UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-2302
Summary Calendar

ROBERT LAMB,

Plaintiff-Appellant,

VERSUS

CNG PRODUCING COMPANY, INC., CONSOLIDATED NATURAL GAS SERVICE COMPANY, AND SYSTEM PENSION PLAN OF CONSOLIDATED NATURAL GAS COMPANY AND ITS PARTICIPATING SUBSIDIARIES WHO ARE NOT REPRESENTED BY A RECOGNIZED UNION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(CA-H-91-102)

(November 12, 1993)

Before KING, GARWOOD, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

This case arose out of plaintiff/appellant Robert Lamb's April 1990 termination as an employee of defendant/appellee CNG Producing Co., Inc. ("CNG Producing"), a sister company of defendant/appellee

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Consolidated Natural Gas Service Co. ("CNG Service").[1] Of the several claims Lamb asserted against the defendants, only two Texas state law claims remain in this appeal. First, Lamb contends the defendants were barred from discharging him under the doctrine of promissory estoppel, and second, he contends his discharge constituted an intentional infliction of emotional distress. The district court dismissed all of Lamb's claims against CNG. We AFFIRM.

I.

Lamb's story began in 1984 when CNG Service lured him away from his management position with Tenneco Oil Co. in Houston. CNG Service's offer to Lamb included a base salary of $112,500, 4 weeks vacation time, a cash bonus of up to 40% of his base salary, an incentive stock option and restricted stock award, an accelerated vesting pension plan, and assorted "perks" including a company car.[2] CNG did not promise Lamb employment for any specific length of time.

Lamb joined CNG Service on January 9, 1985 as General Manager of Planning and Technology at CNG Service's corporate headquarters in Pittsburgh.

In April 1986, Lamb was promoted to head of the Tulsa division of CNG Producing. In his new capacity, Lamb reported to Tom Fetters, President of CNG Producing in New Orleans. Lamb and Fetters did not get along well. Their personality conflict apparently created tension between Fetters's operations in New Orleans and Lamb's division in Tulsa. There were also a few personality conflicts between Lamb and other CNG Producing

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[1] CNG Producing and CNG Service are sibling companies wholly owned by a common parent, Consolidated Natural Gas Co. All three companies are Delaware corporations.

[2] Record pp. 2238-37; Appellant's Record Excerpts, Tabs 5-6.

employees.

CNG Producing was not immune from the effects of the downturn in the oil and gas industry in the mid-1980s. Lamb's Tulsa division began losing money in 1986, and continued losing money in 1987 and 1988.

Fetters formed a task force in 1988 to discuss ways to counter the company's losses. Lamb was a member of the task force. The task force recommended reorganizing CNG Producing, including the near elimination of Lamb's Tulsa division and the relocation of most Tulsa operations to New Orleans. Lamb disagreed with the task force's recommendation to cut back the Tulsa division.

The reorganization plan proceeded, and CNG Producing all but terminated its Tulsa operations. CNG Producing fired many of its Tulsa employees, though it did not fire Lamb. Lamb was transferred to New Orleans, where he became Vice President of Inland Producing Operations. Lamb was one of ten Vice Presidents who all reported directly to Fetters.

The company's losses continued after the reorganization. In March 1989, the decline cost Fetters his job as President of CNG Producing. David Hunt, who replaced Fetters, began looking for ways to improve the company's economic performance. Hunt concluded that, among other problems, CNG Producing had too many Vice Presidents. Hunt and Jack Leber, Vice President of Human Resources and Administration, produced a plan to eliminate overlapping responsibilities among the company's executive staff, which was to be followed by a company-wide reduction in work force. Hunt determined that most of the management duplication occurred among the areas headed by Lamb, Paul Plusquellec (Vice President of Offshore Producing Operations), and Mike Paine (Vice President of Exploration). He decided to consolidate those three jobs into two, leaving one Vice President in charge of all exploration and development and one Vice President in charge of all operations,

both offshore and inland.

After consulting with Leber and other senior staff members, Hunt selected Plusquellec and Paine to head the new consolidated divisions. The decision to select Plusquellec and Paine over Lamb was based on the higher performance ratings those men had received over the prior year: Plusquellec and Paine had been rated "above average", while Lamb's rating was only "satisfactory". Hunt also believed that Lamb did not have good working relationships with his peers at the company.

Hunt told Lamb about the decision to eliminate Lamb's position and assign his former duties to the other Vice Presidents. He offered Lamb the option to resign and receive a severance package, or to accept a decrease in pay and demotion to the position of Director of Technical Services. Lamb chose the demotion, and assumed his new position on September 1, 1989. As Director of Technical Services, Lamb reported to Paine.

Lamb disliked his new job and said so. He suggested to Paine and Hunt that the company transfer him to Houston and employ him as a consultant, but Paine and Hunt rejected that idea.

For a while, Lamb chaired a special task force for Hunt. When that task force completed its work in late 1989, Lamb's job duties diminished markedly. In early 1990, Hunt realized that Lamb simply did not have enough work to do to justify retaining him as Director of Technical Services. Rather than terminate Lamb immediately, though, Hunt agreed to move Lamb to Houston and continue to employ him until April so Lamb could be eligible for an upcoming restricted stock award. Lamb moved to Houston in February 1990. On April 2, 1990, he was fired. Since his firing, Lamb claims to have suffered from depression, stress, and loss of sleep. Lamb's financial condition, however, did not sustain the damage he says his emotional condition did. In 1991, Lamb made about $150,000 as a consultant.

Lamb brought this lawsuit on January 14, 1991. He asserted six bases for recovery: (1) violation of the Age Discrimination in Employment Act,[3] (2) retaliatory discharge, (3) intentional infliction of emotional distress, (4) fraud, (5) breach of contract, and (6) promissory estoppel.

On January 7, 1993, the district court granted summary judgment for the defendants on all of Lamb's claims. The district court denied Lamb's motion for new trial on March 19, 1993, and entered final judgment against Lamb on March 23, 1993. Lamb appealed to this Court on April 15, 1993. Lamb appeals only on two of his pendent Texas-law claims, those for promissory estoppel and intentional infliction of emotional distress.

II.

We have jurisdiction over this appeal under 28 U.S.C. § 1291.

We review a granting of summary judgment de novo using the same standard applied in the district court: whether "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law".[4] We evaluate the facts in the light most favorable to Lamb.[5] He is entitled to all justifiable inferences in his favor.[6] His summary judgment evidence must be taken as true.[7] To prevail over defendants/appellees' summary judgment motion, however, Lamb must

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[3] 29 U.S.C. §§ 621-634.

[4] Fed. R. Civ. P. 56(c); see, e.g., Yeager v. City of McGregor, 980 F.2d 337, 339 (5th Cir.), cert. denied, ___ S. Ct. ___, 62 U.S.L.W. 3215 (U.S. Oct. 4, 1993).

[5] 10 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2716 (2d ed. 1983).

[6] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

[7] Id.

present sufficient evidence on each element of his claims to support a jury verdict in his favor.[8] A mere "scintilla" of evidence will not suffice.[9]

III.

A. Lamb's Promissory Estoppel Claim

Under Texas law, employers generally may terminate their employees at will, at any time, without cause.[10] Employers may, by contract, limit their right to terminate employees at will.[11] Such a limit on the power of termination at will, however, must be explicitly stated in a written contract.[12] No such contract exists here. Lamb admits that he was always an at-will employee.[13] Accordingly, we hold that the defendants always had the power to terminate Lamb at will, at any time, without cause.

Under Texas law, promissory estoppel has three elements: "(1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment".[14] Although usually pleaded as a defense, promissory estoppel is an independent cause of action that "may also be used

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[8] Id. at 252.

[9] Id.

[10] Winters v. Houston Chronicle Pub. Co., 795 S.W.2d 723, 723-24 (Tex. 1990); Sabine Pilot Svc., Inc. v. Hauck, 687 S.W.2d 733, 734 (Tex. 1985); Guthrie v. Tifco Indus., 941 F.2d 374, 379 (5th Cir. 1991), cert. denied, 112 S. Ct. 1267 (1992).

[11] See Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 538-39 (Tex. App. -- Corpus Christi 1982, no writ).

[12] Webber v. M.W. Kellogg Co., 720 S.W.2d 124, 127 (Tex. App. -- Houston [14th Dist.] 1986, writ ref'd n.r.e.).

[13] Brief of Appellant at 14.

[14] English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983).

by a plaintiff as an affirmative ground of relief".[15] The purpose of the doctrine is equitable:

> Estoppel is a doctrine to prevent injustice. The purpose of estoppel, in general, ". . . is for the protection of those who have been mislead by that which upon its face was fair, and whose character as represented parties to the deception will not, in the interest of justice, be heard to deny."[16]

Our inquiry is hampered by Lamb's failure to indicate clearly what conduct of the defendants he believes constituted the "promise" on which his promissory estoppel claim is based. Logic eliminates the possibility that it was CNG Services' promise to employ him, for that promise was never broken. Lamb apparently seeks to build a "promise" out of statements the defendants made to him while recruiting him from Tenneco. Lamb intimates that the defendants promised to employ him for long enough to recoup unspecified benefits he would be lose by leaving Tenneco. Such an assertion, however, is tantamount to a denial that he was an employee at will. That challenge must fail because Lamb has produced no written contract of employment limiting the defendants' right to terminate him at any time.[17] An oral promise to employ Lamb until he recouped his lost benefits, if made, would be illusory.[18]

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[15] Donaldson v. Lake Vista Community Improvement Ass'n, 718 S.W.2d 815, 818 (Tex. App. -- Corpus Christi 1986, writ ref'd n.r.e.).

[16] Id. at 817 (quoting Kuehne v. Denson, 219 S.W.2d 1006, 1009 (Tex. 1949)).

[17] See Webber, 720 S.W.2d at 127.

[18] See White v. Roche Biomedical Lab., 807 F. Supp. 1212, 1219 (D.S.C. 1992) ("[A] promise of employment for an indefinite duration with no restrictions on the employer's right to terminate is illusory since an employer who promises at-will

We must, then, address whether an illusory promise can serve as the basis for a promissory estoppel claim under Texas law.[19] Counsel have identified no Texas cases directly on point, and our own research has uncovered none, but there is precedent sufficiently analogous to support our conclusion that, under Texas law, a promissory estoppel claim may not be premised on an illusory promise.

The fatal flaw in Gillum v. Republic Health Corp.[20] was not illusoriness but indefiniteness. The Gillum court rejected the plaintiff's promissory estoppel claim, though, holding that the doctrine

> does not create a contract where none existed before, but only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to enforce them. . . . Because we have previously concluded that no express or implied contract existed, we hold that the trial court did not err in granting Republic's summary judgment with regard to Gillum's cause of action for promissory estoppel.[21]

This Court also confronted a promissory estoppel claim premised on an insufficiently definite contract in Neeley v. Bankers Trust Co. of Texas.[22] We said in Neeley that "[t]he same indefiniteness that makes the putative contract unenforceable

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employment has the right to renege on that promise at any time for any reason"), aff'd, 998 F.2d 1011 (4th Cir. 1993) (table).

[19] See generally Michael B. Metzger & Michael J. Phillips, Promissory Estoppel and Reliance on Illusory Promises, 44 Sw. L.J. 841 (1990).

[20] 778 S.W.2d 558 (Tex. App. -- Dallas 1989, no writ).

[21] Id. at 570 (citation omitted).

[22] 757 F.2d 621 (5th Cir. 1985) (applying Texas law).

prevents Neeley from prevailing on a promissory estoppel theory".[23]

What Gillum and Neeley teach is that Texas law frowns upon using an insubstantial promise as the root of a promissory estoppel claim. A promissory estoppel claim first requires the existence of a promise. We cannot create such a promise where none exists. When the only promise made is illusory, there is nothing to which a promissory estoppel claim can attach.[24]

Professor Corbin's observations provide additional support:

> Before [promissory estoppel] can be applied, there must be a real promise to be enforced. Action in reliance on a supposed promise creates no obligation on a man whose only promise is wholly illusory.[25]

We are aware of a few cases from other jurisdictions in which promissory estoppel has been applied to an illusory promise.[26] Their reasoning has yet to sway the courts of Texas. Furthermore, "[t]he scattered cases explicitly using [promissory estoppel] to enforce illusory promises hardly represent mainstream thinking on this subject".[27] Finally, we are reluctant to accept Lamb's argument on this issue because doing so would effectively destroy the employment-at-will doctrine, a change to Texas law we are powerless to make.

Because we conclude that there was no promise on which Lamb's

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[23] Id. at 630 n.7.

[24] See, e.g., Amana Soc'y v. Colony Inn, Inc., 315 N.W.2d 101, 118 (Iowa 1982) (citing Corbin); Taylor v. Canteen Corp., 789 F. Supp. 279, 285-86 (C.D. Ill. 1992); Schleig v. Communications Satellite Corp., 698 F. Supp. 1241, 1249 (M.D. Pa. 1988).

[25] 1A Arthur L. Corbin, Corbin on Contracts § 201 (1963).

[26] See generally the cases collected in 4 Richard A. Lord, Williston on Contracts § 8:6, at 146-47 n.18 (4th ed. 1992).

[27] Metzger & Phillips at 866.

promissory estoppel claim could base itself, we need not consider whether Lamb satisfied the other two prongs of the promissory estoppel test quoted above. Nor need we address the other arguments advanced by the appellees. Specifically, we do not consider whether enforcement of any illusory promises made to Lamb would be barred by the Statute of Frauds, or whether his promissory estoppel claim is pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA).[28]

B. Lamb's Intentional Infliction of Emotional Distress Claim

The tort of intentional infliction of emotional distress is a recent arrival to Texas jurisprudence, first formally accepted by the Texas Supreme Court a few months ago in Twyman v. Twyman.[29] The Twyman Court accepted the definition of the tort given by the Restatement (Second) of Torts:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.[30]

This issue need not detain us long, for Lamb has not even come close to meeting the tort's first element: "extreme and outrageous conduct" on the part of the defendants.[31]

The depth of vileness necessary to constitute "extreme and

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[28] 29 U.S.C. § 1001 et seq.

[29] 855 S.W.2d 619 (Tex. 1993).

[30] Restatement (Second) of Torts § 46(1) (1965).

[31] "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery". Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993) (quoting Restatement (Second) of Torts § 46, cmt. h (1965)).

outrageous conduct" is great indeed. Obnoxious, annoying behavior does not suffice. To meet the standard, the defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community".[32]

No examples of conduct meeting the "extreme and outrageous" standard have so far emerged under Texas law. There have, however, been a few precedents finding certain conduct insufficient to meet the standard.[33] A short review of those precedents shows that, in each case, the defendants engaged in conduct far more arguably "outrageous" than that to which Lamb was exposed. In the employment context, the Texas Supreme Court has said that "the fact of discharge itself as a matter of law cannot constitute outrageous behavior".[34] In Wornick Co. v. Casas, the employer fired Casas and had her escorted from the premises by a security guard. The Texas Supreme Court held that, as a matter of law, she not established that her employer's conduct was outrageous. The Court concluded its opinion with a passage as relevant to Lamb's case as it was to Casas':

> Termination of an employee is never pleasant, especially for the employee. But if we accept Casas' arguments in this case, employers would be subjected to a potential jury trial in connection with virtually every discharge,

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[32] Id. cmt. d, quoted with approval in Casas, 856 S.W.2d at 734.

[33] One Justice of the Texas Supreme Court has expressed doubt that, based on Texas precedents, any conduct could ever be outrageous enough to meet the "outrageous conduct" requirement. See Casas, 856 S.W.2d at 738 n.1 ("Though eager here . . . to declare as a matter of law that certain conduct is not outrageous, the majority is obviously unwilling to declare conduct, no matter how egregious, legally outrageous".) (Doggett, J., concurring).

[34] Casas, 856 S.W.2d at 735.

> and "there would be little left of the employment-at-will doctrine."[35]

Diamond Shamrock Refining & Marketing Co. v. Mendez[36] was decided before Twyman v. Twyman -- in other words, before the Texas Supreme Court had even declared intentional infliction of emotional distress to be an actionable wrong in Texas. The Court in Mendez, though, thought it unnecessary to decide whether to recognize the tort, because Mendez had not proved "outrageous conduct". In Mendez, Mendez's employer fired Mendez, allegedly for stealing some property worth less than five dollars. The employer apparently notified its other employees that Mendez had been fired for stealing. The Texas Supreme Court held that the accusation of theft, even if false, was insufficiently "outrageous" to support a claim for intentional infliction of emotional distress.[37]

In Johnson v. Merrell Dow Pharmaceuticals, Inc.,[38] Johnson's employer fired him after twelve years of employment. Johnson alleged that verbal abuse and repeated threats of termination by his supervisors constituted an intentional infliction of emotional distress. This Court disagreed. We explained:

> [T]his court applying Texas law has repeatedly stated that a claim for intentional infliction of emotional distress will not lie for mere "employment disputes." . . .
> Most of the acts complained of by Johnson "fall within the realm of an ordinary employment dispute." . . . In order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees. Not all of these processes are

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[35] Id. at 736 (quoting Diamond Shamrock Ref. & Mktg. Co. v. Mendez, 844 S.W.2d 198, 202 (Tex. 1992)).

[36] 844 S.W.2d 198 (Tex. 1992).

[37] Id. at 202.

[38] 965 F.2d 31 (5th Cir. 1992).

> pleasant for the employee. Neither is termination. However, there is no indication that Johnson is anything other than an at-will employee. An employer will not be held liable for exercising its legal right to terminate an employee, "even though he is well aware that such [action] is certain to cause emotional distress."[39]

The conduct Lamb believes was "outrageous" consisted of (1) his transfers and demotions during his employment by the defendants; (2) his failure to receive the benefits he would have at Tenneco; and (3) assorted instances of verbal abuse.[40] These allegations are insufficient to establish "extreme and outrageous conduct" under Texas law. First, as to Lamb's transfers and demotions, we have already refused to find such conduct "extreme and outrageous", because "[i]n order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees".[41] Second, as to Lamb's failure to receive the benefits he would have had he remained at Tenneco, Lamb cites no cases to us which would indicate that inflicting a financial loss is sufficient to constitute "extreme and outrageous conduct". Finally, as for the alleged incidences of verbal abuse, the section of the Restatement (Second) of Torts from which the Texas Supreme Court took its definition of the tort of intentional infliction of emotional distress says:

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . [P]laintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are

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[39] Id. at 33-34 (citations omitted).

[40] These range from a 1988 incident in which Fetters called Lamb an "asshole" at a company dinner to a 1989 incident in which Lamb states that Hunt "got very emotional" with Lamb and "used a loud critical voice".

[41] Johnson, 965 F.2d at 34.

> definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.[42]

Lamb's intentional infliction of emotional distress claim must be viewed with a sense of perspective. We need only compare the insults Lamb received with facts of the Casas, Mendez, and Johnson cases. If the plaintiffs in those cases did not prove outrageous conduct under Texas law, neither has Lamb.[43]

We AFFIRM the judgment of the district court.

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[42] Restatement (Second) of Torts § 46 cmt. d (1965).

[43] Cf. McKethan v. Texas Farm Bureau, 996 F.2d 734, 743 (5th Cir. 1993) (finding conduct not legally "outrageous" because it was less "extreme" than that the Texas Supreme Court declined to punish in Wornick Co. v. Casas).