1987

Becky Lowe v. Sorenson Research Company, Inc. : Supplement

Utah Supreme Court

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FU 19870395

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RAWLINS & CRITCHLOW	1891
RAWLINS, THURMAN, WEDGEWOOD & HURD	1897
RAWLINS, RAY & RAWLINS	1907
INGEBRETSEN, RAY & RAWLINS	1929
INGEBRETSEN, RAY, RAWLINS & CHRISTENSEN	1941
INGEBRETSEN, RAY, RAWLINS & JONES	1948
RAY, RAWLINS, JONES & HENDERSON	1949

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IN REPLY REFER TO:

November 9, 1987

Clerk of the Court
Utah Supreme Court
332 State Capitol Building
Salt Lake City, Utah 84114

Re: Becky Lowe v. Sorenson Research Company, Inc.
Case No. 20395

Dear Clerk:

Pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure, the following citations are supplemental cases decided since the filing of the Supreme Court brief by counsel for defendant-respondent Sorenson Research Company, Inc. which have a direct impact on the above-entitled matter.

1. Rose v. Allied Development Company, 719 P.2d 83 (Utah 1986) [Rejects the claim for breach of covenant of good faith and fair dealing in a suit for wrongful termination and held that because the employment was terminable-at-will the court found no cause of action could exist for breach of an implied covenant of good faith and fair dealing.] See Brief of defendant-respondent, pps. 7-23.

2. Ericksen v. Transatlantic Reinsurance Co., 119 L.R.R.M. (B.N.A.) 3621 (N.D. Ill. 1984) [The United States District Court for the Northern District of Illinois, applying Illinois law, dismissed the claim of an at-will employee for wrongful termination based upon the alleged breach of an implied covenant of good faith and fair dealing, noting that the good faith obligation does not create an independent cause of action.] See Brief of defendant-respondent, pps. 7-23.

3. Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986) [Rejects the argument that an employee handbook establishes an employment contract.] See Brief of defendant-respondent, pps. 23-30.

4. Ericksen v. Transatlantic Reinsurance Co., 119 L.R.R.M. (B.N.A.) 3621 (N.D. Illn. 1984) [Reaffirms general rule that an employment handbook is not part of an employment contract and affirms dismissal of action for failure to state a claim upon which relief could be granted.] See Brief of defendant-respondent, pps. 23-30.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH

Randall N. Skanchy

RNS/mb

cc: H. Ralph Klemm (w/o enclosures)

F.2d 572, 117 LRRM 2941 (6th Cir. 1984) (en banc). If, as claimed by plaintiffs, his action accrued on July 10 when he actually received the arbitration papers then the instant action is not time-barred.

Plaintiff's own affidavit introduced into evidence indicates that he learned of the actual contents of the arbitration panel's award on July 7 when he met with appeal officials to discuss the situation. He had actual knowledge then of the award regardless of what the union officials told him about discontinuing his "moonlighting." He also knew on July 7 what the union had done in pursuing his grievance to arbitration and that the union would no longer contest the award which adversely affected him.[2] There was no substantial factual controversy, then, concerning what plaintiff reasonably knew about the union's alleged breach of duty and the company's right to insist upon its rule limiting his outside business pursuits on July 7, 1981.

[1] For purposes of a hybrid §301/unfair representation action, the time the statute of limitations begins to run is when the claimant knows or should have known of the union's alleged breach of its duty of fair representation See Howard v. Lockheed-Georgia Co , 742 F.2d 612, 614, 117 LRRM 2784 (11th Cir. 1984); Metz v. Tootsie Roll Ind., Inc., 715 F.2d 299, 304, 114 LRRM 2340 (7th Cir. 1983), cert denied, 104 S.Ct. 976, 115 LRRM 2360 (1984); Santos v. District Council, 619 F.2d 963, 969, 103 LRRM 3082 (2d Cir. 1980), Shapiro v Cook United Inc., 762 F.2d 49, 119 LRRM 2583, No. 83-3087, slip op. at 3 (6th Cir 5/17/85) (per curiam), and Northwest Ind. Credit Union v. Salisbury, et al., No. 84-1115 (6th Cir. 7/11/85) (unpublished per curiam).

Regardless of plaintiff's belief of what the arbitration award entailed, he claimed, essentially, that the Union had not adequately prepared and presented his position during the arbitration hearing. Dowty, however, knew of or learned about all the facts relating to the Union's preparation of his case by the July 7 meeting. Coggins' assertion was not contradicted that plaintiff had read the Union's post-hearing brief several times. We find no error, then, in the determination by the district court:

> During the meeting held on [July 7, 1981], plaintiff learned of the arbitration panel's decision, read the hearing briefs of the union, and was informed of the response of the union to the decision At that time, he was also aware of the union's conduct during the grievance and arbitration procedure, including the fact that the union had refused to permit him to be represented by his own counsel *By July 7, plaintiff was armed with all the facts with which he (or his attorney) needed to draft [¶23 in the complaint], which alleges that the union breached its duty of fair representation* In short, by July 7, 1981, plaintiff "knew or reasonably should have known that" the union, in his opinion, had breached its duty of fair representation

(emphasis added.)

[2] We are not persuaded by plaintiff's argument that he cannot be deemed to have knowledge until he receives *formal* notice of the arbitrator's decision and award. Failure of an employee to receive a copy of an arbitration decision does not toll the running of limitations periods in §301 actions when he knows what the union has done to represent his interests and essentially the disposition of his grievance. See Brown v. Duff Truck Lines, Inc , 557 F Supp. 194, 196, 117 LRRM 3076 (S.D. Ohio 1983). To uphold plaintiff's contention, as the district court cogently noted, even if a claimant knew about the contents of an arbitration decision, his cause of action would never accrue if he never obtained a copy of the decision. We reject plaintiff's contention accordingly.

We affirm the judgment of the district court that the six month's limitation bars plaintiff's claims but remand for entry of the district court's final judgment as of August 26, 1981

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[2] In addition to that part of the award set out in footnote 1, it provided in pertinent part

> The Board of Arbitration finds and determines on the basis of the evidence adduced at the arbitration hearing, and consideration of documentary exhibits, and post hearing briefs that the company's policy prohibiting certain types of "after-hours" work, or "moonlighting" on the part of its employees is reasonable, and within the recognized rights of management the company's policy was orally communicated to the grievant in 1973 at the time he was hired, and that said policy was set forth in written form in 1977,
>
> The Union is accorded the contractual right in each instance to challenge a plant rule, or policy unilaterally drafted by the company including the right to grieve the application of a rule

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ERICKSEN v. TRANSATLANTIC REINSURANCE CO.

U.S. District Court, Northern District of Illinois

ERICKSEN v. TRANSATLANTIC REINSURANCE COMPANY, INC., et al., No. 84 C 2070, September 6, 1984

EMPLOYMENT AT WILL

1. Wrongful discharge — Exceptions to general rule — Employee handbook ▸175.117 ▸170.503 ▸170.508

Exceptions to general rule in Illinois that employment handbook is not part

of employment contract arise where (1) handbook is adopted as modification of pre-existing employment contract and consideration exists to create mutuality of obligations, and (2) another document exists which can be construed as express employment contract that is subject to "policies" of employer.

2. Wrongful discharge — Breach of contract — Employment manual — Consideration ▸170.503 ▸170.508

Discharged at-will employee fails to state claim for breach of contract, despite contention that employment manual received after employee was hired expressed company policy against arbitrary termination; continuing to work after inception of personnel policy is not consideration for policy so as to render that policy part of employment contract.

3. Wrongful discharge — Breach of 'good faith' covenant ▸170.512

At-will employee fails to state claim for breach of implied covenant of good faith and fair dealing in employment contract resulting from his alleged wrongful discharge, where employee alleges no specific contractual obligation that has been violated by employer.

4. Wrongful discharge — Defamation ▸170.64 ▸172.1071 ▸172.0812

Statement by employer that audit of terminated employee's client files revealed them to be poorly quoted, handled, and documented does not impugn employee's professional fitness or ability to perform his job Alleged defamatory statement, as matter of law, reasonably may be innocently construed as not imputing any unfitness or lack of ability on employee's part.

Peter Andjelkovich & Associates, Chicago, Ill , for plaintiff.

P. Kevin Connelly (Lederer, Reich, Sheldon & Connelly), Chicago, Ill., for defendants.

Full Text of Opinion

LEIGHTON, District Judge. — This cause comes before the court on the motion of plaintiff, William K. Ericksen, to amend his complaint, join a necessary party defendant, and to remand the cause to state court. Also before the court is the motion of defendants Transatlantic Reinsurance Co., Inc., American International Group, Inc. d/b/a Transatlantic Reinsurance Co., Inc. and d/b/a American International Underwriters Agency, Inc., and Frank Robbins, pursuant to Fed R Civ. P. 12(b)(6), to dismiss all counts of plaintiff's complaint for failure to state a claim upon which relief may be granted. For the following reasons, plaintiff's motion is denied; defendant's motion is granted.

Plaintiff was employed by defendants Transatlantic Reinsurance Co., Inc. and American International Group, Inc., for a period of over six years. He began as an underwriter, and later achieved the position of Casualty Manager and Branch Manager On May 18, 1983, plaintiff's direct supervisor, Frank Robbins, terminated plaintiff's employment.

On February 17, 1984, plaintiff brought suit against defendants in the Circuit Court of Cook County, Illinois, alleging wrongful termination, breach of the duty of good faith and fair dealing, and defamation Defendants, based on diversity of citizenship, 28 U.S.C §1332, removed the action to federal court on March 8, 1984 pursuant to 28 U S.C §1441. On March 13, 1984, the parties submitted the motions presently before the court.

In his motion to amend the complaint, plaintiff alleges that Bruce Ebert, an Illinois citizen and Resident Vice-President of American International Group, Inc., is a necessary party defendant in this action However, plaintiff avers no facts in support of his claim; nor can the court glean from the conclusory nature of the motion how Ebert might be thought to be a person in whose absence relief could not be granted A motion to amend a pleading, as with all motions generally, must conform to the particularity requirements of Fed.R.Civ.P. 7(b). Mere conclusory allegations are insufficient Martinez v. Trainpr, 556 F 2d 818 (7th Cir. 1977). Because the motion fails to meet these requirements, it is denied The court, therefore, does not reach the remand issue.

Defendants have moved to dismiss all counts of plaintiff's complaint It is axiomatic that under Fed R Civ P 12(b)(6), a complaint should be dismissed for failure to state a claim only if it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 41 LRRM 2089 (1957)

For purposes of this discussion, Counts I and III, alleging wrongful

termination [1] will be considered together, as will Counts II and IV, alleging breach of the duty of good faith and fair dealing.[2] Count V, alleging defamation, will be considered separately.

The gravamen of the wrongful termination counts is an alleged discharge in violation of a company "personnel policy manual." Plaintiff, an at-will employee, assets that the manual expressed a company policy against arbitrary termination. The manual states, in pertinent part:

> Infractions of company policy or conduct unacceptable to the orderly and efficient operations of the company's business require corrective action. It should be emphasized that all disciplinary action must be administered both fairly and consistently with the intent of correcting unacceptable behavior not punishing it.

The import of plaintiff's argument is that the handbook takes his employment out of the at-will category, and transforms it into a contractual relationship, for which he can bring an action in breach.

[1] However, Illinois follows the general rule that an employment handbook is not part of an employment contract. Enis v. Continental Illinois National Bank & Trust, 582 F.Supp. 876, 878, 116 LRRM 2047 (N.D. Ill. 1984); Rynar v. Ciba-Geigy Corp., 560 F.Supp. 619, 624, 115 LRRM 4692 (N.D. Ill. 1983); Sargent v. Illinois Institute of Technology, 78 Ill.App.3d 117, 121, 397 N.E.2d 443 (1st Dist. 1979). There are two exceptions to the general rule. The first is where the handbook is adopted as a modification of a preexisting employment contract and consideration exists to create mutuality of obligations. Rynar v. Ciba-Geigy Corp., 560 F.Supp. at 624; Carter v. Kaskaskia Community Action Agency, 24 Ill.App.3d 1056, 1059, 322 N.E.2d 574 (5th Dist. 1974). The second arises where another document exists which can be construed as an express employment contract and the contract is subject to the "policies" of the employer. Rynar v. Ciba-Geigy Corp., 560 F.Supp. at 624; Piper v. Board of Trustees of Community College District No. 514, 99 Ill.App.3d 752, 760, 426 N.E.2d 262 (3d Dist. 1981).

[2] Plaintiff's allegations do not trigger application of the first exception. While it is true that the manual in question was adopted after plaintiff's employment, it was not adopted under circumstances creating mutuality of obligation. Plaintiff's complaint states only that "he read the manual, and honored its provisions in the performance of his managerial responsibilities." Merely continuing to work after the inception of a personnel policy is not consideration for the policy, so as to render that policy part of the employment contract. Rynar v. Ciba-Geigy Corp., 560 F.Supp. at 625. The second exception to the rule is inapplicable here, as plaintiff alleges no separate employment contract. Accordingly, the general rule that an employment handbook is not part of an employment contract will be honored and Counts I and III are dismissed for failure to state a claim.

[2, 3] In Counts II and IV, plaintiff alleges breach of the duty of good faith and fair dealing in connection with the alleged wrongful termination. While the obligation to deal in good faith is implied in all contracts, such an obligation "is in aid and furtherance of other terms of the agreement of the parties." Murphy v. American Home Products Corp., 58 N.Y.2d 293, 304, 448 N.E.2d 86, 115 LRRM 4953 (C.A. N.Y. 1983). It does not create an independent cause of action. Gordon v. Matthew Bender & Co., Inc., 562 F.Supp. 1286, 1290, 115 LRRM 4100 (N.D. Ill. 1983). As stated in Gordon, "the principle of good faith comes into play in defining and modifying duties which grow out of specific contract terms and obligations. It is a derivative principle." Id. at 1289. Since no specific contractual obligation is alleged here, the good faith principle does not come into play as a cause of action. Counts II and IV are therefore dismissed.

[4] In Count V of his complaint, plaintiff claims that defendants defamed him by communicating to his fellow employees allegedly "scandalous slander of and concerning plaintiff in his employment." A false statement which imputes that a person lacks ability in his profession or that he is unfit to perform his employment duties is actionable as defamation. Cartwright v. Garrison, 113 Ill.App.3d

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[1] Plaintiff also claims an action for discrimination under the Illinois Human Rights Act, Ill.Rev.Stat. ch. 68, ¶1.101 et seq. (1981). That statute provides a comprehensive scheme for damages based on alleged discriminatory actions, pre-empting such claims as the one in question. Curtis v. Continental Illinois National Bank, 568 F.Supp. 740, 742, 32 FEP Cases 1540 (N.D. Ill. 1983).

[2] In his memorandum in opposition to defendants' motion to dismiss, plaintiff would have the court construe these counts as stating a claim for retaliatory discharge under Kelsay v. Motorola, Inc., 74 Ill.2d 172, 384 N.E.2d 353, 115 LRRM 4371 (1978), and Palmateer v. International Harvester Co., 85 Ill.2d 124, 421 N.E.2d 876, 115 LRRM 4165 (1981). The court declines the invitation. In deciding a motion to dismiss, a court is obliged to look to the face of the pleadings only. Since plaintiff's original complaint does not frame the issue of retaliatory discharge, it will not be considered. For the same reason, the court will not look outside the pleadings and consider the affidavits attached to defendants' motion.

536, 542, 447 N.E.2d 446 (2d Dist. 1983); Makis v. Area Publications Corp., 77 Ill.App.3d 452, 456, 395 N.E.2d 1185 (1st Dist. 1979).

In Illinois, actions for libel and slander are controlled by the innocent construction rule, announced in John v. Tribune Co., 24 Ill.2d 437, 181 N.E.2d 105 (1962), cert. denied, 371 U.S. 877, and modified in Chapski v. Copley Press, 92 Ill.2d 344, 442 N.E.2d 195 (1982); Fried v. Jacobson, 99 Ill.2d 24, 457 N.E.2d 392 (1983). The rule requires that, where reasonable, statements must be innocently construed. The question of whether a statement may reasonably be innocently construed is initially a matter of law; only if it is not capable of being so construed may the question be given to the finder of fact for a determination of whether it actually was so understood. Chapski v. Copley Press, 92 Ill.2d at 352; Paul v. Premier Electrical Construction Co., 581 F.Supp. 721, 723 (N.D. Ill. 1984); Spelson v. CBS, Inc., 581 F.Supp. 1195, 1200-1201 (N.D. Ill. 1984).

Applying the innocent construction rule to the case at bar, the court finds that the allegedly defamatory statement is susceptile of innocent construction, and may reasonably be interpreted as not imputing any unfitness or lack of ability on plaintiff's part. The remark in question stated:

> that an audit had revealed plaintiff's client files to be poorly quoted, handled and documented.

The language refers to but one aspect of plaintiff's employment with defendants, and does not impugn his professional fitness or ability to perform. As such, the words are not actionable as a matter of law, and Count V is dismissed.

Taking plaintiff's allegations as true, and reading them in the light most favorable to him which we are required to do, the court finds that plaintiff has not satisfied the requisite specificity of pleading necessary to survive a motion to dismiss. Accordingly, the motion to dismiss is granted and the suit is dismissed in its entirety.

So Ordered.

LOCOMOTIVE ENGINEERS v. ICC

U.S. Court of Appeals, District of Columbia Circuit

BROTHERHOOD OF LOCOMOTIVE ENGINEERS v. INTERSTATE COMMERCE COMMISSION, et al., and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, et al., Intervenors; UNITED TRANSPORTATION UNION v. UNITED STATES OF AMERICA, et al, and Same, Intervenors, Nos. 83-2290 and 83-2317, July 12, 1985; Order Amending Dissenting Opinion July 19, 1985

Petitions for review of orders of the Interstate Commerce Commission. Previous opinion (119 LRRM 2258) amended; orders vacated and case remanded.

Before WRIGHT and MIKVA, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Full Text of Order

It is ORDERED by the court, *sua sponte*, that the opinion for the court filed by Circuit Judge Wright on May 3, 1985 be, and hereby is, amended as follows:

The fourth full paragraph on page 3 [119 LRRM 2258, right hand column, fifth full paragraph of opinion] is amended to read:

Because we find that ICC made no semblance of a showing that the exemption was necessary, as required by the exemption authority section, we vacate the ICC decisions and remand the case to the Commission for proceedings consistent with this opinion.

The only paragraph of text on page 22 [119 LRRM 2265, right hand column, last paragraph and 119 LRRM 2266, left hand column, lines 1-2] is replaced with the following paragraph:

We thus vacate the 1983 orders and remand the case to the Commission. The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

Footnote 10 on page 22 [119 LRRM 2266] is deleted.

Order

It is ORDERED, by the Court, *sua sponte*, that the Dissenting Opinion filed by Senior Circuit Judge MacKinnon on May 3, 1985 be, and hereby is, amended as follows:

Page 6, line 10, [119 LRRM 2268, left hand column, first full paragraph line