UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2440
Summary Calendar

DALE L. OLDHAM,

Plaintiff-Appellant,

versus

WESTERN AG-MINERALS COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 92 904)

(January 27, 1994)

Before POLITZ, Chief Judge, GARWOOD and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:[*]

Dale L. Oldham appeals an adverse summary judgment on his *ex contractu* and *ex delicto* claims against Western AG-Minerals Company, Rayrock Mines, Inc., and Rayrock Yellowknife Resources, Inc. We affirm.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Oldham worked as a controller for Western, a wholly-owned subsidiary of Rayrock, which in turn is a wholly-owned subsidiary of Yellowknife. Oldham's duties primarily entailed the administration of Western's accounting and financial matters. His job performance was satisfactory, but problems began to surface in 1990 following a business trip to New Mexico. He failed to report for work or to call in on the day after his return. He admitted to drinking heavily the night before and revealed to John Wells, his supervisor, that he was an alcoholic. Oldham was cautioned that his behavior was not acceptable, his drinking problem had to be controlled, and a repeat of the absence incident could result in his termination.

During the summer of 1991 Oldham began to drink again. He experienced blackouts, displayed unusual behavior at work, and his work performance suffered. Wells was informed.

Before Wells could meet with Oldham, Oldham missed work and failed to call the office. Oldham had been arrested for driving under the influence of alcohol. After his release from jail he met with Wells and was informed that he could either seek professional in-patient treatment at Western's expense or be terminated immediately. Oldham chose to undergo treatment. Wells spoke with Oldham's wife and told her that Oldham would not be fired if he underwent treatment.

Oldham entered the treatment facility, followed all recommendations made by his therapist, permitted his records to be

released to Western, and underwent marriage counseling. During his stay at the facility Oldham maintained contact with his office. He also assisted the employee assigned to do his work during his absence.

Shortly before Oldham was scheduled to return to work Yellowknife concluded that he posed a serious risk to Western due to the seriousness of his drinking problem and the fiduciary nature of his position as controller. As Western was unable to find a different assignment within the company Oldham was terminated four days prior to his release from the treatment facility.[1]

Oldham filed suit against Western and Rayrock for breach of contract and intentional infliction of emotional distress. He sued Yellowknife for tortious interference with contract. In granting the summary judgment to Western, Rayrock, and Yellowknife the district court held that Oldham had an employment agreement terminable at the will of either party and that the defendants did not waive the right to terminate him; Oldham's termination did not rise to the level of an extreme and outrageous act; and Yellowknife, as the parent company of a wholly-owned subsidiary, did not tortiously interfere with Oldham's employment agreement. Oldham timely appeals.

Analysis

Oldham asserts that the district court erred in granting

[1]Wells believed that it would be in Oldham's best interest to inform him of his termination while he was under professional care and had a support system in place. Wells arranged for a counselor to be present when he advised Oldham of his termination.

summary judgment. Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] Upon review, we apply the same standard of review as the district court.

Oldham first argues that the district court improperly granted Western and Rayrock summary judgment on his breach of contract claim. The district court found that Oldham was an at-will employee at all times. Oldham maintains that although his employment agreement with Western was terminable-at-will, Western waived its right to terminate his employment when Wells agreed not to fire him if he entered into treatment. The evidence reflects that Western waived only its right to terminate Oldham immediately. Oldham maintains that the alleged waiver by Western guaranteed that he would never be fired for alcoholism if he entered treatment. Under Texas law, however, waiver is defensive in nature and operates only to prevent the loss of existing rights. It cannot be used to create liability where liability otherwise does not exist.[3] Waiver, therefore, cannot create for Oldham a right to a particular term of employment preventing his termination under an at-will employment agreement. We find that the decision not to immediately fire Oldham in no way altered Western's ability to terminate Oldham's employment thereafter. The district court did not err as

---

[2]**Sims v. Monumental General Ins. Co.**, 960 F.2d 478, 479 (5th Cir. 1992); see also **Celotex Corp. v. Catrett**, 477 U.S. 317 (1986).

[3]**Hruska v. First State Bank of Deanville**, 747 S.W.2d 783, 785 (Tex. 1988).

a matter of law in granting Western and Rayrock summary judgment on Oldham's breach of contract claim.

Secondly, Oldham contends that the district court erred in granting Western and Rayrock summary judgment on his intentional infliction of emotional distress claim. That tort requires intentional or reckless action by extreme and outrageous conduct which causes severe emotional distress.[4] The district court determined from the summary judgment record that Western's actions were not extreme and outrageous as a matter of law. We agree. Liability for extreme and outrageous conduct has been found only where the conduct is so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency and may rightly be regarded as atrocious and utterly intolerable in a civilized community.[5] The summary judgment record reflects that Oldham's termination failed to reach the level of extreme and outrageous conduct required by Texas law for recovery for intentional infliction of emotional distress.

Finally, Oldham complains that the district court erred in granting Yellowknife summary judgment on his tortious interference with contract claim. In his complaint Oldham alleged that Yellowknife tortiously interfered with his employment relationship with Western and Rayrock by ordering that he be discharged. In

---

[4]**Wilson v. Monarch Paper Co.**, 939 F.2d 1138, 1142 (5th Cir. 1991); **Tidelands Auto. Club v. Walters**, 699 S.W.2d 939 (Tex.App. - Beaumont 1985, writ ref'd n.r.e.).

[5]**Horton v. Montgomery Ward & Co., Inc.**, 827 S.W.2d 361 (Tex.App. - San Antonio 1992, writ denied).

order to succeed, Oldham must show that Yellowknife intentionally or willfully interfered with an existing contract that caused him harm.[6] Oldham cannot recover, however, for tortious interference with contract if Yellowknife is privileged to act to protect its own legitimate interest. One such legitimate interest is a financial interest superior to that of either of the contracting parties. Yellowknife moved for summary judgment on the theory that it was privileged to involve itself with the employment relationship between Oldham and Western based upon its status as the parent corporation of a wholly-owned subsidiary.[7] The district court agreed, finding that Yellowknife could not be held liable for interfering with Oldham's employment agreement with Western or Rayrock because Western and Rayrock are both wholly-owned subsidiaries of Yellowknife. The district court concluded that "a parent and a wholly owned subsidiary always have a unity of purpose or a common design,"[8] and therefore cannot tortiously interfere with each other. We conclude that the district court did not err in granting Yellowknife summary judgment.

The judgment of the district is AFFIRMED.

---

[6]**Deauville Corp. v. Federated Dep't Stores, Inc.**, 756 F.2d 1183 (5th Cir. 1985).

[7]See **American Medical Int'l v. Giurintano**, 821 S.W.2d 331 (Tex.App. - Houston [14th Dist.] 1991, no writ).

[8]**Id.** at 336.