

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10324

WILLIAM L. NEELY,

Plaintiff-Appellant,

versus

NEWS AMERICA PUBLISHING, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-2479)

(April 7, 1995)

Before DAVIS and JONES, Circuit Judges and CUMMINGS*, District Judge.

PER CURIAM:**

The court has carefully considered this case in the light of the district court's opinion and the helpful and thorough briefs and arguments of counsel. Having done so, we affirm in part, but we must also vacate and remand part of the court's judgment for further proceedings.

* District Judge of the Northern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The point most vigorously contested between the parties is whether, assuming Neely suffered a disability under the relevant state law, there was sufficient evidence from which a trier of fact could infer that discrimination on the basis of his disability motivated his termination. The court concluded there was insufficient evidence, because the company president allegedly had no information about the extent of Neely's physical problems when he decided to fire Neely. From the record evidence, we must disagree with this conclusion. A reasonable trier of fact could have inferred that Neely's supervisor Lundsten, who reported to Bortner about Neely, might have kept him abreast of Neely's condition and may well have had the responsibility as a supervisor to do so. Further, the evidence shows that Bortner "participated" in the decision to terminate Neely, suggesting that other people in the company at the very least contributed information to this decision. Finally, although the evidence is somewhat vague, the jury could have inferred that critical comments made within the company and to Neely's former customers about his health condition may have constituted more than mere "stray remarks" concerning the impact of his disability on his employment. The question of causal connection is, we acknowledge, a close one on the facts of this case, and undoubtedly more light will be shed on this case if it is fully re-tried.

The district court declined to decide the question whether Neely has suffered a "disability" within the relevant Texas law, as understood by reference to the Americans With Disabilities

Act. On the present state of the record, this court likewise declines to resolve what may be another ultimately vexing issue.

We agree, however, that the district court correctly disposed of Neely's state-law claims for breach of contract, fraud, estoppel, and intentional infliction of emotional distress, and judgment as a matter of law on those issues is affirmed.

Based on the foregoing, the judgment of the district court is vacated and remanded on Neely's state-law disability discrimination claim, and affirmed insofar as it dismissed Neely's other claims.

VACATED and **REMANDED** in part, **AFFIRMED** in part.