim in this interlocutory appeal, we decline to consider her claims of immunity arising from the City's claims of sovereign immunity and the other grounds set forth in the motion for summary judgment.[3] Thus, the sole issue before this court is whether the trial court erred in denying summary judgment in favor of McMillian based on her affirmative defense of official immunity.

STANDARD OF REVIEW

[3] We note that the City and McMillian ask us to consider only McMillian's official immunity claim, not any immunity claim by the City based on McMillian's official immunity claim.

Summary judgments are reviewed *de novo*. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1995). The summary judgment motion must show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. If the defendant moves for summary judgment on grounds of an affirmative defense, the defendant must establish all elements of the affirmative defense as a matter of law. *See American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). No disputed question of material fact can remain on the affirmative defense. In determining whether a disputed issue of material fact exists, we take as true all evidence favorable to the nonmovant (Fletcher), indulge every reasonable inference, and resolve any doubts in her favor. *See Nixon*, 690 S.W.2d at 548-49.

OFFICIAL IMMUNITY

At the outset, we note that our task is not to address the substance of Fletcher's allegations, i.e., whether the acts alleged can, as a matter of law, suffice to warrant recovery on grounds of intentional infliction of emotional distress; rather, we address *only* the issue of official immunity. Sometimes referred to as governmental, quasi-judicial, or qualified immunity,[4] official immunity is a common-law defense that protects government officers from personal liability in performing discretionary duties in good faith, within the scope of their authority. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653-54 (Tex. 1994). Because official immunity is an affirmative defense, McMillian, as the party asserting it, bears the burden of establishing, as matter of law, that she was (1) performing a discretionary function in each instance; (2) acting in good faith; and (3) acting within the scope of her authority. *See id*. Failure to establish any of these elements of official immunity precludes summary judgment on this affirmative defense.

In this case, our consideration of the summary judgment motion begins and ends with

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[4] *See Travis v. City of Mesquite*, 830 S.W.2d 94, 100 n.2 (Tex. 1992)(Cornyn, J., concurring); *Carpenter v. Barner*, 797 S.W.2d 99, 101 (Tex. App.–Waco 1990, writ denied).

the good faith element of the defense. To determine whether a government official has acted in good faith, we apply a test of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith. *See id.* at 656. To establish the good-faith element of the official immunity defense, a movant must offer evidence that a reasonably prudent manager under the same or similar circumstances would have believed that it was necessary to take the same actions.[5] McMillian cites no specific evidence to show that she acted in good faith.[6] In her summary judgment motion, McMillian did not undertake to offer any proof of reasonableness, but merely cited to her second amended answer in an effort to establish the good faith element. Although this pleading asserts that McMillian acted in good faith, it does not constitute summary judgment evidence. *See Hidalgo v. Surety Sav. & Loan Ass'n*, 462 S.W.2d 540, 543 (Tex. 1971) (pleadings generally do not constitute summary judgment evidence). McMillian offers no other proof of good faith to support the motion. In the absence of summary judgment proof, McMillian failed to demonstrate, as a matter of law, that she acted in good faith. Having failed to establish this critical element of the affirmative defense of official immunity, McMillian was not entitled to summary judgment. Accordingly,

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[5] *See City of Lancaster*, 883 S.W.2d at 656 (to establish "could have believed" aspect of good-faith test in summary judgment, officer must prove that reasonably prudent officer might have believed action at issue should have been taken); *City of Hidalgo v. Prado*, 996 S.W.2d 364, 368 (Tex. App.–Corpus Christi 1999, no pet.) (for summary judgment purposes, officials establish good faith with affidavits and interrogatory answers stating that they had read plaintiff's pleadings and were familiar with allegations, that all acts alleged were within scope of authority, requiring personal deliberation, decision, and judgment, that acts were justified and that any reasonable official in the same or similar circumstances would have so believed given the established law and the information possessed at the time); *City of Houston v. Newsom*, 858 S.W.2d 14, 18 (Tex. App.–Houston [14th Dist.] 1993, no writ) (police officers accused of wrongfully shooting bystander while chasing fleeing felon offer evidence of good faith with affidavits stating that (1) actions taken in good faith, (2) officers knew individual was felon and probably possessed weapon, (3) felon fled when officers attempted to arrest him, (4) felon while fleeing pointed gun at officers, (5) officers' actions in accordance with department policies and procedures and in compliance with state law, (6) officers reacting to emergency situation, (7) officers did not discharge weapons merely to apprehend felon but did so in fear of their lives).

[6] Instead, McMillian argues that Fletcher offers no evidence of malice. However, the rules for a "no evidence" summary judgment motion do not apply here. *See* TEX. R. CIV. P. 166a(i) (party can move for summary judgment on grounds that there is no evidence of one or more essential elements of claim or defense on which adverse party would have burden of proof at trial).

we find that the trial court did not err in denying the summary judgment motion.

We affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Justices Yates, Fowler and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).