UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40104

STEVE M. WOODRUFF,

Plaintiff-Appellee
Cross-Appellant,

VERSUS

DELTA BEVERAGE GROUP, ETC., ET AL.,

Defendants,

DELTA BEVERAGE GROUP, INC.,

Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(92-CV-87)

(January 30, 1995)

Before DAVIS, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:[1]

This case concerns primarily the long established employment-at-will doctrine in Texas; particularly, the proof necessary to instead require cause for termination, when an employee handbook is in play. Steve M. Woodruff and his former employer, Delta Beverage Group, Inc., each challenge different parts of the judgment on

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Woodruff's claims for wrongful discharge and slander, the jury having found for Woodruff on the former, and for Delta on the latter, and the district court having denied Fed. R. Civ. P. 50(b) post-verdict motions for judgment as a matter of law. We **AFFIRM** as to slander, and **REVERSE** as to wrongful discharge; Woodruff takes nothing.

I.

Woodruff began work in 1974 for Pepsi-Cola's plant in Texarkana, Texas; in 1979, he became a district manager. The plant was purchased in 1988 by Delta, with Woodruff retained as a district manager.

In May 1991, Woodruff's supervisor, Mike Christopher, held a meeting with district managers concerning market pricing information on Delta's competitor, Coca-Cola. When Christopher told the group that he needed Coca-Cola's prices, Woodruff replied that he could call a friend at Coca-Cola for the information. Christopher responded: "I cannot ask you to do that, but we've got to have [those prices]." Woodruff left the meeting, and telephoned Charles Cochran at the Texarkana Coca-Cola plant.[2] Cochran refused to provide any pricing information to Woodruff, citing Coca-Cola's policy and concern regarding antitrust violations, and, concomitantly, reported the call to his supervisor. Several weeks later, Delta received a letter of protest from Coca-Cola's general counsel, informing Delta of the incident, alerting it to Coca-

[2] Woodruff apparently attempted to call another person at Coca-Cola; that person not being available, he spoke with Cochran.

Cola's policy against such conduct, and requesting it to ensure no similar incident occurred in the future.[3]

In response, Delta conducted an investigation, resulting in Woodruff admitting calling Coca-Cola for prices. Accordingly,

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[3] Coca-Cola's letter to Delta stated:

> This is to call to your attention a serious matter.
>
> On May 29th, Steve Woodruff, an employee of the Delta Beverage Group, telephoned Charles Cochran, an employee of the Coca-Cola Bottling Company of Texarkana, a member of the CCE Bottling group, and attempted to engage Mr. Cochran in a conversation about pricing. Mr. Cochran immediately terminated the conversation by telling Mr. Woodruff that such conversations were totally against the bottler's and CCE's policy.
>
> We want to confirm that statement of policy in this letter. Since the acquisition of the Coca-Cola Bottling Company of Texarkana by Coca-Cola Enterprises Inc. in July 1990, and prior thereto, it has been the bottler's firm policy to comply with the spirit and intent of the antitrust laws. All conversations with competitors about any aspect of our business are strictly prohibited under this policy and are not to occur. Employees of our bottlers have never agreed, do not agree and will not agree in any way to restrict competition between our businesses. They will not exchange or communicate any information about past, present or future aspects of prices, promotions, relationships with customers or suppliers or any other aspect of our business.
>
> As you should know, it is our policy as required by law to compete vigorously with your company. It is our intent to make pricing decisions unilaterally and independently from any contact with your company, and we do not, and will not, ever agree with your company as to the prices or discounts which either of us offer.
>
> Please ensure that your operations comply in equal respect with the antitrust laws and that none of your employees ever contact us about pricing or discounts again.

citing its policy on antitrust concerns, Delta discharged Woodruff in mid-1991.[4] He remained, for the most part, unemployed for one year.

Approximately a year after his discharge, Woodruff filed suit in state court against Delta, claiming, *inter alia,* wrongful discharge and slander.[5] Delta removed this diversity action to federal court; and, following a two-day trial, the jury found for Woodruff on wrongful discharge and for Delta on slander, and awarded Woodruff damages. Delta and Woodruff moved unsuccessfully for judgment as a matter of law on their adverse verdicts.

II.

Delta appeals the judgment for wrongful discharge; Woodruff, for slander. In short, both assert that they were entitled to

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[4] Christopher, Woodruff's supervisor, was also discharged as a result of the May 1991 incident. Delta's "Summary of Antitrust Laws" states in part:

> It is against Company policy to have any discussion or communication with any competitor relating to price.... The types of communications with competitors which are absolutely prohibited include ... exchange of price lists or pricing information with competitors.

Additionally, at or about the time that Delta purchased the plant and became his employer, Woodruff was required to sign a memorandum stating, "I fully understand that I have been instructed to not engage in any discussions with a competitor that may be construed to limit competition by setting pricing or promotion policies or practices."

[5] Also, Woodruff claimed libel and intentional infliction of emotional distress, and named two Delta employees as defendants. These additional claims and defendants were dismissed, and are not in issue on appeal.

judgment as a matter of law. Rule 50(a)(1) of the Federal Rules of Civil Procedure provides in relevant part:

> If during a trial by jury a party has been fully heard on an issue and there is no *legally sufficient evidentiary basis* for a reasonable jury to find for that party on that issue, the court ... may grant a motion for judgment as a matter of law against that party with respect to a claim ... that cannot under the controlling law be maintained ... without a favorable finding on that issue.

(Emphasis added.) Of course, such motions "made at the close of all the evidence", if denied, may be renewed following the verdict. Fed. R. Civ. P. 50(b). Delta's appeal and Woodruff's cross-appeal turn on whether the evidence was legally sufficient; whether the verdict is supported by "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions". ***Bank One, Texas, N.A. v. Taylor***, 970 F.2d 16, 22 (5th Cir. 1992), *cert denied*, 113 S. Ct. 2331 (1993) (citation omitted); *see also*, ***Pagan v. Shoney's, Inc.***, 931 F.2d 334, 337 (5th Cir. 1991); ***Rideau v. Parkem Ind. Serv.***, 917 F.2d 892, 897 (5th Cir. 1990).

A.

As this court has long recognized, "Texas is an employment-at-will state. Absent a specific contract [term] to the contrary, employment contracts are terminable at will by either party." ***Moulton v. City of Beaumont***, 991 F.2d 227, 230 (5th Cir. 1993) (citing ***Zimmerman v. H.E. Butt Grocery Co.***, 932 F.2d 469, 471 (5th Cir.), *cert denied*, 112 S. Ct. 591 (1991)); ***East Line & Red River R.R. Co. v. Scott***, 10 S.W. 99, 102 (Tex. 1888).

Delta asserts, in part, that there was insufficient evidence to establish an abrogation of the Texas employment-at-will doctrine that allowed it to discharge Woodruff without cause.[6] The jury was instructed that Woodruff had the burden of demonstrating "that the employment relationship was altered by an oral or written agreement that [he] would not be terminated except for cause". (In fact, although the jury was permitted to consider alteration by either a written or oral agreement, Woodruff hangs his hat on a claimed oral agreement.)

It goes without saying that the existence, *vel non*, of a contract modifying at-will employment presents a mixed question of law and fact. ***Zimmerman***, 932 F.2d at 471. Of course, issues of law are for the court; of fact, for the jury. *See, e.g.,* ***Griffin v. United States***, 112 S. Ct. 466, 467 (1991) ("jurors are not generally equipped to determine whether a particular theory of conviction is contrary to law, but are well equipped to determine whether the theory is supported by the facts"). At issue is whether there was legally sufficient evidence to support the jury's finding. In answering that question, however, we initially review *de novo* which types of evidence were, as a matter of law, capable of establishing an employment contract. ***Id.***; ***Crum v. American Airlines, Inc.***, 946 F.2d 423, 426 (5th Cir. 1991).

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[6] Even assuming modification of the at-will doctrine, with the resulting obligation to discharge only for cause, Delta insists that it had proper cause. Because we agree that cause was not necessary, we need not address this issue.

Delta's employment handbook provides progressive procedures for disciplining employees for various rule infractions.[7] Generally, its employees receive counseling followed by a written warning and suspension. Thus, for most infractions, an employee is terminated only after several consecutive violations; but, the handbook also provides alternative procedures for more serious violations.[8] Woodruff having been terminated for a first offense, he claimed he was denied the handbook procedure.

Needless to say, critical to Woodruff's wrongful discharge claim is his assertion that Delta was contractually bound by the handbook procedures. Our review of the record reveals three types,

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[7] The relevant portion of the handbook states:

> The following steps will be used in all employee counseling actions except as noted within this handbook.... These steps include:
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> Step 1 - Initial Counseling (verbal-report of conversation)
>
> Step 2 - Follow-up Counseling (in writing)
>
> Step 3 - Disciplinary Suspension (3 days without pay)
>
> Step 4 - Disciplinary Suspension (without pay) pending investigation subject to termination

[8] For the more serious violations, the handbook permits immediate termination; one is "Violation of company policy or procedure". Delta sought to establish at trial that Woodruff was in violation of express company policy when he tried to obtain pricing information. *See supra* note 4 (stating Delta's antitrust policy). Thus, it contends that even if the handbook is found to govern Woodruff's employment, it acted within the provision allowing for immediate termination. As stated, because we conclude that Woodruff was an employee at will, we need not reach this issue. *See supra* note 6.

or classes, of evidence on which the jury might have agreed with this assertion: the handbook; testimony from Delta employees; and Woodruff's testimony that he was informed by Delta that the handbook would be applied to him. We address each in turn.

1.

Applying Texas law, our court has noted that "[e]mployee handbooks and manuals do not create contracts [modifying at-will employment] when the parties have not expressly agreed that the procedures contained in these materials are binding."[9] ***Zimmerman***, 932 F.2d at 471. The handbook did not include any express provision binding Delta to its procedures. In fact, Woodruff concedes that the handbook, standing alone, cannot constitute a contract modifying at-will employment. ***Crum***, 946 F.2d at 428; ***Zimmerman***, 932 F.2d at 472; ***Badgett v. Northwestern Resources Co.***, 818 F. Supp. 998, 1002 (W.D. Tex. 1993); ***Perez v. Vinnell Corp.***, 763 F. Supp. 199, 201 (S.D. Tex. 1991); ***Whitehead v. University of Texas***, 854 S.W.2d 175, 181 (Tex. App. 1993). Instead, as noted, he contends that the at-will relationship was altered by an oral agreement.

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[9] We know of only one case from this circuit that has applied Texas law and found that an employee handbook constituted a contract limiting at-will employment. In ***Aiello v. United Air Lines, Inc.***, 818 F.2d 1196, 1199 (5th Cir. 1987), a divided panel concluded that an employee handbook created an obligation to discharge only for cause. The exception in ***Aiello***, however, is limited to handbooks that "*expressly* recognize[] an obligation to discharge only for good cause". ***Crum***, 946 F.2d at 427 (citing ***Hicks v. Baylor Univ. Med. Ctr.***, 789 S.W.2d 299, 302-03 (Tex. App. 1990) (interpreting *Aiello*)) (emphasis added); *see also* ***Moulton***, 991 F.2d at 231 n.23. As noted, Woodruff concedes that Delta's handbook contains no express provision.

2.

As another type of evidence in support of his oral agreement claim, Woodruff offered testimony by Delta employees that they were entitled to the handbook procedures. Even assuming the beliefs of other Delta employees are relevant, their testimony, in each instance, was only a general "understanding" that the procedures would be applied to them. This understanding appears to have been based only on the fact that the procedures had always been followed at Delta.[10] But, as our prior cases have held, this does not give rise to the presumption that Delta has extended to each of its employees a contractual right to termination only for cause. ***Crum***, 946 F.2d at 427; ***Zimmerman***, 932 F.2d at 472; ***Badgett***, 818 F. Supp. at 1002. Our court has reasoned:

> To equate compliance with employee manual guidelines with treatment of a manual as a contract is to create a claim "Catch 22" for employers: if an employer follows the guidelines in disciplining or discharging an employee, the employee could argue that the employer thereby treated the manual as a contract; but if an employer does not follow the guidelines, then the employee could excoriate the employer for failing to follow the guidelines that it represented it would follow.

Zimmerman, 932 F.2d at 472.

This reasoning is sound. To hold otherwise would create a reluctance on the part of employers to institute procedures for the betterment of working conditions and worker morale. We therefore

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[10] Moreover, contrary to the employees' understanding of their employment relationship with Delta is Delta's "Application for Employment" form which states, just above the signature line, "I understand that if I am employed, such employment is terminable at will".

decline to penalize Delta for following its handbook procedures by deriving a contractual obligation from that conduct.

3.

The only remaining type of evidence in support of Woodruff's being contractually entitled to the handbook procedures is his assertion that he received an oral representation to this effect from Jeff Goerke, Delta's Manager of Human Resources. In ***Zimmerman***, our court held that representations by three separate managers that a handbook was a contract were insufficient legally to alter employment-at-will. ***Id***. Such a conclusion is all the more justified here; in fact, we find insufficient evidence that such a representation was even made. The entire evidence on this point consists only of Woodruff's testimony:

> Q. Okay. Did anyone at Delta ever tell you that you personally could expect that [handbook] procedure to be applied to you?
>
> A. Well, from what I understood, it applied to everybody.
>
> Q. And who did you understand that from?
>
> A. From Mr. Goerke himself.
>
> Q. What exactly did Mr. Goerke say about that policy and procedure?
>
> A. Well, in the meeting, I understand we had several branches there, and it was that this applies to everyone.
>
> Q. Including management folks, route drivers, everybody?
>
> A. I mean, it didn't just exactly say "management," but with everyone, that's the guy out in the parking lot all the way to the guy that's up in the, you know, front office running the whole place.

This testimony plainly fails to establish a specific and express oral contract. At best, it establishes only that Goerke instructed Delta's managers that the handbook would be applied to everyone, including themselves. Nothing in Woodruff's testimony suggests that he was entitled to the handbook procedures as a matter of contractual right. Rather, Goerke simply advanced the procedures for what they were -- the company's handbook procedures.[11] And, as noted, the mere fact that Delta sought to consistently apply its handbook procedures to all of its employees does not give rise to a modification of at-will employment. *E.g.*, ***Id.***

In sum, the evidence was legally either without effect or insufficient to support finding Woodruff's at-will employment altered by a written or oral contract.[12] Because his employment was terminable at will, his wrongful discharge claim fails.

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[11] We might well ask how else Delta could implement its handbook procedures without instructing its managers to apply them. If we were to conclude that Delta bound itself contractually by simply instructing its managers to apply those procedures, we would directly conflict with the precedent discussed earlier. *See* ***Crum***, 946 F.2d at 427 (instructing managers to follow handbook procedures is not evidence that handbook constituted contract).

[12] Indeed, the closest question in our analysis was whether the employment-at-will issue was preserved for appeal. *See* ***House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.***, 468 F.2d 64, 67-68 (5th Cir. 1972). Although we conclude that Delta did preserve this issue, it should have been more fully developed for the district court. Had it been, Delta may well have prevailed there.

B.

Woodruff challenges the judgment on his slander claim, for which, as the jury was instructed, he was required to prove the following:

> First, that [Delta] made a false statement regarding [Woodruff].
>
> Second, that the statement was orally communicated by [Delta] to a third person.
>
> Third, that there was no legal excuse for the communication.
>
> Fourth, that the statement accuses [Woodruff] of the commission of a crime or affects [Woodruff] injuriously in his profession.
>
> Fifth, that [Woodruff] suffered damages as a proximate result of [Delta's] action.

As stated, and viewing the evidence in the light most favorable to Delta, our review is limited to whether there was sufficient evidence to support a reasonable juror's finding that Delta did not slander Woodruff.

Woodruff sought to prove that several Delta employees had stated that he was fired for "price fixing".[13] A juror could find

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[13] Woodruff's termination notice states: "Violation of Company Policy for Violation of Antitrust Laws." Here, we need not pursue the legal significance, if any, for slander purposes between "price fixing" and "violation of antitrust laws".

In any event, the jury may have been persuaded by Delta's defense to the slander claim. The court instructed: "As a defense to the claim of slander, [Delta] contends that the statements made by it were privileged as having been made regarding an employment matter to persons having a common interest in the matter to which the communication related." *See e.g.,* ***Danawala v. Houston Lighting & Power Co.***, 14 F.3d 251, 254 (5th Cir. 1993); ***Seidenstein v. National Medical Enter., Inc.***, 769 F.2d 1100, 1103 (5th Cir. 1985) (applying Texas law slander defense). Delta presented evidence that many of the alleged slanderous communications were made to its customers, and only upon their inquiries.

reasonably that Woodruff's evidence was lacking. For instance, one witness was unable to attribute "price fixing" statements to a Delta employee. Indeed, that witness admitted that Woodruff stated that he had been terminated for price fixing. And, other testimony concerning alleged statements by Delta employees was either directly disputed, or called into question.[14]

Moreover, even assuming these statements were made, a juror could conclude reasonably that Woodruff had not proved that he incurred damages as a proximate result of them. For example, one of Woodruff's witnesses admitted that he did not think that Woodruff's reputation had been damaged.

As discussed, our review of the jury's verdict is limited. Again, "we must affirm the verdict unless the evidence points `so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary [conclusion].'" ***Pagan***, 931 F.2d at 337 (quoting ***Jones v. Wal-Mart Stores, Inc.***, 870 F.2d 982, 987 (5th Cir. 1989)). The district court, out of the presence of the jury, acknowledged that Woodruff's slander evidence was "very weak". Ultimately, the jury agreed, and the district court refused to grant judgment as a

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[14] For example, one of Woodruff's witnesses originally testified that he had not heard until "several months ago" that Woodruff had been fired for price fixing. The trial was held in October 1993; Woodruff was discharged in July 1991, and was fully employed a year later; and this action was filed in June 1992. The jury could conclude reasonably that the witness' testimony, relating events that may have occurred nearly two years after Woodruff's discharge and *after* the action was filed, was lacking in either credibility or significance.

matter of law. In sum, for a variety of reasons, the jury could conclude reasonably that Woodruff did not prove slander.

III.

For the foregoing reasons, that portion of the judgment on slander is **AFFIRMED**; that on wrongful discharge is **REVERSED**, with judgment **RENDERED** for Delta Beverage Group, Inc.

AFFIRMED in part and REVERSED and RENDERED in part