UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-5284
Summary Calendar

CHARLES LEE FONTENOT and
WINTER FONTENOT,

Plaintiffs-Appellants,

VERSUS

MOBIL OIL EXPLORATION &
PRODUCING SOUTHEAST, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Louisiana

(91 CV 2707)

July 7, 1993

Before HIGGINBOTHAM, SMITH, AND DeMOSS, Circuit Judges.

PER CURIAM:*

I.

Plaintiff Charles Fontenot alleges that he was injured on May 1, 1991, when he slipped and fell on an oil platform operated by Mobil Oil Exploration and Producing Southeast, Inc. (hereinafter Mobil). At the time of the accident, plaintiff was employed by

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Thibeaux & Son Construction, Inc. (hereinafter Thibeaux) for approximately one year and had been on the Mobil platform for two days prior to the accident. Fontenot was in the process of transferring five-gallon containers in plastic crates from one portion of the platform to another. Although the platform was soapy and wet from a scrubdown that was being performed by Fontenot and other Thibeaux employees, plaintiff had successfully transferred other containers without accident until his feet slipped out from under him while passing over a pipe that was permanently suspended one foot above the deck.

II.

Plaintiffs filed suit in the 38th Judicial District Court of the State of Louisiana, and defendant Mobil removed the matter to the United States District Court for the Western District of Louisiana, pursuant to 28 U.S.C. §1441 on the grounds that the case was governed by federal law contained in the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 et seq.

Mobil moved and obtained summary judgment on all claims against it, contending that plaintiff was Mobil's borrowed servant and that Mobil therefore was immunized from tort liability pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905. The district court certified the judgment as a final judgment pursuant to Federal Rule of Civil Procedure 54(b).

III.

On appeal from summary judgment, this court reviews the case de novo. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 82 (1992). In reviewing the grant or denial of summary judgment, we are bound to apply the same standards as the district court, Meza v. General Battery Corp., 908 F.2d 1262, 1275 (5th Cir. 1990); that is, we are to determine whether there is any genuine issue of material fact or whether the movant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). In making that determination we are bound to believe all the evidence asserted by the non-movant and to draw all inferences in the light most favorable to that party. Adickes v. S. H. Kress and Co., 398 U.S. 144 (1970). In other words, it is not the role of the judge on ruling on a motion for summary judgment to make determinations regarding credibility, to weigh the evidence, and to draw inferences from the facts. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1985).

IV.

The question of whether Fontenot was a borrowed servant is a question of law. Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977), *cert. denied,* 436 U.S. 913 (1978). However, the issue involves factual disputes that require resolution by a fact-finder. Brown v. Union Oil Co. of California, 984 F.2d 674 (5th Cir. 1993). Only upon resolution of those disputes may the judge take the facts

and apply them to the legal standard that determines whether borrowed-employee status exists as a matter of law.

The legal standard governing borrowed employees was enunciated by this court in Ruiz v. Shell Oil Co., 413 F.2d 310, 312-13 (5th Cir. 1969). The court suggested nine factors to be evaluated in determining whether the borrowed employee doctrine applies:

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

V.

The threshold question on review of summary judgment is whether Mobil has carried its initial burden of showing that there is an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In response, Fontenot may not rest on the mere allegations or denials of his pleadings but must

present affidavits or other evidence that set forth specific facts showing that there is a genuine issue for trial.

This court believes that Mobil has clearly discharged its burden by reference to Fontenot's deposition testimony and to an affidavit of a Mobil employee who claims to have had supervisory control over the plaintiff. Plaintiff fails, however, to present sufficient facts in his affidavit to defeat the summary judgment motion. Without Fontenot's deposition testimony, this court would be faced with conflicting affidavits and would have no way of resolving the dispute without infringing on the fact-finder's role. Summary judgment "by no means authorizes trial on affidavits." 477 U.S. at 254. However, this court certainly would not be overstepping its boundaries by accepting what plaintiff himself testified to during deposition and drawing legal conclusions from such testimony since, as stated above, the final determination of borrowed-employee status is a question of law.

VI.

Application of the facts of this case to the Ruiz standard easily can dispose of all but the first factor. With regard to the second factor, there is no question that Fontenot was performing Mobil's work. The sole purpose of Mobil's hiring Thibeaux workers was to perform work Mobil was not able to accomplish with its own employees.

The third factor focuses on the understanding between the nominal and borrowing employers. Plaintiff argues that the

contract provisions, far from creating a borrowed-servant relationship, indicate that Thibeaux and Mobil in fact intended Fontenot to remain a Thibeaux employee. Plaintiff cites Alday v. Patterson Truck Lines Inc., 750 F.2d 375 (5th Cir. 1985) and West v. Kerr-McGee Corp., 765 F.2d 526 (5th Cir. 1985), but the district court properly distinguished those cases on the basis of the specific prohibition of the borrowed-employee status in those contracts. Instead, the instant case is nearly identical to Alexander v. Chevron, U.S.A., 806 F.2d 526, 528 (5th Cir. 1986), *cert. denied,* 483 U.S. 1005 (1987), in which the borrowing company hired the nominal employer "to perform the work as an independent contractor and not as an employee of Company." The contract in this case provides that the "[c]ontractor shall do and perform the work as the independent contractor, free of control or supervision of company."

Furthermore, this court has recognized that the "reality at the worksite and the parties' actions in carrying out a contract...can impliedly modify, alter, or waive" the contract provisions, whatever the express language might provide. Melancon v. Amoco Production Co., 834 F.2d 1238, 1245 (5th Cir. 1988). Given that Thibeaux did nothing more than tell Fontenot to report to the Mobil platform, the situation indicates that Thibeaux agreed to Mobil's temporary assertion of control over the Thibeaux employees. Indeed, Thibeaux was in the business of loaning out its workers and never attempted to assert any control over its employees once they were sent to the worksites.

Regardless of Fontenot's claims to the contrary, this court considers his acceptance of a job that regularly sent him to temporary work places as acquiescence to each of those employment situations. 784 F.2d at 617. Furthermore, Fontenot said during deposition that he received and followed instructions from a Mobil supervisor. And according to Mobil's uncontradicted affidavit, Fontenot had attended at least two safety meetings by his third day of work at the platform and had at no time objected to Mobil's authority over him. By failing to complain, plaintiff acquiesced to his new work environment. 834 F.2d at 1246. There was, then, not merely constructive acquiescence, but acquiescence in fact.

With regard to the fifth factor, this court has said that it is not necessary that the lending employer completely sever its relationship with the employee. 784 F.2d at 617. "Such a requirement would effectively eliminate the borrowed employee doctrine as there could never be two employers." Id. Instead, the focus should be on the lending employer's relationship with the employee during the employee's period of employment by the borrower. Id. The only evidence of any continuing relationship between Fontenot and Thibeaux -- a phone call Fontenot made from the platform to Thibeaux with regard to his pay -- is insufficient to rebut the claim that their employment relationship had been temporarily terminated.

The sixth factor also argues in favor of Mobil. Contrary to the allegations he makes in his affidavit, Fontenot testified during deposition that Mobil supplied most of what the Thibeaux

workers needed to do their work and to clean up. He reported to Mobil with nothing except his personal safety equipment.

The seventh factor is neutral in this case since Fontenot had been working for Mobil for only a short period -- two days -- before the date of the accident. Capps v. N.L. Baroid-NL Industries, Inc., 784 F.2d 615, 618 (5th Cir. 1986), *cert. denied,* 479 U.S. 838 (1986). In Capps this court stated that "[i]n the case where the length of employment is considerable, this factor supports a finding that the employee is a borrowed employee; however, the converse is not true." Id.

With regard to the eighth factor, plaintiff argues that Mobil had no authority to discharge him from his employment with Thibeaux. However, the proper focus is not whether the borrowing employer can discharge the employee from his original employment, but whether the borrower has the right to terminate the employee's services with itself. 784 F.2d at 618. Plaintiff does not argue that Mobil could not sever their relationship but in fact conceded during deposition that Mobil could have dismissed him from work on the platform.

Finally, while it is true that Fontenot was paid directly by Thibeaux, it is also the case that Mobil reimbursed Thibeaux at a higher rate for the hours that plaintiff worked. This court has recognized that this indirect form of payment by the borrowing employer is all that is necessary to satisfy the ninth requirement. *See, e.g.,* 834 F.2d at 1246 and 784 F.2d at 618.

Based on these facts alone, the district court properly could have granted Mobil's motion for summary judgment even without resolving the control issue because although this court has considered control to be the central factor, *see, e.g.,* 834 F.2d at 1244-45 and 784 F.2d at 617, the court's language in Ruiz does not demand this interpretation: "no one of these factors, or any combination of them, is decisive, and no fixed test is used to determine the existence of a borrowed-servant relationship." 413 F.2d at 312. Even in Melancon, this court conceded that although often considered the central issue, control is not necessarily determinative. 834 F.2d at 1245. And in Gaudet, this court chose to deemphasize control, stating that the Ruiz factors "are to be weighed as appropriate in each particular case." 562 F.2d at 356.

Given that the issue of control is not determinative as a matter of law, this court may use its discretion in applying the Ruiz standard and rule that the undisputed facts, notwithstanding whatever doubts remain with regard to the issue of control, warrant a conclusion as a matter of law that the evidence does indicate a borrowed-servant relationship. As this court in Gaudet stated, although the court may not resolve disputed issues of material fact in ruling on a motion for summary judgment, it "will not insist upon the expense and delay of a trial if the overall issue can be resolved through a preponderance of other factual matters *not* in dispute." 562 F.2d at 358. If there are sufficient basic factual ingredients that are undisputed, even if some of the Ruiz factors

remain unresolved, the court may grant summary judgment. 784 F.2d at 616.

Even if the control issue were determinative, we could still reach the same conclusion given plaintiff's scant factual presentation. To preclude summary judgment, the mere existence of a disputed factual issue is insufficient. "The dispute must be genuine, and the facts must be material." Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 222 (5th Cir. 1986). Plaintiff's primary claim with regard to the question over control is simply that he was the "lead roustabout" and was not under Mobil's supervisory control. Essentially, this assertion amounts to a claim that he was his own boss. By Fontenot's own testimony, Thibeaux simply instructed plaintiff about where to go and to whom to report. If not under Thibeaux's or Mobil's control, then under whose control was he? His assignment as the lead roustabout actually serves as illustration of Mobil's authority. Fontenot was assigned that position only after a Thibeaux employee consulted with a Mobil employee for approval. Finally, plaintiff also testified that a Mobil supervisor gave Fontenot orders in the morning about what was to be done each day. More importantly, it was a Mobil supervisor that specifically assigned the task plaintiff was performing at the time the accident occurred.

Given the facts set out in plaintiff's own deposition testimony and the undisputed facts contained in Mobil's affidavit, this court believes that no reasonable mind could differ as to the import of the evidence. Plaintiff attempts in his affidavit to

create a trace of doubt surrounding the control issue, but the "mere existence of a scintilla of evidence" will not defeat a properly supported motion for summary judgment. 477 U.S. at 252. The district court therefore properly granted defendant's motion for summary judgment.

AFFIRMED.