IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20122
(Summary Calendar)

JOSEPH W. SMOLLEN, III,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1232)

(January 11, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Plaintiff, Joseph W. Smollen, appeals the district court's determination that he was not acting within the scope of his federal employment when he was involved in an automobile accident. Finding no error, we affirm.

FACTS

Joseph W. Smollen, III, ("Smollen"), a systems engineer at the Strategic Petroleum Reserve Management Office with the Department of Energy ("DOE"), was involved in an automobile/pedestrian accident

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

during a DOE authorized trip to Houston, Texas. After the Attorney General refused to certify that Smollen was acting within the scope of his employment at the time of the accident, Smollen filed this complaint for declaratory relief under 28 U.S.C. § 2679(d)(3) requesting that the district court find and certify that he was an employee acting within the scope of his employment at the time of an accident.

Evidence of the following was presented during a bench trial: Smollen is an expert in systems engineering, with expertise in modern civil, mechanical, electrical, and petroleum engineering design concepts. Moreover, he is an expert in making presentations on technical and nontechnical matters. DOE authorized Smollen to travel to Houston, Texas, to review and oversee crude oil testing at Southern Petroleum Labs in an effort to devise a better way to measure the amount of gas in oil under high pressure. Smollen's travel authorization permitted Smollen to rent a car while in Houston. Smollen rented the car upon his arrival and drove to the lab to monitor lab tests for several hours. He then drove to his hotel and called his brother-in-law, Frank Newman ("Newman"). Smollen invited Newman to dinner; Newman declined, but suggested that Smollen drive to Newman's home, approximately 25 miles from his hotel, for dinner. Smollen agreed and arrived at Newman's home around 7:30 p.m. Although Smollen usually contacted Newman when he visited and they routinely discussed their work when they got together, the dinner was not arranged before Smollen's arrival in Houston. While in Newman's home, Smollen ate dinner, had one drink before dinner and one drink after dinner, watched television, and

talked about the gas-in-oil project, recipes, and family matters. During their conversation about the gas-in-oil project, Smollen showed Newman some charts and took notes. Newman observed that Smollen had talked for a while and had not yet clearly defined the problem. Newman's main suggestion was that Smollen should state his problem and say why it is a problem. Newman has no knowledge, experience, or training in the petrochemical industry, and he did not understand the charts or the technical aspects of the problem. Smollen left Newman's home around midnight with an alcoholic beverage to drink after he returned to his hotel. While en route to his hotel in the rental car, Smollen was involved in an automobile/pedestrian accident.

The district court concluded that Smollen was outside the scope of employment when the accident occurred. After the court issued its decision, Smollen timely moved for a new trial on the basis that he was told by a Harris County assistant district attorney that government agents seized his briefcase from the Harris County police department because it contained "government information." The court denied Smollen's motion. Smollen appeals, asserting that the district court erred when it (1) determined that he was outside the scope of his employment, (2) refused to admit evidence of a DOE memorandum that allegedly concluded that Smollen was within the scope of his employment when the accident occurred, and (3) denied his motion for a new trial.

DISCUSSION

SCOPE OF EMPLOYMENT

Smollen asserts three bases for this court to conclude that the district court erred when it concluded that he was not acting within the scope of his employment at the time of his accident: (1) the court applied the wrong law; (2) the court erroneously failed to find four facts that would have supported the conclusion that he was within the course of his employment, or (3) the court misapplied Texas law to the facts found by the court.

The Federal Employees Liability Reform & Tort Compensation Act ("FELRTCA") amended the Federal Tort Claims Act ("FTCA") to restore immunity to federal employees who perform non discretionary functions. Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865, 875 (9th Cir. 1992). The FELRTCA provides that, if the Attorney General refuses to find and certify that the employee was acting with the scope of his employment, the employee may petition the court to certify the scope of employment. 28 U.S.C. § 2679(d)(3). It does not indicate whether federal or state law governs. Smollen argues for the first time on appeal that the district court should have applied "federal common law", rather than state law, when it determined whether Smollen was within the course of his employment for purposes of the FELRTCA.

It is well established in this Circuit that, absent some manifest injustice, parties are ordinarily bound by the theory of law they argue in the district court. American Int'l Trading Corp. v. Petroleos Mexicanos, 835 F.2d 536, 540 (5th Cir. 1987). However, this Court may consider a choice of law issue raised for the first time on appeal where manifest injustice would result. Employers Ins. of Wausau v. Occidental Petroleum Corp., 978 F.2d 1422, 1430 n.8 (5th

Cir. 1992), cert. denied, 114 S.Ct. 61, 126 L.Ed.2d 30 (1993). Manifest injustice exists in extreme circumstances and demands more than a different result. American Int'l Trading Corp. 835 at 540. "If 'manifest injustice' only meant that application of another jurisdiction's law would yield a different result, then choice of law issues could always be raised first on appeal." Id. Thus, a showing of manifest injustice requires more than a showing that the law of a different forum should be applied.

Smollen contends that, under Garcia v. United States, 799 F. Supp. 674, 677-78 (W.D. Tex. 1993), aff'd on other grounds, 22 F.3d 609, 610 (5th Cir.), reh'g en banc granted, 22 F.3d 612 (5th Cir. 1994), federal law determines whether a federal employee was acting within the scope of his employment for purposes of FELRTCA. Therefore, he asserts, it would be a manifest injustice for the court not to apply federal law. We are not persuaded by Smollen's Garcia-based argument. Even if Smollen were correct in his contention that federal common law applies, such fact alone would not constitute manifest injustice. Smollen has not argued or shown more than his assertion that federal law governs. Thus, even if we were to assume, arguendo, that federal law should have been applied to this issue, Smollen has not shown manifest injustice. As we stated in Employers Ins. of Wausau, 978 F.2d at 1430 n.8, "[b]ecause the choice of law issue was not raised below, and because we find no manifest injustice in refusing to decide the issue on appeal, we decline to address it." For this reason, we do not address the issue

of whether the federal common law, rather than state law, governs the determination of Smollen's scope of employment.[1]

Smollen next contends that even if Texas law controls, the district court erroneously failed to find that: (1) he could consult with anyone who might contribute to the furtherance of government business; (2) Newman was a NASA engineer with a higher official government ranking than Smollen and that his ability to contribute did not depend on an arbitrary description of function; (3) Newman could assist Smollen in preparing for and organizing his presentation; and (4) that there was a mingling of personal and professional purposes for the meeting between Newman and Smollen. These contentions are challenges to the district court's factual findings.

We review the district court's findings of fact for clear error. Southern Pacific Transp. Co. v. Chabert, 973 F.2d 441, 444 (5th Cir. 1992), cert. denied, 113 S.Ct. 1585, 123 L.Ed.2d 152 (1993). Under

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1 We note it is likely that the court below correctly applied state law for purposes of FELRTCA. For this reason, we are not persuaded by Smollen's argument that Garcia (which is currently pending en banc) requires application of federal common law. Although we have not yet addressed this issue, we have held that state law governs for purposes of the FTCA. Bettis v. U.S., 635 F.2d 1144, 1147 (5th Cir. 1981). Those circuits addressing the issue have concluded that state law governs. Nasuti v. Scannell, 906 F.2d 802, 805 n.3 (1st Cir. 1990); Aliota v. Graham, 984 F.2d 1350, 1358 (3d Cir.), cert. denied, 114 S.Ct. 68 (1993); Jamison v. Wiley, 14 F.3d 222, 237 (4th Cir. 1994); Arbour v. Jenkins, 903 F.2d 416, 421-22 (6th Cir. 1990); Brown v. Armstrong, 949 F.2d 1007, 1012 & n.7 (8th Cir. 1991); Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 876 (9th Cir. 1992); S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1542, amended, 924 F.2d 1555 (11th Cir. 1990), cert. denied, 112 S.Ct. 62 (1991); cf. Yalkut v. Gemignani, 873 F.2d 31, 34 (2d Cir. 1989) and Sullivan v. Freeman, 944 F.2d 334, 336 (7th Cir. 1991). Yalkut and Sullivan suggest, without discussion, that state law governs tort claims under FELRTCA.

the clearly erroneous standard, this Court will not set aside the district court's factual findings unless, based upon the entire record, it is "`left with the definite and firm conviction that a mistake has been committed.'" Burlington Northern R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd., 983 F.2d 631, 639 (5th Cir. 1993) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985)).

The district court's factual findings and conclusions of law show that it did consider testimony and other evidence regarding these facts in making its determination that Smollen was outside the scope of his employment. The record supports the district court's factual findings, as well as its conclusion that

> Smollen could not have had a reasonable expectation that Mr. Newman could have offered any assistance to the DOE, which would have included any advice or information that would have assisted the DOE in solving any problem or matter to which it was involved concerning the problem with the gas and the oil under pressure.

There was no clear error in the district court's factual findings.

Smollen next argues that the district court misapplied Texas law. He contends that the appropriate standard of review is de novo because the facts are essentially undisputed. In this circuit, a district court's legal conclusions following a bench trial are subject to plenary review, but its factual findings are subject to the clearly erroneous standard of review. Southern Pacific Transp. Co., 973 F.2d at 444.

Under Texas law, an employee is acting within the scope of his employment if the act (1) falls within the scope of the employee's

general authority; (2) furthers the employer's business; and (3) is for the accomplishment of the object for which the employee was hired. Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972). When an employee undertakes a special mission under his employer's direction or performs a service in furtherance of the employer's business with its express or implied approval, the employee is generally acting within the scope of his employment from the start of the special mission until its completion, absent any deviation for personal reasons. See Chevron, USA, Inc. v. Lee, 847 S.W.2d 354, 356 (Tex. Ct. App. 1993). In order to be on a "special mission", an employee must be under the control of the employer or acting in furtherance of the employer's business. Id. If found to be on a special mission, the employee will be considered to be generally acting within the scope of his employment from the start of the special mission until its completion, absent any deviation therefrom for personal reasons. Id.

Where there is a fact issue as to the "course and scope" of an employee in performing a particular task which may give rise to an issue of liability upon the part of the master, that issue should be submitted for the jury's determination. Ryder Truck Rentals v. Latham, 593 S.W.2d 334, 336-337 (Tx.Ct.App. 1979). Thus, whether or not an employee acted within the scope of his employment is a question for the factfinder. See also, Blue Steel Bldgs., Inc. v. Hardin, 553 S.W.2d 122 (Tex. Ct. App. 1977) (scope of employment is a question for the jury); Dictaphone Corp. v. Torrealba, 520 S.W.2d 869 (Tex. Ct. App. 1975) (scope of employment question submitted to

the jury); Chevron, USA, Inc. (scope of employment question submitted to the jury).

Smollen argues that he was on a "special mission" when DOE sent him to Houston in furtherance of its gas-in-oil project and that, as a result, he was within the scope of his employment throughout his stay in Houston, even if he combined business with personal matters when he contacted Newman. Smollen relies upon Chevron, USA, Inc. (Employee was on special mission when en route to a mandatory seminar which was for the ultimate benefit of the employer; at the time of the accident, the requirement of travel was dictated by the employer); Blue Steel Bldgs., Inc. (Employer sent employee from Austin to Houston to pick up supplies and bring them back to Austin; employee spent the night at his daughter's home near Houston, and left about 5 a.m. to return to Austin; the accident occurred en route back to Austin, and there was "nothing in the record to suggest that at the time of the collision he had undertaken a mission of his own"); and Dictaphone Corp. (Employee made several stops while en route from Houston to Bryan for business purposes at time of fatal accident; at time of collision, employee was going to a Holiday Inn to cash a check to get money to pay his expenses on his trip).

In each of these cases, the jury determined that the employee was in the course and scope of his employment at the time of the accident. However, none of these cases holds that an employee is within the scope of his employment throughout his travel to another city for business purposes. For this reason, we are not persuaded by Smollen's argument regarding these cases.

The district court made the following factual findings: (1) Smollen's job description did not give him an unlimited right to make personal contacts; there should at least be a reasonable expectation that a proposed personal contact would meet or accomplish one of the purposes stated in the job description; (2) on the evening in question Smollen could not have had any reasonable expectation that his contact and consultation with Newman would have provided any information that would assist him in solving any problem or matter involving DOE, including the gas-in-oil project; and (3) the preponderance of the evidence supports the conclusion that Smollen's get-together with Newman was for his own, personal purposes, and not to further the purpose of carrying out DOE's business. Our review of the record reveals no clear error in these factual findings.

Based upon the facts as determined by the district court, we cannot say that the circumstances at the time of Smollen's accident preponderate toward finding that he was on a business "special mission". We find no error in the district court's determination that Smollen was engaged in a personal mission, rather than furthering his employer's interests, when the accident occurred and that, as a result, he was acting outside the scope of his employment.

Because Smollen was pursuing his own personal mission when the accident occurred rather than furthering his employer's business, it was not error for the court to determine that he was not within the scope of his employment.

MOTION FOR NEW TRIAL

Smollen moved for a new trial on the basis that he discovered, after the district court rendered its decision, that federal agents

seized his briefcase from the Harris County police department. He argues that the district court erred when it denied his motion.

In determining whether to grant a new trial on the basis of new evidence, the district court should consider whether the new evidence (1) would likely change the outcome; (2) could have been discovered earlier with due diligence; and (3) would be cumulative or impeaching. Peteet v. Dow Chem. Co., 868 F.2d 1428, 1435 (5th Cir.), cert. denied, 493 U.S. 935 (1989). The standard of review is whether the district court's denial was an abuse of its discretion. Id.

Smollen contends that the seizure of his briefcase by federal agents indicates that the government believed that he was in the course and scope of his employment when the accident occurred. He contends also that he could not have known about the seizure of the brief case because "it was solely within the knowledge of the government," and that this information is not cumulative or impeaching because the district court concluded that he was not within the scope of his employment. Finally, Smollen simply states that the district court would most likely have reached a different result with respect to the scope of employment issue.

Nothing suggests that the government's retrieval of the briefcase is relevant. The mere presence of government information in an employee's briefcase, even if established,[2] does not indicate that an employee is acting within the scope of his employment. Accordingly, the government's actions have little, if any, probative

2 Based on the testimony, the briefcase likely contained, among other things, the graphs, charts, and other lab results that Smollen testified that he showed Newman. It would not be surprising, then, that the government would want to retrieve these items.

value on the issue of whether Smollen was within the scope of his employment when the accident occurred. Moreover, nothing suggests that this evidence would have changed the outcome of the trial. The district court found that Smollen discussed some business with Newman that evening, but the court nevertheless found that the meeting was personal in nature. Given the irrelevance of the evidence and its immateriality, the district court did not abuse its discretion when it denied Smollen's motion for a new trial.

EXCLUSION OF EVIDENCE

Smollen contends that the district court abused its discretion when it excluded evidence that the government destroyed a memorandum prepared by a DOE attorney, which allegedly concluded that Smollen was within the scope of his employment when the accident occurred. Smollen contends that the investigation conducted by the DOE attorney, her conclusion, and the subsequent disappearance of the memorandum are evidence that Smollen was acting within the scope of his employment. He argues that the government should not profit from the memorandum's destruction.

This Court has long held that the admission of evidence rests within the sound discretion of trial court. Jon-T Chems., Inc. v. Freeport Chem. Co., 704 F.2d 1412, 1417 (5th Cir. 1983). Where the DOE has denied certification of the employee's scope of employment, the district court must make an independent determination. 28 U.S.C. § 2679(d)(3). Therefore any conclusion in the DOE memorandum as to whether Smollen was within the scope of his employment is irrelevant. To the extent that the investigation by DOE discovered any relevant factual information, Smollen was free to introduce that information,

and he does not contend that he could not do so. Accordingly, the district court did not abuse its discretion when it excluded the testimony regarding the memorandum.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.