

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8673

ROBERT E. LIND, D.B.A.,

Plaintiff-Appellee,
Cross-Appellant,

versus

RONALD W. HASTY, ET AL.,

Defendants,

RONALD W. HASTY and
BRUCE M. WOODWORTH,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court
for the Western District of Texas
EP 90 CV 321

(April 15, 1993)

Before WILLIAMS, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Two officials at the University of Texas at El Paso appeal a judgment against them in their individual capacity entered upon a jury verdict in favor of a former instructor at the university. Both the former instructor and the officials appeal. We have heard

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

oral argument in the case, considered the briefs, and reviewed the record. We are left with the firm conviction that with one exception the judgment below should be affirmed for essentially the same reasons stated by the district judge in his careful ruling on defendants' motion for judgment n.o.v. We reverse the judgment against Bruce M. Woodworth awarding damages for intentional infliction of mental distress for want of sufficient evidence, affirm the judgment against Ronald W. Hasty, and reject all other contentions of the parties.

I.

Plaintiff Robert Lind was an untenured instructor in the College of Business Administration at UT-El Paso. He was a member of the faculty from 1984 until 1989, when he resigned to take a position at the University of Portland. On August 6, 1990, Lind filed suit against UTEP and several of its employees in U.S. District Court for the Western District of Texas, alleging federal claims based on the Rehabilitation Act and § 1983 as well as state-law claims for intentional infliction of emotional distress and intentional interference with contract rights. Among the employees sued in both their official and individual capacities were Ronald Hasty, Dean of the College of Business Administration, and Bruce Woodworth, Chairman of the Department of Management.

By all accounts Lind's relationship with defendants was not a happy one. Lind contracted syringomyelia while employed at UTEP, a disease that severely affected his physical abilities, caused him great pain, and, defendants contended at trial, made it difficult

for him to perform his duties. Defendants allege that this poor performance led to a series of poor evaluations from the university. Lind attributes these below-average reviews as well as other slights and disagreements to unlawful discrimination on the basis of his handicap. The jury found for defendant UTEP on this claim, and Lind has not appealed.

These events also formed the basis for Lind's claim for intentional infliction of emotional distress. According to Lind, defendants Hasty and Woodworth consistently displayed antagonism toward him. Lind cites as one particular example Woodworth's decision to remove him from the classroom rather than attempting to accommodate Lind's medical problems. Woodworth and Hasty concede the existence of "ill will" among the parties, but maintain that neither their actions nor Lind's injuries rise to the levels required to establish a claim for intentional infliction of emotional distress.

The jury specifically found that the emotional distress was inflicted with malice, willfulness or callous and reckless disregard. In doing so, the jury rejected claims against two other officials of the university. The jury, in a separate interrogatory, found that the emotional distress "was severe," and, finally, in a separate interrogatory, awarded punitive damages.

II.

Under Texas law, intentional infliction of emotional distress consists of 1) intentional or reckless conduct 2) that is extreme or outrageous in nature 3) that caused emotional distress 4) that

is severe. Wilson v. Monarch Paper Co., 939 F.2d 1138, 1142 (5th Cir. 1991) (citing Tidelands Auto Club v. Walters, 699 S.W.2d 939 (Tex.App--Beaumont 1985, writ ref'd n.r.e)). Hasty and Woodworth contend that the record contains no evidence of either (2) extreme or outrageous conduct or (4) severe emotional distress. The district court denied their motions for a directed verdict and j.n.o.v., specifically noting in the second instance that defendants failed to request a jury instruction defining these elements of the claim. In particular, the court observed that "defendants did not request this definition of 'severe emotional distress' be given to the jury."

The parties agree that this court's review of the evidence is governed by Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1974) (en banc). This standard provides that the jury's verdict must stand if "reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." Id. at 374. The elements of the substantive claim--whether particular conduct rises to the level of intentional infliction of emotional distress--is a matter of state law.

Lind argues that the evidence supports the verdict. Rather than attempting to accommodate his medical problems, Woodworth "removed him from classes in an effort to have him forced into leave without pay." Hasty also called Lind's doctor "in order to obtain information to disqualify the professor from teaching duties." Finally, Lind asserts that the defendants' conduct reflected a general antagonism toward him.

Hasty and Woodworth contend that their conduct was "far from extreme":

Plaintiff testified that Defendant Woodworth refused to distribute information to faculty, was cold to him, shouted him down, and canceled his classes. Plaintiff testified that Defendant Hasty offered to help him with his publications, seemed hostile to him, shouted at him a couple of times, refused to reschedule classes, and spoke to Plaintiff's physician about his condition.

"These actions [do not] constitute extreme or outrageous conduct," but fall "entirely within the realm of an employment dispute." For this reason, they argue that Lind's claim is foreclosed by Wilson and Dean v. Ford Motor Credit Co., 885 F.2d 300 (5th Cir. 1989), two decisions that upheld the jury's verdict in favor of plaintiffs despite strong reservations about the scope of the emotional distress cause of action under Texas law. Much of the conduct cited by Lind (poor evaluations, shouting, general hostility) was found insufficient in these cases. The Wilson and Dean courts sustained the jury verdicts on the basis of particular actions--the placement of company checks in plaintiff's purse in Dean, the humiliating demotion of plaintiff, a former vice president, to the position of janitor in Wilson--that went well beyond the antagonism that often accompanies an ordinary employment dispute. Two incidents in this case that resemble these outrageous actions are defendants' removal of Lind from classes and their attempt secretly to obtain medical information from Lind's doctor. But even this conduct, by itself, is not extreme enough to state a claim for intentional infliction of emotional distress, especially in light of two recent decisions in which defendants prevailed. Ramirez v.

Allright Parking, 970 F.2d 1372 (5th Cir. 1992) (demotion of plaintiff did not involve the "systemic degradation and humiliation that was present in Wilson"); Johnson v. Merrel Dow Pharmaceuticals, 965 F.2d 31 (5th Cir. 1992) (former employer truthfully informed current employer that plaintiff had received psychiatric care).

III.

Woodworth and Hasty presented a common defense. The jury returned the same verdict and awarded the same damages against each of them. However, the evidence against Hasty differs in a material way from the case against Woodworth. That difference is Hasty's unsolicited phone call to Dean James Robertson of the University of Portland at Portland, Oregon. When Lind left UTEP, he accepted a position at the University of Portland as a visiting professor and was being considered for a tenure track position when Hasty called.

The jury could conclude from Dean Robertson's trial testimony that Hasty made this telephone call to harm Lind; that he misrepresented himself as the present Dean; and that in the guise of inquiring about Lind he intentionally gave "the impression that Bob and his performance were something that I ought to look at very closely." Dean Robertson testified that Hasty "had raised a number of doubts in my mind as to Bob's qualifications. . . . I concluded that this was not a friend of Bob Lind who was making the call."

This event separates Woodworth and Hasty and adds enough to the sufficiency of evidence against Hasty that we cannot upset the jury verdict against him. The jury was entitled to infer a

malevolent purpose to injure both at the time of the call and earlier. The tension of running an office, and Lind was far from a model employee, does not explain Hasty's gratuitous effort to harm after Lind had left UTEP, or so the jury could decide. In sum, we affirm the judgment in all respects except we reverse the judgment against Bruce M. Woodworth.

AFFIRMED in part and REVERSED in part.